

# CERCLA CHOICE-OF-LAW: INSURERS' ATTEMPTS TO ESCAPE THEIR OWN QUAGMIRES

BY  
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*With the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Congress put financial responsibility for hazardous waste cleanup on polluters, either via reimbursement to the Environmental Protection Agency (EPA) for EPA's cleanup efforts or by requiring polluters to pay for cleaning the sites themselves. To facilitate cleanup by EPA, CERCLA created a trust fund, commonly called "Superfund," which was funded by taxes imposed on the chemical and petroleum industries. The Superfund's maintenance, however, is largely based on EPA's ability to obtain reimbursement for its cleanup efforts. Because EPA cannot pursue reimbursement from individual shareholders, its effort is severely hampered when the polluter is bankrupt or a dissolved company. One of the potential parties that may provide reimbursement is the polluter's insurance company. Unfortunately for EPA, liability for insurance companies in indemnification suits is not based on CERCLA, but on state law. Thus, insurance liability for cleanup often depends on which state law the presiding court applies to the case.*

*This Comment first gives an overview of the various choice-of-law methodologies being applied today. Second, it shows how each choice-of-law methodology affects whether liability is imposed on the insurance company or not. Finally, it discusses whether insurance companies should be liable for environmental cleanup as a result of CERCLA and proposes an amendment that Congress should incorporate into CERCLA to facilitate CERCLA's original goals.*

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## I. INTRODUCTION

As a response to the proliferation of hazardous waste contamination at sites throughout the United States, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act<sup>1</sup> (CERCLA or the Act) in 1980. The Act has a twofold purpose.<sup>2</sup> First, it sets up the “Superfund” which the Environmental Protection Agency (EPA) can draw from when paying for hazardous waste site cleanup.<sup>3</sup> Second, it imposes joint and several liability, potentially assessing the entire cost of cleanup to a polluter contributing only a small amount of the overall total damage.<sup>4</sup> It

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<sup>1</sup> Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2000).

<sup>2</sup> See Amy Pilat McMorrow, *CERCLA Liability Redefined: An Analysis of the Small Business Liability Relief and Brownfields Revitalization Act and its Impact on State Voluntary Cleanup Programs*, 20 GA. ST. U. L. REV. 1087, 1090–93 (2004) (providing an overview of CERCLA).

<sup>3</sup> 42 U.S.C. § 9611(a) (2000).

<sup>4</sup> Liability under CERCLA “shall be construed to be the standard of liability which obtains under section 1321 of [the Federal Water Pollution Control Act].” *Id.* § 9601(32). Originally, CERCLA did not expressly provide for joint and several liability. However, court decisions interpreting CERCLA have found such liability to exist within its structure. See, e.g., United

imposes liability on past or present owners, operators, and other related parties.<sup>5</sup> Finally, it creates a federal cause of action that enables EPA to pursue the costs it incurs through its cleanup efforts.<sup>6</sup>

When trying to avoid paying enormous environmental cleanup costs, polluters generally seek insurance coverage.<sup>7</sup> Insurance liability usually depends on the court's interpretation of various clauses within the comprehensive general liability policy (CGL).<sup>8</sup> Since CERCLA is a federal statute, liability is uniformly applied to polluters in all states. In contrast, potential liability for indemnification by insurers is based on non-uniform state insurance law. One of the primary problems in these disputes is choosing which state insurance law to apply in a case that has contacts in several states.<sup>9</sup> In the context of cleanup under CERCLA, choice-of-law disputes usually focus on a choice between the law of the state that contains the hazardous waste site and the law of the state where the parties formed the insurance contract.<sup>10</sup> For example, in *ARTRA Group, Inc. v. American*

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*States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 (3d Cir. 1992) (holding that even though joint and several liability was not explicit in CERCLA, it still can be applied under CERCLA); *United States v. Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988) (holding that even though CERCLA did not mandate joint and several liability, it permits it when cases involve indivisible harm); *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 732 (8th Cir. 1986) (asserting retroactive strict liability under CERCLA).

<sup>5</sup> There are four categories of liable parties:

1) the owner and operator of a vessel or a facility; 2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of; 3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and 4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

42 U.S.C. § 9607(a) (2000).

<sup>6</sup> *Id.* § 9607.

<sup>7</sup> See generally Carol A. Crocca, Annotation, *Liability Insurance Coverage for Violations of Antipollution Laws*, 87 A.L.R. 4th 444 (1991 & Supp. 2005) (discussing litigation involving liability insurance in pollution cases).

<sup>8</sup> *Id.* The basic provision that invokes controversy is: "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence." *Id.* at 453.

<sup>9</sup> See, e.g., *Boardman Petroleum, Inc. v. Federated Mut. Ins. Co.*, 135 F.3d 750, 754 (11th Cir. 1998) (holding that Georgia law, the place of contracting between the parties, applied to the case even though the hazardous waste site was located in South Carolina); *Gen. Ceramics Inc. v. Firemen's Fund Ins. Cos.*, 66 F.3d 647, 659 (3d Cir. 1995) (holding that New Jersey insurance law applied to an indemnification case involving a hazardous waste site located in Pennsylvania); *ARTRA Group, Inc. v. Am. Motorists Ins. Co.*, 642 A.2d 896, 901 (Md. Ct. Spec. App. 1994), *rev'd*, 659 A.2d 1295 (Md. 1995) (holding that Illinois insurance law applied to the case because it was the place of contracting between the parties, even though the hazardous waste site was located in Maryland).

<sup>10</sup> See Symeon C. Symeonides, *Choice of Law in the American Courts in 1994: A View "From the Trenches,"* 43 AM. J. COMP. L. 1, 80 (1995) (discussing choice-of-law issues in environmental

*Motorists Insurance Co.*, insurance liability for cleanup costs would not have been triggered if Maryland law, the law of the place of the hazardous waste site, had been applied because it would have found that the environmental pollution exclusion clause in the contract clearly and unambiguously excluded liability.<sup>11</sup> In contrast, under Illinois law, the law of the place of contracting, the environmental pollution exclusion clause would be found ambiguous and be construed against the insurer, triggering indemnification.<sup>12</sup> Thus, as the above example illustrates, indemnification can depend entirely on which state law is applied, even when the contract language is identical.

Even though the choice-of-law field (also commonly referred to as conflict-of-laws) spans several centuries,<sup>13</sup> there is no single set of rules or universally accepted theoretical framework for courts to solve conflicts between the laws of different jurisdictions.<sup>14</sup> There are essentially four basic choice-of-law methodologies in the United States. The first methodology, developed by Professor Joseph Beale and at one time universally accepted, is called “vested-rights” and was the theory of choice in the *Restatement (First) of Conflict of Laws*.<sup>15</sup> It is based on the principle that every state has exclusive control over its own territory.<sup>16</sup> If the right “vests” in a particular state, that state’s law is applied. For example, in tort actions, the law of the place of injury controls the substantive issues in the case.<sup>17</sup> The second methodology, developed by Professor Brainerd Currie, is called “interest analysis.”<sup>18</sup> As the name implies, courts should only apply law of the states that have an interest in the outcome of the litigation. From there, courts should only apply the law of the state that has the *most* interest in the litigation. Currie theorized that the forum should have a presumption in favor of applying its own law and should apply the law of a foreign jurisdiction only if the forum does not have any interest at all in the application of its law to the case at hand.<sup>19</sup> The third methodology,

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pollution insurance cases).

<sup>11</sup> ARTRA Group, 642 A.2d at 899.

<sup>12</sup> *Id.*

<sup>13</sup> See *McCandlish v. Cruger*, 2 S.C.L. (2 Bay) 377, 378 (S.C. Constitutional Ct. App. 1802) (drawing from English precedent, the court applied “Carolina law” to the case based on a bill of exchange made in St. Croix stating that when the place of performance of a contract is different from the place of contract formation, the law of the place of performance governs the case); see also PETER M. NORTH & J.J. FAWCETT, *CHESHIRE & NORTH’S PRIVATE INTERNATIONAL LAW* 17–19 (13th ed. 1999) (citing England’s early conflict cases: *Shelling v. Farmer*, 93 Eng. Rep. 756, 1 Stra. 646 (1725) (finding that actions concerning foreign real property were not justiciable in England); *Robinson v. Bland*, 96 Eng. Rep. 129, 2 Burr. 1077 (K.B. 1760) (involving an English action based on a gambling debt that occurred in France)).

<sup>14</sup> See, e.g., Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT’L L. 975, 978 (1994) (“Conflict of laws is a source of constant embarrassment to lawyers, judges, and scholars.”).

<sup>15</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT].

<sup>16</sup> JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 311–12 (1935) (“The power of a state is supreme within its own territory . . . It follows generally that no statute has force to affect any person, thing, or act . . . outside the territory of the state that passed it.”).

<sup>17</sup> FIRST RESTATEMENT, *supra* note 15, § 378.

<sup>18</sup> BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 183–84 (1963).

<sup>19</sup> *Id.*

developed by Professor Robert Lefflar, is called the “better-law” theory. It establishes a five-factor test to determine which state law is more appropriate or “better” suited to the case.<sup>20</sup> Finally, the *Restatement (Second) of Conflict of Laws (Restatement)*, the dominant methodology in today’s courts, is a fusion of vested-rights, interest analysis, and the better-law theory.<sup>21</sup> It lists territorial factors, as well as jurisdictional interests of the states, and asks courts to choose which state has a more significant relationship to the dispute.

While inconsistent results are common in choice-of-law disputes, CERCLA choice-of-law indemnification cases are different from other indemnification cases because there are more interested parties. For example, a choice-of-law dispute involving a lessee’s duty to indemnify the lessor for injuries to an employee involves three parties: the lessee (indemnifier), the lessor (policy holder), and the employee (injured party), with the lessee indemnifying the lessor.<sup>22</sup> On the other hand, environmental insurance disputes may involve four parties: the insurance company, the polluter, the government, and the general public,<sup>23</sup> with the polluter reimbursing EPA, and the insurance company reimbursing the polluter.<sup>24</sup> This is critically important in cases where the polluter is either a dissolved<sup>25</sup>

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<sup>20</sup> Robert A. Lefflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1585 (1966). For a more extensive analysis of the “better-law” theory, see *infra* notes 52–67 and accompanying text.

<sup>21</sup> In tort actions, for example, section 145 lists territorial factors to be taken into account such as the place of accident (vested-rights) while keeping in mind section 6 that lists factors such as the relevant policies of forum and other interested states (interest-analysis). RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971) [hereinafter RESTATEMENT].

<sup>22</sup> See, e.g., *Cunningham v. Goettl Air Conditioning, Inc.*, 980 P.2d 489, 493 (Ariz. 1999) (holding that lessee was required to indemnify lessor, even if lessor was an actively negligent party, in tort action brought against lessor by lessee’s employee for injuries sustained when employee fell through skylight); *Campbell v. Annge*, 688 N.Y.S.2d 233, 234 (N.Y. App. Div. 1999) (holding that the lessor of automobile was entitled to indemnification from lessee, under terms of lease agreement, for amounts expended in personal injury suit brought by motorists injured in collision with lessee’s girlfriend, who was driving leased automobile in contravention of lease agreement).

<sup>23</sup> Here, the general public represents the injured party. Since CERCLA was created to protect the welfare of the general public, it follows logically that a violation of CERCLA “injures” the general public.

<sup>24</sup> See generally *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 594 S.E.2d 455, 456–57 (S.C. 2004) (involving a chemical company that sought indemnification from its insurance company after it had been found liable under CERCLA); *TBG, Inc. v. Commercial Union Ins. Co.*, 806 F. Supp. 1444, 1445 (N.D. Cal. 1990) (involving a brake manufacturing company seeking indemnification from its insurance company for costs paid to EPA for cleanup); *Becker Metals Corp. v. Transp. Ins. Co.*, 802 F. Supp. 235, 237 (E.D. Mo. 1992) (involving a metal company’s effort to have its insurance company represent it in an EPA proceeding).

<sup>25</sup> See, e.g., *Global Landfill Agreement Group v. 280 Development Corp.*, 992 F. Supp. 692, 695–96 (D. N.J. 1998) (holding that a contribution action could not be brought against a corporation that had already been dissolved); *United States v. Distler*, 741 F. Supp. 643, 647 (W.D. Ky. 1990) (holding that a dissolved corporation could not be held liable under CERCLA); *Hillsborough County v. A & E Rd. Oiling Serv.*, 877 F. Supp. 618, 622 (M.D. Fla. 1995) (holding that a dissolved corporation that no longer had any assets cannot be deemed to be a “person” subject to CERCLA liability). But see *United States v. Mex. Feed & Seed Co.*, 764 F. Supp. 565, 572–73 (E.D. Mo. 1991), *rev’d in part, aff’d in part* 980 F.2d 478 (1992) (holding that dissolution did not change the court’s finding that a waste oil service corporation was liable under

or bankrupt company because, through the doctrine of limited liability, individual shareholders are not liable for their company's polluting.<sup>26</sup> If insurance liability is not enforced, the government suffers because it funds EPA's cleanup effort in the first place.<sup>27</sup>

This Comment first gives an overview of the various choice-of-law methodologies being applied today. Second, it shows how choice-of-law methodology affects whether the law of the place of the hazardous waste site is applied or the law of the place of contract is applied. Finally, because of the need for predictability, uniformity, and to create reliable precedent in the highly volatile field of CERCLA insurance litigation, Congress should amend CERCLA to require that the state law allowing payment for CERCLA cleanup should be applied when the outcome of the litigation depends solely on that choice. While the concerns of the insurance industry have some weight, they are outweighed by the general policy behind CERCLA, which is to ensure the cleanup of CERCLA pollution and the need to look at the reasonable expectations of both parties when contracting, construing ambiguities against the insurance company because it is the drafter of the policy.

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CERCLA); *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245 (6th Cir. 1991) (recognizing that corporate successors would be responsible for CERCLA violations involving soil and groundwater pollution if the corporation had completely merged because successors stand in the place of their predecessors); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 1991 U.S. Dist. LEXIS 20238, at \*5 (N.D. Cal. 1991) (vacating a motion to dismiss based on the idea that a dissolved company can be held liable for CERCLA claims).

<sup>26</sup> See, e.g., *Redwing Carriers v. Saraland Apts.*, 94 F.3d 1489, 1502-03 (11th Cir. 1996) (holding that under Alabama law, only a partner that takes some control over the partnership business can be held liable for CERCLA violations); *Amcast Indus. Corp. v. Detrex Corp.*, 1990 U.S. Dist. LEXIS 15191, at \*9 (N.D. Ind. 1990) (holding that corporate shareholders were not "owners" under CERCLA when they were not directly and personally involved in the operation of the facilities); *CBS, Inc. v. Henkin*, 803 F. Supp. 1426, 1438 (N.D. Ind. 1992) (holding that a defendant who was a minority shareholder in a corporation that had been formed for the sole purpose of purchasing all of the outstanding stock of the company who owned the manufacturing plant was not liable under CERCLA). But see *City of N. Miami v. Berger*, 828 F. Supp. 401, 410-11 (E.D. Va. 1993) (finding two corporate officers of a landfill operation liable for contamination under CERCLA where they held positions of authority and each owned a significant portion of the company); *Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1278 (E.D. Pa. 1994) (holding that corporations formed by an owner of hazardous-waste disposal site were the alter egos of a sole proprietor and subject to CERCLA liability); *United States v. Allen*, 1990 U.S. Dist. LEXIS 19955, at \*14 (W.D. Ark. 1990) (holding that the president of a corporation who also owned the majority of the stock was liable for CERCLA violations).

<sup>27</sup> The Superfund was originally funded by a tax on the chemical and petroleum industries that went into a trust fund used by EPA for cleanup of hazardous waste sites. 42 U.S.C. § 9611 (2000). See also U.S. ENVTL. PROT. AGENCY, CERCLA Overview, <http://www.epa.gov/superfund/action/law/cercla.htm> (last visited Apr. 23, 2006). EPA initially tries to reach settlements with responsible parties to pay for the violations they cause. If they do not comply, EPA can draw from Superfund to cleanup sites and then pursue reimbursement costs later. Thus, cleanup is not solely based on the willingness of responsible parties, nor is EPA's reimbursement guaranteed. See ENVTL. PROT. AGENCY, Superfund: Getting the Cleanup Done, <http://permanent.access.gpo.gov/webarchives/epagov/www.epa.gov/compliance/cleanup/superfund/getdone/index.html> (last visited Apr. 22, 2006).

## II. CURRENT CHOICE-OF-LAW THEORIES

There are four basic choice-of-law theories presently in the United States: vested-rights, interest analysis, better-law, and *Restatement*. Each forms the foundation for derivative theories.<sup>28</sup>

A. *Vested-Rights*

The essential premise of the vested-rights theory is that each state or country has exclusive control over its territory.<sup>29</sup> If the rights of the parties vest in a particular jurisdiction, that jurisdiction's substantive law has control over the suit whether the suit itself is brought in that state or another state.<sup>30</sup> Even though the vested-rights approach is usually associated with Professor Joseph Beale, the theory is traceable back to Justice Joseph Story<sup>31</sup> and earlier precedents.<sup>32</sup>

*Ft. McHenry Lumber Co. v. Pennsylvania Lumbermen's Mutual Insurance Co.*,<sup>33</sup> a case involving the release of chromium, arsenic, and copper into groundwater surrounding a wood treatment facility, provides an example of the vested rights approach. The court held that Maryland law applied to the insurance contract because the policies were issued in Maryland.<sup>34</sup> Maryland law stated that the place of contracting controlled the substantive law, and the issuance of an insurance policy was the final step in making a contract complete. Since the contract "vested" in Maryland, Maryland law was controlling.<sup>35</sup> Beale's theory became the basis of *Restatement (First) of Conflict of Laws*<sup>36</sup> and at one time was almost universally accepted.<sup>37</sup>

B. *Interest Analysis*

As a response to the vested-rights approach, Professor Brainerd Currie, along with others, developed "interest analysis," which focused on governmental, instead of individual, interests.<sup>38</sup> Currie reduced his analysis

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<sup>28</sup> For a chart summarizing current choice-of-law in the United States, see Symeon C. Symeonides, *Choice-of-Law in the American Courts in 1999: One More Year*, 48 AM. J. COMP. L. 143, 145-46 (2000) [hereinafter Symeonides 2000]. There have been no subsequent changes since this chart was created. See Symeon C. Symeonides, *Choice-of-Law in the American Courts in 2003: Seventeenth Annual Survey*, 52 AM. J. COMP. L. 9, 26 (2004) (stating that no changes have occurred since the chart summarizing 1999 choice-of-law was produced).

<sup>29</sup> BEALE, *supra* note 16, at 311-12.

<sup>30</sup> LEA BRILMAYER, *CONFLICT OF LAWS* 22 (2d ed. 1995) (asserting that under vested-rights, applying a different law than the state in which the right vests would violate state sovereignty).

<sup>31</sup> JOSEPH STORY, *COMMENTARIES ON THE CONFLICTS OF LAWS* § 18, at 19 (1834).

<sup>32</sup> See sources cited *supra* note 13.

<sup>33</sup> 1988 U.S. Dist. LEXIS 11063 (D. Md. 1988).

<sup>34</sup> *Id.* at \*6.

<sup>35</sup> *Id.*

<sup>36</sup> FIRST RESTATEMENT, *supra* note 15.

<sup>37</sup> LEA BRILMAYER & JACK GOLDSMITH, *CONFLICT OF LAWS*, at XXVII (5th ed. 2002). The largest deviation from Beale occurs in the areas of tort and contract. *Id.*

<sup>38</sup> Andrew T. Guzman, *Choice-of-Law: New Foundations*, 90 GEO. L.J. 883, 892 (2002).

to a series of checkpoints for the court to consider.<sup>39</sup> First, the court looked at the policies underlying each jurisdiction's law.<sup>40</sup> Second, if only one of the jurisdictions had an interest in applying its law to the case, there was a "false conflict," and the law of the place of interest applied.<sup>41</sup> Third, if both jurisdictions had a legitimate interest, there was a "true conflict," and the court applied the law of the forum.<sup>42</sup> Fourth, if the forum did not have an interest, but there was unavoidable conflict between two other states, then the court applied the law of the forum.<sup>43</sup> Finally, if neither the forum nor the foreign state had an interest, this was the "un-provided for" case, and the forum's law applied.<sup>44</sup>

In other words, the question in determining substantive law was not in which jurisdiction the right vested, but rather which jurisdiction had an interest under the particular facts of the case. For example, in *Crucible Materials Corp. v. Aetna Casualty & Surety Co.*<sup>45</sup> the court had to decide whether to apply New York or Pennsylvania law in a case involving hazardous waste in New York.<sup>46</sup> The court applied Pennsylvania's two-pronged test to the case: "(1) whether there is a 'true conflict' or a 'false conflict' among the states whose laws may apply; and (2) which state has a greater interest in seeing its laws applied."<sup>47</sup> Based on the lower court's analysis, this court assumed there was a conflict and proceeded to determine which state had a greater interest.<sup>48</sup> To analyze which state had the greater interest, Pennsylvania borrowed the five factors in section 188 of the *Restatement*.<sup>49</sup> The five factors were "the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties."<sup>50</sup> Since more of the contacts involved New York, it had a greater interest in the case, and its substantive law was applied.<sup>51</sup>

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<sup>39</sup> Brainerd Currie, *Comments on Babcock v. Jackson: A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242-43 (1963).

<sup>40</sup> *Id.* at 1242.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1242-43.

<sup>43</sup> *Id.* at 1243.

<sup>44</sup> BRILMAYER & GOLDSMITH, *supra* note 37, at 218-19.

<sup>45</sup> 228 F. Supp. 2d 182 (N.D.N.Y. 2001).

<sup>46</sup> *Id.* at 187.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 187-88.

<sup>49</sup> *Id.* at 188.

<sup>50</sup> *Id.*

<sup>51</sup> This reasoning is an adaptation from pure "interest analysis." Here, instead of applying forum law (Pennsylvania) to the case when there was a true conflict, the court applied the law of the place with the greater interest. This is called "comparative impairment" and was first proposed by Professor William F. Baxter, *Choice-of-Law and the Federal System*, 16 STAN. L. REV. 1 (1963).



*C. Better-Law Theory*

The “better-law” theory, developed by Professor Robert Leflar, identifies five factors on which courts should base their choice-of-law decisions when resolving conflicts between jurisdictions.<sup>52</sup> These factors are: predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum’s governmental interests, and application of the better rule of law.<sup>53</sup> Leflar asserted that not all of these factors are supposed to be important in every case.<sup>54</sup> Furthermore, he argued that “the better rule of law” factor was practically important, and courts should use it explicitly.<sup>55</sup> The better-law factor basically asks the court to decide which law they think is better, but asserts no other criteria to answer this question except that it be sound and wise, and that it promote justice.<sup>56</sup>

An example of Leflar’s theory is *Benoit v. Test Systems, Inc.*,<sup>57</sup> which involved a New Hampshire resident who was injured while temporarily working for a New Hampshire company as a result of placement by a Massachusetts temporary employment agency.<sup>58</sup> The issue was whether Benoit could sue the placement agency for workers’ compensation. If decided under New Hampshire law, Benoit would be barred from bringing a suit because New Hampshire requires the “borrowing” employer (employer who the employee actually works for on a daily basis, but the employee is actually paid by the placement agency) to provide workers’ compensation to its employee.<sup>59</sup> On the other hand, if decided under Massachusetts law, the suit would be allowed because Massachusetts law does not require the “borrowing” employer to provide workers’ compensation for borrowed employees.<sup>60</sup>

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<sup>52</sup> Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1585 (1966).

<sup>53</sup> *Id.* at 1585–88.

<sup>54</sup> *Id.*

<sup>55</sup> See *id.* at 1588 (discussing the preference for better rule of law); Frederic L. Kirgis, *Fuzzy Logic and the Sliding Scale Theorem*, 53 ALA. L. REV. 421, 452 (2002) (discussing states’ avoidance of both Restatements in favor of Robert Leflar’s better rule of law approach).

<sup>56</sup> See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 299 (1966) (asserting that a forum concluding that its law is better is simply saying “that its local rules of law are wiser, sounder, and better calculated to serve the total ends of justice under law in the controversy before it than are the competing rules of the other state”).

<sup>57</sup> 694 A.2d 992 (N.H. 1997).

<sup>58</sup> *Id.* at 993; see also *Victoria v. Smythe*, 703 A.2d 619, 621 (R.I. 1997) (holding that a Florida law was the better law when applied to a case arising from a Rhode Island domiciliary who was injured by a car driven by a British domiciliary who, in turn, had rented his car in New Jersey from a Florida-based car rental corporation); *Kuehn v. Childrens Hosp.*, Los Angeles, 119 F.3d 1296, 1300 (7th Cir. 1997) (holding that California had the better rule of law when applied to a medical malpractice case based upon negligence committed by the employees of Childrens Hospital Los Angeles); *Hunker v. Royal Indem. Co.*, 204 N.W.2d 897, 908 (Wis. 1973) (holding that Ohio had the better rule of law when applied to a car accident involving two Ohio residents and one Wisconsin resident).

<sup>59</sup> *Benoit*, 694 A.2d at 994.

<sup>60</sup> *Id.*

The court analyzed the facts under Leflar's five factors. Leflar's first factor, predictability of results, would favor New Hampshire law because Benoit would have expected the law of the place of employment to apply, especially since she worked there for fourteen months before being injured.<sup>61</sup> The second factor, maintenance of interstate and international order, also favored New Hampshire law because the plaintiff had a substantial connection with New Hampshire, because she was a resident of the state and worked there.<sup>62</sup> The third factor, simplification of the judicial task, was of little weight because the only issue was whether someone could bring a suit.<sup>63</sup> The fourth factor, advancement of the forum's governmental interests, favored New Hampshire law because its interest of protecting its businesses from suits arising out of contracts with Massachusetts temporary employment agencies outweighed Massachusetts' interest in allowing employees to recover from third-party tortfeasors.<sup>64</sup> Finally, the last factor, application of the better rule of law, favored New Hampshire.<sup>65</sup> The court stated, "We believe that our rule is the sounder rule of law because it focuses upon the reality of individualized employment situations, and places the burden of providing coverage on the more appropriate employers. Hence, the fifth consideration weighs in favor of applying New Hampshire law."<sup>66</sup> Finally, as with vested-rights and interest analysis, at least four out of Leflar's five factors made it into *Restatement*.<sup>67</sup>

#### *D. Restatement (Second): The Most Significant Relationship*

*Restatement (Second) of Conflicts of Laws* promulgates the "most significant relationship test"<sup>68</sup> and resembles the Uniform Commercial Code in that it points to several sections to solve a single problem.<sup>69</sup> Structurally, the test breaks down into three parts. First, Section 6 lists factors or policies that all choice-of-law problems should take into account when determining which state has the "most significant relationship."<sup>70</sup> Second, it sets out

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<sup>61</sup> *Id.* at 995.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 995–96.

<sup>65</sup> *Id.* at 996.

<sup>66</sup> *Id.*

<sup>67</sup> RESTATEMENT, *supra* note 21, § 6. Even the "better rule of law" factor arguably can be seen in § 6(2)(e): the basic policies underlying the particular field of law. *Id.*

<sup>68</sup> BRILMAYER & GOLDSMITH, *supra* note 37, at 262–63.

<sup>69</sup> James P. George, *False Conflicts and Faulty Analyses: Judicial Misuse of Governmental Interests in the Second Restatement of Conflict of Laws*, 23 REV. LITIG. 489, 519 (2004).

<sup>70</sup> Section 6(1) says that the court should first look to its own choice-of-law rules. If its rules do not apply, section 6(2) provides seven factors to determine the most significant relationship:

(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

general principles applied to torts, contracts, and property. For example, in tort, the court considers: 1) the place where the injury occurred, 2) the place where the conduct causing the injury occurred, 3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and 4) the place where the relationship, if any, between the parties is centered.<sup>71</sup> Third, it breaks down these general considerations into subcategories.<sup>72</sup>

While providing courts with great flexibility, the most significant relationship test essentially combines what the drafters thought to be the best of the existing choice-of-law theories (including vested-rights, interest analysis, and the better-law theory) into laundry lists.<sup>73</sup> As a result, courts have applied several different theories under one banner. There is no “typical” application because some courts “count contacts; sometimes they apply the law of the place of the injury; sometimes they perform interest analysis; often they mix several different approaches.”<sup>74</sup>

### III. CHOICE-OF-LAW IN THE CONTEXT OF CERCLA

While all of the preceding choice-of-law theories are alive today, only vested-rights and *Restatement* play a major role in CERCLA cases because Leflar’s better-law theory and interest analysis are not practiced in many states anymore.<sup>75</sup> This does not diminish, however, the impact of interest analysis or the better-law theory on CERCLA cases because both theories, along with vested-rights, have been incorporated into *Restatement*.<sup>76</sup>

#### A. Vested-Rights

CERCLA choice-of-law disputes under vested-rights analysis are determined either by applying the law of the place of contracting or by finding some exception to this mechanical rule.

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RESTATEMENT, *supra* note 21, § 6.

<sup>71</sup> *Id.* § 145.

<sup>72</sup> *Id.* §§ 146–48. In tort, for example, § 146 discusses personal injury; § 147 discusses property damage; § 148 discusses fraud. *Id.*

<sup>73</sup> George, *supra* note 69, at 519.

<sup>74</sup> BRILMAYER & GOLDSMITH, *supra* note 37, at 264.

<sup>75</sup> See Symeonides 2000, *supra* note 28, at 145–46 (listing the choice-of-law methodology each state applies). For an example of the better-law theory in CERCLA context, see *American States Ins. Co. v. Mankato Iron & Metal Inc.*, 848 F. Supp. 1436, 1444 (D. Minn. 1993) (holding that Minnesota, the place of contracting, was the better rule of law in a dispute arising out of a hazardous waste site in Illinois). For examples of interest-analysis in the context of CERCLA, see *Crucible Materials Corp. v. The Aetna Casualty & Surety Co.*, 228 F. Supp. 2d 182, 189 (N.D.N.Y. 2001) (holding that New York law applied to a case that was based on pollution sites primarily located in New York); *CXY Chemical U.S.A. v. Gerling Global General Ins. Co.*, 991 F. Supp. 770, 777 (E.D. La. 1998) (applying a combination of interest-analysis and *Restatement*, the court held that Louisiana law, the place of the hazardous waste, applied to an insurance contract signed in Alberta, Canada); and *In re Combustion, Inc.*, 960 F. Supp. 1056, 1072 (W.D. La. 1997) (applying a combination of “interest analysis” and the factors from *Restatement*, the court held that Louisiana law, the place of hazardous waste, applied to all issues in the case).

<sup>76</sup> George, *supra* note 69, at 519.

### 1. Applying the Law of the Place of Contracting

Traditionally, courts interpret the place of contracting, or *lex loci contractus*, as “the place where the last act is performed which makes an agreement a binding contract.”<sup>77</sup> An example of applying the law of the place of contracting in the CERCLA context is *ARTRA Group, Inc. v. American Motorists Insurance Co.*<sup>78</sup> This case arose from comprehensive general liability policies that American Motorists Insurance Company (AMICO) issued to ARTRA Group, Inc. (ARTRA) in Illinois.<sup>79</sup> Both parties were headquartered in Illinois.<sup>80</sup> These policies covered sites throughout the United States, including the site in dispute, a paint manufacturing plant in Baltimore, Maryland known as the Hollins Ferry site.<sup>81</sup> In 1991, Sherwin-Williams sued ARTRA and other prior owners of the Hollins Ferry site, claiming damages resulting from the release of hazardous waste at the site.<sup>82</sup> ARTRA wanted AMICO to represent and indemnify it, but AMICO refused.<sup>83</sup>

The conflict of law arose when the parties disagreed as to whether Maryland or Illinois law applied to the interpretation of the pollution exclusion clause in the policy.<sup>84</sup> ARTRA argued Illinois law should apply

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<sup>77</sup> *Riviera Beach Volunteer Fire Co. v. Fid. & Cas. Co. of N.Y.*, 388 F. Supp. 1114, 1120 (D. Md. 1975) (asserting that Maryland follows the *lex loci contractus* rule for choice-of-law); see also *Chazen v. Parton*, 739 So. 2d 1104, 1107 (Ala. 1999) (asserting that *lex loci contractus* is the law of the place where the contract is made); *Godinger Silver Art Co., Ltd. v. Olde Atlanta Mktg., Inc.*, 604 S.E.2d 212, 215 (Ga. Ct. App. 2004) (asserting that *lex loci contractus* means that a contract is governed by the law of the place in which it was made); *Dragon v. Vanguard Ind., Inc.*, 89 P.3d 908, 914 (Ka. 2004) (asserting that *lex loci contractus* means the law of the place where the contract is made, except when it is based on performance); *State Farm Mut. Auto. Ins. Co. v. Ballard*, 54 P.3d 537, 539 (N.M. 2002) (asserting that *lex loci contractus* means the law of the place where the contract was executed).

<sup>78</sup> 642 A.2d 896 (Md. Ct. Spec. App. 1994), *rev'd*, 659 A.2d 1295 (Md. 1995). Although this case was reversed, it provides a good example of a court applying traditional *lex loci contractus* principles in the context of CERCLA; see also *Wysong & Miles Co. v. Employers of Wausau*, 4 F. Supp. 2d 421, 425–26 (M.D.N.C. 1998) (holding that North Carolina, the place of contracting, controlled all substantive issues for the case arising from a hazardous waste site located in North Carolina); *Boardman Petroleum, Inc. v. Federated Mut. Ins. Co.*, 135 F.3d 750, 754 (11th Cir. 1998) (holding that Georgia’s *lex loci contractus* rule pointed to the application of Georgia’s law because it had a greater interest than any other state in a consolidated case involving two lawsuits arising from hazardous waste sites located in South Carolina); *Ft. McHenry Lumber Co., Inc. v. Pa. Lumbermen’s Mut. Ins. Co., Inc.*, 1988 U.S. Dist. LEXIS 11063, at \*6 (D. Md. 1988) (holding that Maryland law, the place of contracting, applied to a case arising out of a hazardous waste site located in Maryland).

<sup>79</sup> *ARTRA*, 642 A.2d at 898.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 897.

<sup>82</sup> *Id.* at 898.

<sup>83</sup> *Id.*

<sup>84</sup> The pollution exclusion clause said that insurance does not apply

to bodily injury or property damage arising out of the discharge, disbursement, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, disbursement, release or escape is sudden and accidental.

*Id.*

because Illinois was the place of contracting. Under Illinois law, the pollution exclusion clause would be found ambiguous and, therefore, be construed against the insurer, requiring the insurer to pay.<sup>85</sup> AMICO argued that Maryland law should apply because Maryland had a strong public policy on environmental issues. Under Maryland law, the pollution exclusion clause would be clear and unambiguous, negating insurer liability.<sup>86</sup>

Ironically, AMICO argued for the application of the law where the hazardous waste sites were located because that state's law would give them the best opportunity to evade liability.<sup>87</sup> This argument is illogical. If the Court of Appeals followed AMICO's reasoning, it would apply Maryland's law based on Maryland's public policy against environmental pollution but, at the same time, cut off an important vehicle for paying for that same pollution. In spite of this contradiction, the district court agreed with AMICO and applied Maryland law because Maryland had a strong public policy against environmental pollution.

In reversing the district court, the Court of Appeals stated that the district court erred when it relied upon Maryland's public policy against environmental pollution in order to apply Maryland law.<sup>88</sup> The Court of Appeals concluded that even though Maryland had a strong public policy against environmental pollution, "Maryland has *no* strong public policy regarding *who pays* for the cleanup. That issue is controlled by the contract between insured and insurer."<sup>89</sup> Thus, the court applied Illinois law to the case because it was the place of contracting.

Even though the Court of Appeals determined Maryland had no interest in who pays for environmental cleanup, it applied Illinois law which could have enabled Maryland sites to be cleaned up with insurance company money. The court seemed to be trying to avoid an ironic situation: Maryland has a strong public policy against environmental pollution, but the application of its insurance law would relieve the insurance company of liability. While the application of Illinois law was a legitimate use of its

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<sup>85</sup> *Id.* at 899.

<sup>86</sup> *Id.*

<sup>87</sup> Ultimately, Maryland's highest court reached this result. See *American Motorists Ins. Co. v. ARTRA Group, Inc.*, 659 A.2d 1295 (Md. 1995).

<sup>88</sup> *Id.* at 900. On appeal and in the alternative, AMICO asked the court to apply the doctrine of *renvoi*. *Id.* at 899. If the court of appeals had applied *renvoi*, the Maryland court would have first looked to the law of the place where the contract (including their choice-of-law principles) was formed and ask which state's law the foreign state would apply. From there, the Maryland court would have applied whichever state's substantive law that the contracting state's choice-of-law rules required it to apply. Here, AMICO asserted that the court of appeals should have looked to Illinois law (including Illinois's choice-of-law rules) and found that Illinois's choice-of-law rules would require Maryland law to be applied. Thus, it argued, the Maryland court should have applied its own law. *Id.* at 899–900. The appeals court refused to apply AMICO's analysis because it concluded that Maryland had not adopted the *renvoi* doctrine. *Id.* at 900. The court concluded this, even though the United States District Court for the District of Maryland in *Travelers Indemnity Co. v. Allied Signal, Inc.*, applied Maryland law because the places of contracting, New Jersey and New York, would have applied Maryland law. 718 F. Supp. 1252 (D. Md. 1989). AMICO's argument, however, was ultimately accepted by the highest court of Maryland. See *American Motorists Ins. Co. v. ARTRA Group, Inc.*, 659 A.2d 1295 (Md. 1995). For a further discussion of *renvoi*, see *infra* notes 101–110 and accompanying text.

<sup>89</sup> *ARTRA*, 642 A.2d at 901.

choice-of-law rules, the court applied Illinois law, which was indifferent to Maryland's environmental pollution, and reached a result that would have furthered the cleanup of Maryland's environmental pollution if the decision had been upheld.

## 2. *Exceptions to the Place of Contracting*

In order to avoid inequitable results that sometimes follow from application of the law of the place of contracting, courts in vested-rights states have employed various exceptions to the rule.<sup>90</sup>

### *a. Public Policy*

The public policy exception is used when the forum court refuses to apply the law of a foreign state, despite it being the place of contracting, because that law goes against the public policy of the forum state.<sup>91</sup> To override the law of the place of contracting, however, "the public policy must be very strong and not merely a situation in which [the forum state's] law is different from the law of another jurisdiction."<sup>92</sup>

An example of the public policy exception to the place of contracting within the context of CERCLA is *CPC International, Inc. v. Aerojet-General Corp.*<sup>93</sup> CPC International, Inc. (CPC) was found directly liable for cleanup costs under CERCLA in 1991, arising from groundwater contamination at the Ott/Story/Cordova site in Muskegon County, Michigan.<sup>94</sup> As a result, CPC sought coverage and indemnification under nineteen separate comprehensive general liability policies against fourteen insurance companies.<sup>95</sup> CPC urged the court to apply New Jersey law to the case

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<sup>90</sup> The various exceptions include public policy, substance/procedure, penal laws, and *renvoi*. BRILMAYER & GOLDSMITH, *supra* note 37, at 129–66.

<sup>91</sup> See, e.g., *Convergys Corp. v. Keener*, 582 S.E.2d 84, 86 (Ga. 2003) (holding that application of Ohio law that allowed a covenant of disclosure was against the public policy of Georgia); *Hulcher Servs. v. R.J. Corman R.R. Co., L.L.C.*, 543 S.E.2d 461, 465 (Ga. Ct. App. 2000) (holding that the choice of Texas law would not be followed where it flagrantly contravened the public policy of Georgia); *Enron Capital & Co. v. Pokalsky*, 490 S.E.2d 136, 139 (Ga. Ct. App. 1997) (holding that although the parties chose the law of a foreign jurisdiction to govern, a Georgia court will not enforce the contract if it is "particularly distasteful"); *Konover Prop. Trust, Inc. v. WHE Assocs., Inc.*, 790 A.2d 720, 728 (Md. Ct. Spec. App. 2002) (asserting that public policy is an exception to *lex loci contractus*).

<sup>92</sup> *Kramer v. Bally's Park Place, Inc.*, 535 A.2d 466, 467 (Md. 1988) (refusing to apply the public policy exception in holding that a gambling contract, made in a state where the type of gambling engaged in was lawful, was enforceable in Maryland, even though that type of gambling was illegal in Maryland).

<sup>93</sup> 825 F. Supp. 795, 804–07 (W.D. Mich. 1993); see also *LaFarge Corp. v. Travelers Indem. Co.*, 118 F.3d 1511, 1515–16 (11th Cir. 1997) (holding that Florida law would apply to the case even though Texas was the place of contract). The court predicted that the Florida Supreme Court would use *Restatement* instead of *lex loci contractus* in insurance cases involving real property because Florida has a substantial interest in damage caused by pollution within its borders. *Id.*

<sup>94</sup> *CPC*, 825 F. Supp. at 798.

<sup>95</sup> *Id.*

because the last act of the contract was a countersignature in New Jersey.<sup>96</sup> The insurers asserted that the court should simply apply the law of the forum, Michigan.<sup>97</sup>

The district court stated that Michigan applied the law of the place of contracting when parties did not stipulate the forum in the contract. However, the court stated that a Michigan court would not apply the mechanical place-of-contracting test because it “would result in the pointless application of the law of several different forums to the numerous insurance transactions at issue here.”<sup>98</sup> Instead, the court applied Michigan law because the location of the dump site was a “critical factor” and held that the Michigan Supreme Court would find that the health and safety of its citizens would be of “paramount interest.”<sup>99</sup> Thus, Michigan law applied to the case because of its interest in the cleanup of its hazardous waste sites.

Even though the district court said that Michigan had a great interest in the health and safety of its citizens, the application of Michigan law allowed the insurance companies to avoid liability because CPC did not satisfy notice requirements to its insurers.<sup>100</sup> In other words, the main justification the court used to validate its choice of Michigan law was completely undermined by the fact that this decision negated a valuable resource to fund cleanup. Citizens of Michigan probably do not have an interest in assuring that their own law prevents the allocation of resources for environmental cleanup.

*b. Renvoi*

The French word *renvoi* means “return” or “sending back.”<sup>101</sup> Under the doctrine of *renvoi*, the forum first looks at its law and decides whether its choice-of-law rules point to the application of its substantive law or a foreign jurisdiction’s law to the case. If its choice-of-law rules point to a foreign jurisdiction, it looks at the whole law of the foreign jurisdiction, including its choice-of-law rules. The forum then applies the whole law of the foreign jurisdiction and determines how the foreign jurisdiction would adjudicate the case as if it were the forum. Because the forum court looks at the foreign jurisdiction’s choice-of-law rules and not just its substantive law, analysis of how the foreign court would proceed could result in the forum court applying the foreign jurisdiction’s substantive law, or could result in the foreign jurisdiction “returning” the case back to the forum court and the forum court applying its substantive law.<sup>102</sup>

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<sup>96</sup> *Id.* at 802. CPC acknowledged, however, that only three of the 19 insurance policies had a countersignature signed in New Jersey. *Id.* at 801.

<sup>97</sup> *Id.* at 802.

<sup>98</sup> *Id.* at 809.

<sup>99</sup> *Id.* at 808.

<sup>100</sup> *Id.* at 814–15. Under Michigan law, the court concluded that “CPC’s proof of timely notice to CU of adjacent landowners’ claims was not sufficient proof of timely notice to CU of the USEPA’s later CERCLA claim.” *Id.* at 814.

<sup>101</sup> LAROUSSE CONCISE DICTIONARY: FRENCH-ENGLISH, ENGLISH-FRENCH 449 (2001).

<sup>102</sup> See generally JOHN R. KENNEL ET AL., CONFLICT OF LAWS, 16 AM. JUR. 2D *Conflict of Laws* §

*Commercial Union Insurance Co. v. Porter Hayden Co.*<sup>103</sup> is an example of the *renvoi* doctrine applied in the CERCLA context. Porter Hayden Co. (Porter) faced claims arising from asbestos pollution in Maryland.<sup>104</sup> Porter sought indemnification from Commercial Union Insurance Co. (Commercial), which insured Porter from 1941 to 1952.<sup>105</sup> Maryland is a vested-rights state, and the place of contracting test would have resulted in the application of New York law.<sup>106</sup> Under New York law, Commercial would not have to indemnify Porter because Porter failed to give Commercial timely notice of the claims Porter faced. Under Maryland law, Commercial's failure to provide evidence of prejudice, resulting from the failure to provide notice, would have foreclosed the use of prejudice as a defense. Therefore, under Maryland law, Commercial would have to indemnify Porter for its cleanup costs.<sup>107</sup>

Instead of applying the law of the place of contracting (New York), the court employed the doctrine of *renvoi* and looked at the whole law of the foreign jurisdiction—New York—including New York's choice-of-law rules.<sup>108</sup> Since New York has adopted *Restatement*, it would apply Maryland substantive law because Maryland is the location of the hazardous waste.<sup>109</sup> Thus, the case “returned” from New York to Maryland, and the court applied Maryland law, basically assuring Porter that Commercial would have to indemnify it.

It appears the Maryland court used *renvoi* to ensure a particular result—making sure insurance money was available for cleanup. When application of foreign law did not ensure payment by the insurance company, the court employed the doctrine of *renvoi* to assure money for environmental cleanup.<sup>110</sup>

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5 (2004) (detailing and discussing the doctrine of *renvoi*). For examples of *renvoi*, see *Miller v. White*, 702 A.2d 392, 396 (Vt. 1997) (holding that Quebec law did not apply because Quebec would not apply its own law under these facts); *Nodak Mutual Insurance Co. v. American Family Mutual Insurance Co.*, 590 N.W.2d 670, 675 (Minn. 2000) (declining to apply North Dakota law because, under facts similar to the ones here, North Dakota had previously found that Minnesota had a greater interest in application of Minnesota law); *Phillips v. General Motor Corp.*, 995 P.2d 1002, 1011 (Mont. 2000) (finding that North Carolina and Michigan courts would not apply their own product liability laws if the case was before their respective courts); and *Braxton v. Anco Electric, Inc.*, 409 S.E.2d 914, 917 (N.C. 1991) (declining to apply Virginia law because Virginia would not have applied its own law).

<sup>103</sup> 698 A.2d 1167 (Md. Ct. Spec. App. 1997).

<sup>104</sup> *Id.* at 1204.

<sup>105</sup> *Id.* at 1176.

<sup>106</sup> *Id.* at 1200.

<sup>107</sup> *Id.* at 1195–96.

<sup>108</sup> *Id.* at 1203.

<sup>109</sup> *Id.* at 1204.

<sup>110</sup> *But see American Motorists Ins. Co. v. ARTRA Group, Inc.*, 659 A.2d 1295 (Md. 1995) (applying the law of Maryland through the doctrine of *renvoi* which resulted in the insurer not having to indemnify for cleanup).



*c. Place of Performance*

The place of performance exception to the place of contracting test allows courts to use the law of the state where the contract was performed instead of where the contract was negotiated. Courts use this approach when the contract is executed in one jurisdiction but relates to and is performed in another jurisdiction.<sup>111</sup> Such a contract in a CERCLA context was at issue in *EDO Corp. v. Newark Insurance Co.*<sup>112</sup> EDO Corp. (EDO) had several manufacturing operations in various states, including the site at issue, located in Connecticut.<sup>113</sup> Newark Insurance Co. (Newark) issued ten consecutive policies to EDO covering the years 1972 to 1982 from its principal place of business located in New York—the place of contracting.<sup>114</sup> Newark breached its duty to defend EDO against cleanup claims and the conflict centered on whether New York or Connecticut law would apply, concerning damages for the breach of the contract.<sup>115</sup> Under Connecticut law, damages for failure to defend include settlement monies, counsel fees, and interest.<sup>116</sup> Under New York law, a party who breaches the duty to defend is liable only for reasonable counsel fees and necessary expenses.<sup>117</sup>

Instead of applying the law of New York (the place of contracting), the court applied Connecticut law because it was the place of performance, or the location of operative effect—the waste site leading to the underlying claim.<sup>118</sup> The court reasoned the place of operative effect was the proper law to apply when the case involved multiple-risk insurance policies, because “the parties here contemplated—at the time of contracting—that the policies would have an operative effect in Connecticut . . . hence it was foreseeable that liability could arise from the operation of this facility.”<sup>119</sup> Thus, the court applied Connecticut law to the case, requiring the insurance company to pay greater damages, including settlement costs and interest.

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<sup>111</sup> See, e.g., *Castilleja v. Camero*, 414 S.W.2d 424, 426 (Tex. 1967) (holding that the place of performance governs the legality of the contract when it was to be performed in Mexico); *Seiders v. Merchs. Life Ass'n of the U.S.*, 54 S.W. 753, 754 (Tex. 1900) (holding that the law of Missouri, the place of performance, governed the case involving a contract formed in Texas but payable in Missouri); *Pratt v. Sloan*, 152 S.E. 275, 277 (Ga. Ct. App. 1930) (holding that Florida law applied to a brokerage contract that was formed in Georgia, but performed in Florida); *Baker v. Metallizing Co. of Am.*, 118 S.E.2d 843, 844 (Ga. Ct. App. 1961) (asserting that Illinois law, as the place of performance, would have controlled the issues in the case if it had been pleaded); *Grand Sheet Metal Prods. Co. v. Aetna Cas. & Sur. Co.*, 500 F. Supp. 904, 909 (D. Conn. 1980) (holding that Connecticut law governed a multiple-risk fire policy insuring properties in 40 states when the actual loss occurred in Connecticut).

<sup>112</sup> No. Civ. H-90-951, 1997 WL 76575 (D. Conn. Jan. 16, 1997).

<sup>113</sup> *Id.* at \*1.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at \*2.

<sup>116</sup> *Id.* (citing *City of W. Haven v. Liberty Mut. Ins. Co.*, 639 F. Supp. 1012, 1020 (D. Conn. 1986)).

<sup>117</sup> *Id.* (citing *Servidone Constr. Corp. v. Sec. Ins. Co. of Harford*, 477 N.E.2d 441, 444 (N.Y. 1985)).

<sup>118</sup> *Id.* at \*3.

<sup>119</sup> *Id.*

*B. Restatement (Second)*

Courts applying *Restatement* decide choice-of-law questions differently depending on whether the litigation involves hazardous wastes sites in multiple states or sites confined to a single state. Courts generally apply the law of the place of contracting, the location of the hazardous waste site, or the states of the parties' domicile.

*1. Multi-State—Applying the Law of the Waste Site*

In suits that involve owners of hazardous waste sites located in multiple states (multi-state) trying to collect under a single policy, courts either apply the law of the state of each site (majority rule) or apply the law of the state that has the most sites (minority rule). The common thread in both lines of analysis, however, is that the location of the risk is the most important factor in determining which state's law to apply.

*a. Applying the Law of the State with the Most Sites*

Courts that apply the law of the states with the most sites emphasize that the insurance policy should be interpreted under the substantive law "of the state that the parties understood was to be the principal location of the insured risk."<sup>120</sup> An illustration of applying the law of the state where the most sites are located is *Hartford Accident & Indemnity Co. v. Dana Corp.*<sup>121</sup> Dana Corp. (Dana) was insured by fifty-six insurers, covering its sixty-three auto-component manufacturing facilities in nineteen states, the subjects of environmental cleanup.<sup>122</sup> Of the sixty-three facilities, twenty-five were located in Indiana, the forum of this litigation.<sup>123</sup> The court undertook an analysis of Section 188 of *Restatement* and found that Michigan satisfied two of the important factors leading to application of Michigan law (the place of negotiation and the place of contracting); Indiana satisfied two of the important factors leading to application of the law of Indiana (primary location of the insured risk and the place of performance—where the insurance money would be put to use), and the domicile of the parties was indeterminate.<sup>124</sup>

Fireman's Fund, one of the Dana's insurers, contended the law of Ohio should apply because it was Dana's place of domicile and the location at

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<sup>120</sup> *Gilbert Spruance Co. v. Pa. Mfrs. Ass'n Ins. Co.*, 629 A.2d 885, 889 (N.J. 1993) (asserting that the law of a single state should govern an insurance policy that covers multiple states).

<sup>121</sup> 690 N.E.2d 285 (Ind. App. 1998).

<sup>122</sup> *Id.* at 288.

<sup>123</sup> *Id.* at 289.

<sup>124</sup> *Id.* at 290. Note that *Restatement* allows the court to duplicate factors. For example, the court stated that the place of contracting and the place of negotiation are two separate factors. In most situations, however, negotiation is implicit in contracting. The court does the same type of analysis with the place of the insured risk and the place of performance of the insurance payments. Arguably, these two factors are really the same thing. It is hard to imagine that the place of performance of the insurance policy could be any different than the site which the money is supposed to insure.

which Dana paid policies and premiums.<sup>125</sup> It also argued that because the lawsuit was multi-state, the location of the insured risk should be given less weight because the sites were scattered throughout several states.<sup>126</sup> The court disagreed and held that *Restatement* required that the court apply the law of the place where the risk was *principally* located (Indiana), even though Dana's sites were scattered throughout the country.<sup>127</sup> In concluding that Indiana's law applied, the court supported its decision to apply the law of a single state to multi-state litigation by stressing the need of "judicial economy, predictability and uniformity."<sup>128</sup>

While the court stressed the application of a single state's law would promote judicial economy, uniformity, and predictability, its decision also promoted unfairness, violating the fourth policy consideration (the protection of justified expectations) that a court is supposed to consider when deciding choice-of-law cases.<sup>129</sup> The insurers which contracted with Dana in Michigan concerning hazardous waste-sites located outside of Indiana, could hardly have expected Indiana law to apply in their case. In other words, the court's conclusion that applying the law of the state with the most sites promotes predictability rests on the assumption that all the insurers knew that Indiana's twenty-five sites would require application of Indiana law to all sixty-three sites.

*b. Applying the Law of Each State Containing a Site*

While still focusing on the goals of uniformity and predictability, courts applying the law of each state containing a site stress that application of the law where the insurance contract was made "would lead to greater uncertainty and non-uniformity of result."<sup>130</sup> For example, in *In re Clark Equipment Co. v. Liberty Mutual Insurance Co.*,<sup>131</sup> the polluter had sites in

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<sup>125</sup> *Id.* at 293.

<sup>126</sup> *Id.* at 294. Fireman's Fund based its argument on RESTATEMENT, *supra* note 21, § 193 cmt. b.

<sup>127</sup> *Hartford*, 690 N.E.2d 285, 294 (Ind. App. 1998).

<sup>128</sup> *Id.* at 290.

<sup>129</sup> RESTATEMENT, *supra* note 21, § 6 (d).

<sup>130</sup> *In re Clark Equipment Co. v. Liberty Mut. Ins. Co.*, Civ. A. No. 89C-OC-173, 1994 WL 466325, at \*6 (Del. Super. Ct. Aug. 1, 1994); *see also* *Millipore Corp. v. The Travelers Indem. Co.*, 115 F.3d 21, 31 (1st Cir. 1997) (holding that, instead of Massachusetts, the law of New Jersey should apply to waste sites within New Jersey); *Permacel v. Am. Ins. Co.*, 691 A.2d 383, 388 (N.J. Super. Ct. App. Div. 1997) (holding that New York, Connecticut, and Maryland law should apply to the sites in their respective states because it was foreseeable that their laws would apply and because these states had an overriding interest in their environments); *NL Indus., Inc., v. Commercial Union Ins. Co.*, 938 F. Supp. 248, 256 (D.N.J. 1996) (holding that the law of the place of the individual site should control the case arising from hazardous waste sites located in New Jersey and Oregon); *Unisys Corp. v. Ins. Co. of N. Am.*, 712 A.2d 649, 652 (N.J. 1998) (holding that New Jersey law should apply to sites within New Jersey and other state's law should be applied to waste sites within their borders if their laws differ from New Jersey's); *Pfizer, Inc. v. Employers Ins. of Wausau*, 712 A.2d 634, 644 (N.J. 1998) (holding that the law of the individual waste site was the dominant factor when determining choice-of-law).

<sup>131</sup> *In re Clark Equipment Co.*, 1994 WL 466325).

Michigan, Indiana, Delaware, and North Carolina.<sup>132</sup> Instead of applying the law of the state with the most sites, the court emphasized that uniformity would be preserved more effectively if it applied the law of the state where the site was located.<sup>133</sup> Thus, the court applied Michigan, Indiana, Delaware, and North Carolina law to their respective sites.<sup>134</sup>

Other courts have stressed that judicial administration (the amount of resources and time the court should consume in applying the law to a case) is not a hindrance when applying the law of the place of the site.<sup>135</sup> In *Unisys Corp. v. Insurance Co. of North America*,<sup>136</sup> the court stated that since the central facts, in the initial application of law, will likely transfer to the remaining sites in question, an experienced trial court would be able to “make the issues manageable.”<sup>137</sup> Thus, the court rejected the reasoning of the minority rule and asserted that it could manage the application of the laws of several states to sites in several states.<sup>138</sup>

Finally, courts have emphasized that the parties’ expectations at time of contracting as to which state law will be applied is the most significant factor when resolving a conflict between states’ laws.<sup>139</sup> In *Permacel v. American Insurance Co.*, the polluter had five sites in New York, Connecticut, and Maryland during the terms of the insurance policies.<sup>140</sup> The court emphasized that it was reasonable to expect New York, Connecticut, and Maryland law to apply to the suit because all of those states had a significant interest in the cleanup of hazardous waste within their borders and that it was foreseeable that Permacel would transport its waste to those states.<sup>141</sup> Because it was foreseeable that Permacel would transport its waste to different states, the insurers should have known at the time of contracting that the law of the place of the waste site should apply.

Interestingly, the court stressed that it was foreseeable that the law of the place where the site was located would apply because of that state’s interest.<sup>142</sup> However, though it was foreseeable for the waste to be transferred to a particular location at a *later time*, it is equally reasonable that the parties expected the law of the place of contracting to apply *at the time* the contract was formed.

## 2. Multi-State—Applying the Law of the Place of Domicile

Although not favored, courts occasionally apply the law of the place of domicile in multi-state cases, concluding that the location of the parties is

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<sup>132</sup> *Id.* at \*3.

<sup>133</sup> *Id.* at \*6.

<sup>134</sup> *Id.*

<sup>135</sup> *Unisys*, 712 A.2d at 652.

<sup>136</sup> 712 A.2d 649 (N.J. 1998).

<sup>137</sup> *Id.* at 652.

<sup>138</sup> *Id.*

<sup>139</sup> *Permacel v. Am. Ins. Co.*, 691 A.2d 383, 391 (N.J. Super. Ct. App. Div. 1997).

<sup>140</sup> *Id.* at 384.

<sup>141</sup> *Id.* at 389.

<sup>142</sup> *Id.*

the most important factor.<sup>143</sup> In these cases, the domicile of the polluter is the key factor. In *Emerson Electric Co. v. Aetna Casualty & Surety Co.*, the polluter, Emerson Electric Co. (Emerson), had more than sixty waste sites located in twenty states and was insured by fifty-seven insurers.<sup>144</sup> Emerson asserted the trial court erred by applying the various laws of the place of the waste sites and argued that the case should be decided by Illinois law—the state it believed had the most contacts.<sup>145</sup> The insurers agreed the case should be based on a single state’s law, but they argued the state should be Missouri, the domicile of Emerson.<sup>146</sup> Illinois law would uniformly compel the insurance companies to fulfill their obligations in representing and indemnifying Emerson, while the application of Missouri law would result in a mixture of liability and non-liability for the insurance companies. The court agreed the law of each state of the site should not control because “the application of the law of the site creates the result that one insurance policy could be interpreted differently in different locations.”<sup>147</sup> Based on *Restatement*, the court concluded the location of the risk had greater weight than any other contact, provided that the risk is located, at least principally, within a single state.<sup>148</sup> Since the sites were located in more than twenty states, the court concluded this factor was not that important.<sup>149</sup>

Instead of applying the law of the place of contract, however, the court applied the law of Emerson’s domicile.<sup>150</sup> The court held that even though the “place of the delivery, the place of the last act giving rise to a contract, and the place of performance may tend to favor the insurer, their significance is minor compared to the element of domicile.”<sup>151</sup> Since the procurement of insurance was mainly coordinated from Emerson’s corporate headquarters in Missouri, “Emerson’s domicile played an active, dominant and dynamic role in the procurement of all of these policies.”<sup>152</sup> Because most of the activity involving the formation of the policies was centered around Emerson’s domicile in Missouri, the court concluded

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<sup>143</sup> *Emerson Elec. Co. v. Aetna Cas. & Sur. Co.*, 743 N.E.2d 629, 646 (Ill. App. Ct. 2001); see also *J. Josephson, Inc. v. Crum & Forster Ins. Co.*, 679 A.2d 1206, 1216 (N.J. Super. Ct. App. Div. 1996) (holding that New Jersey law, the place of insured’s domicile, applied to the case where the place of contracting was New York while the waste site was located in Pennsylvania); *Potomac Elec. Power Co. v. Cal. Union Ins. Co.*, 777 F. Supp. 968, 973–74 (D.D.C. 1991) (holding that District of Columbia law, where the insurance policy-holder was based, controlled the case, arising from a site located in Maryland).

<sup>144</sup> *Emerson*, 743 N.E.2d at 633.

<sup>145</sup> *Id.* at 638–39. Emerson thought Illinois had the most contacts because it was the place of negotiation and four of the sites were in Illinois. *Id.* at 640–41.

<sup>146</sup> *Id.* at 639.

<sup>147</sup> *Id.* (quoting *Aetna Cas. & Sur. Co. v. Dow Chem. Co.*, 883 F. Supp. 1101, 1108 (E.D. Mich. 1995)); see also *Maremont Corp. v. Cheshire*, 681 N.E.2d 548, 552 (Ill. App. Ct. 1997) (“A contrary result would open these policies to five different views of the law, depending on the site of the risk. That would not be good policy or good law.”).

<sup>148</sup> *Emerson*, 743 N.E.2d at 640; see also *RESTATEMENT*, *supra* note 21, § 193, cmt. b, at 611–12.

<sup>149</sup> *Emerson*, 743 N.E.2d at 640.

<sup>150</sup> *Id.* at 646.

<sup>151</sup> *Id.* at 641.

<sup>152</sup> *Id.* at 642.

Missouri's law would meet the justified expectations of the parties.<sup>153</sup> The court also stated its decision comported with the goals of predictability, uniformity of result, and ease in the determination of the law to be applied.<sup>154</sup> Because the court applied Missouri law, some of the insurance companies avoided payment.

### 3. Multi-State—Applying the Law of the Place of Contracting

Courts applying the law of the place of contracting in multi-state cases constitute a smaller percentage of the overall cases than courts which apply the law of the place of the site.<sup>155</sup> Courts applying the former approach conclude that the place of contracting is more significant than the location of the hazardous waste site.<sup>156</sup> For example, in *Household International, Inc. v. Liberty Mutual Insurance Co.*,<sup>157</sup> the hazardous waste sites were located in Ohio and Massachusetts.<sup>158</sup> The court stated that because the case involved sites in multiple states, the place of the waste site would receive little weight in the analysis.<sup>159</sup> Instead, the court applied New York law because it was the place of contracting.<sup>160</sup> The court emphasized that application of the law of the place of contracting would further the ideals set out in *Restatement* because such an approach implemented the justified expectations of the parties, and preserved "predictability and uniformity of result, and ease in determination and application of the law to be applied."<sup>161</sup>

By applying New York law, the court allowed the insurance companies to assert a late-notice defense to coverage. Because Household was late in giving notice to its insurers, the insurers escaped liability and did not have to pay for cleanup.

### 4. Single-State—Applying the Law of the Waste Site

Most courts applying the law of the waste site in single-state liability insurance contracts cases rely on the rebuttable presumption in favor of the state where the insured risk is located as laid out in *Restatement*.<sup>162</sup> This

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<sup>153</sup> *Id.*; see *RESTATEMENT*, *supra* note 21, § 6(2)(d) cmt. c at 12, cmt. g, at 15.

<sup>154</sup> *Emerson*, 743 N.E.2d at 642; see *RESTATEMENT*, *supra* note 21, § 6(2)(f)–(g).

<sup>155</sup> *Symeonides*, *supra* note 10, at 80–81.

<sup>156</sup> See *Chemetron Invs., Inc. v. Fid. & Cas. Co. of N.Y.*, 886 F. Supp. 1194, 1200 (W.D. Pa. 1994) (holding that Illinois law, the place of contracting, should control the substantive issues of the case); *Household Int'l, Inc. v. Liberty Mut. Ins. Co.*, 749 N.E.2d 1, 10 (Ill. App. Ct. 2001) (holding that the law of New York, the place of contracting, controlled the case which arose from hazardous waste sites located in Ohio and Massachusetts).

<sup>157</sup> 749 N.E.2d 1, 5 (Ill. App. Ct. 2001).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 9.

<sup>160</sup> *Id.* at 10.

<sup>161</sup> *Id.*; see also *RESTATEMENT* *supra* note 21, at § 6(2)(d) cmt. c, at 12, cmt. g, at 15 (1971); *Id.* § 6(2)(f)–(g).

<sup>162</sup> *RESTATEMENT*, *supra* note 21, § 193; see, e.g., *Reichhold Chems., Inc. v. Hartford Accident and Indem. Co.*, 750 A.2d 1051, 1058 (Conn. 2000) (holding that Washington law, the place of the waste site, controlled the case because New York's contacts did not overcome *Restatement's* presumption in favor of applying the law of the place of the site); *KNS Co., Inc. v. Fed. Ins. Co.*, 866 F. Supp. 1121, 1125 (N.D. Ill. 1994) (holding that Indiana law, the place of the waste site,

presumption was applied in *Reichhold Chemicals, Inc. v. Hartford Accident & Indemnity Co.*<sup>163</sup> This case arose out of a hazardous waste site located in Tacoma, Washington.<sup>164</sup> The court held the only way to overcome the presumption in favor of Washington law, the place of the site, was to show that another state's interest was greater than Washington's.<sup>165</sup> The court's justification for this presumption was twofold. First, Washington had a significant interest in the health and welfare of its citizens.<sup>166</sup> Second, Washington partly bore the responsibility under CERCLA for the site cleanup and part of the burden if the site was not cleaned up.<sup>167</sup> New York's interest in the litigation was to limit "liability coverage in order to deter deliberate pollution and to protect insurers."<sup>168</sup> The court concluded that the contacts in New York, the place of contracting, were not significant enough to overcome this presumption.<sup>169</sup> The court stated its ruling would further the interests of uniformity and predictability because, from then on, its holding would put potential parties on notice that the "most significant interest" test dictates presumption in favor of the law of the state where the insured risk is located.<sup>170</sup> Thus, the court decided that Washington law applied to the case, placing liability upon the insurer.

The problem with the court's analysis is that it puts the cart before the horse. Uniformity and predictability are factors that, by their very nature,

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applied to the case because the place of the insured risk is the most important factor in single-state cases); *Gilbert Spruance Co. v. Pa. Mfrs. Assoc. Ins. Co.*, 629 A.2d 885, 894 (N.J. 1993) (holding that New Jersey law, the place of the site, applied to the case).

<sup>163</sup> 750 A.2d 1051, 1058 (Conn. 2000).

<sup>164</sup> *Id.* at 1057.

<sup>165</sup> *Id.* at 1056.

<sup>166</sup> *Id.* at 1057.

<sup>167</sup> *Id.* Although CERCLA is a federal law, the states play a part in the cleanup process:

The President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that (A) the State will assure all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President; (B) the State will assure the availability of a hazardous waste disposal facility acceptable to the President and in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C. § 6921 et seq.] for any necessary offsite storage, destruction, treatment, or secure disposition of the hazardous substances; and (C) the State will pay or assure payment of (i) 10 per centum of the costs of the remedial action, including all future maintenance, or (ii) 50 percent (or such greater amount as the President may determine appropriate, taking into account the degree of responsibility of the State or political subdivision for the release) of any sums expended in response to a release at a facility, that was operated by the State or a political subdivision thereof, either directly or through a contractual relationship or otherwise, at the time of any disposal of hazardous substances therein.

42 U.S.C. § 9604(c)(3) (2004). Later, the state can get a credit from the federal government for its expenses if the site is on the National Priorities List under the National Contingency Plan. 42 U.S.C. § 9604(c)(5) (2004). Thus, the state has to expend some of its resources, at least for a limited time.

<sup>168</sup> *Reichhold Chems., Inc. v. Hartford Accident and Indem. Co.*, 750 A.2d 1051, 1057 (Conn. 2000).

<sup>169</sup> *Id.* at 1059.

<sup>170</sup> *Id.*

show consistency with prior decisions and allow parties to contract knowing the law that applies. This court asserted a rule that applied to all future actions because it would promote uniformity and predictability for future parties. This would be true for all *future* parties. However, *Restatement* defines uniformity and consistency as they relate to past decisions.<sup>171</sup> While the court's ruling furthers consistency and predictability for *future* parties, its decision went against the scope of *Restatement* because its decision was inconsistent with prior decisions. Thus, its ruling is undermined by the fact that it was not predictable for the *present* parties in this case.

##### 5. Single-State—Applying the Law of the Place of Contracting

Courts applying the law of the place of contracting in single-state environmental litigation emphasize the need to look at the case from the standpoint of both the insurer and insured at the initial formation of the contract because this represents the expectations of both the parties.<sup>172</sup> For instance, in *K.J. Quinn & Co., Inc. v. Continental Casualty*,<sup>173</sup> CERCLA liability arose from a hazardous waste site located in New Hampshire,<sup>174</sup> while the insurance contracts in question were negotiated in Massachusetts.<sup>175</sup> The court stated, as a general rule, that within the context of insurance contracts, the state with the “most significant relationship” is the state where the insured risk is located.<sup>176</sup> The court distinguished the case from the general rule on the ground that the pollution was not a fixed business risk.<sup>177</sup> In other words, “the fact that one of its facilities was located in new Hampshire [did] not dictate the application of New Hampshire law to this policy any more than would be the case with the law of Missouri or the several provinces of Canada where other Quinn facilities [were] located.”<sup>178</sup> Because the policies were contracted for in Massachusetts, the court concluded that the law of Massachusetts applied to the case. Furthermore, the parties most likely “intended the consistent application of Massachusetts law to any controversies arising under these contracts.”<sup>179</sup>

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<sup>171</sup> RESTATEMENT, *supra* note 21, § 6 (f), at cmt. i.

<sup>172</sup> See, e.g., *Am. Motorists Ins. Co. v. Stewart Warner Corp.*, No. 01-C 2078, 2004 U.S. Dist. LEXIS 11802, at \*16 (N.D. Ill. 2004) (applying Indiana law, the place of contracting, in a case arising out of a site located in Illinois); *K.J. Quinn & Co., Inc. v. Cont'l Cas.*, 806 F. Supp. 1037, 1041 (D.N.H. 1992) (holding that Massachusetts law, the place of contracting, applied to the case that arose out of a site located in New Hampshire); *Maremont Corp. v. Cheshire*, 681 N.E.2d 548, 552 (Ill. App. Ct. 1997) (holding that Illinois law, the place of contracting, controlled the case that arose from a waste site located in South Carolina); *Gen. Ceramics Inc. v. Firemen's Fund Ins. Co.*, 66 F.3d 647, 658 (3d Cir. 1995) (holding that New Jersey law, the place of contracting, applied to the case that arose from a waste site located in Pennsylvania).

<sup>173</sup> 806 F. Supp. 1037 (D.N.H. 1992).

<sup>174</sup> *Id.* at 1039.

<sup>175</sup> *Id.* at 1040.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1041.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*



By applying Massachusetts law, the court held that the insurance company did not have to defend or indemnify the polluter.<sup>180</sup>

#### IV. AMENDMENT TO CERCLA

Congress should amend CERCLA to require the application of the state law that allows payment for CERCLA pollution when the outcome of litigation solely depends on that law being applied. There are two central reasons for this amendment. First, as demonstrated above, whether a court applies vested-rights or *Restatement*, the CERCLA choice-of-law field leaves much to be desired when it comes to the predictability of the result. This lack of predictable outcomes breeds litigation and is as troublesome to insurers as to those concerned with ensuring adequate sources of funding for cleanup. This amendment would establish consistency in the CERCLA choice-of-law field by requiring the application of the state law that furthers insurance payment when the issue of liability is based entirely on which state law is applied.

Second, the reason that this CERCLA amendment should require payment by insurance companies is because this furthers the goals of CERCLA: ensuring resources for cleanup of hazardous waste sites. This policy is reflected in the expanding web of potential responsible parties that CERCLA has made responsible for hazardous waste cleanup. This reasoning should be extended to include insurance companies. The amendment does not blindly assert that insurance companies are *per se* responsible for the actions of CERCLA polluters. It limits responsibility to situations where insurance companies are using choice-of-law principles to escape liability. Thus, the amendment respects the insurer's arguments that are supported by all state laws that are implicated. It negates, however, an insurer's ability to escape liability based on a manipulation of choice-of-law principles.

##### *A. Predictability & Consistency*

Both *Restatement* and the vested-rights fail to establish predictable and consistent precedent for future litigants. By amending CERCLA to require the application of the state law that ensures resources for cleanup when liability is based solely on its application, Congress would establish predictability and consistency for future litigants.

##### *1. Restatement (Second)*

At the heart of unpredictability and inconsistency is the concept of characterization, which is an initial determination by the court that classifies the suit, such as one arising under contract, tort, or property.<sup>181</sup> In many cases, the outcome of the litigation depends on how the case is

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<sup>180</sup> *Id.* at 1045.

<sup>181</sup> Kirgis, *supra* note 55, at 452.

characterized.<sup>182</sup> A potential problem is that the outcome of the litigation can be manipulated to achieve a certain result, depending on how the case is classified.<sup>183</sup> When a court, for example, is unsatisfied with the result it would get with a contract analysis, it has the ability to simply re-characterize the dispute as a tort case to achieve a different result.<sup>184</sup>

In the context of CERCLA, this problem is common in states which apply the *Restatement*. These courts make an initial determination of which group of factors, the place of contracting or the place of the tort, is the most important. In other words, these courts initially characterize the case as either a tort or contract case, and this characterization guides the court to the state law it will apply. For example, the court in *Household International, Inc. v. Liberty Mutual Insurance Co.* concluded that the place of the pollution should receive little weight in the choice-of-law analysis.<sup>185</sup> The court found that this was really a suit concerning the expectations of the parties—the main contract factor.<sup>186</sup> Additionally, in *Permacel v. American Insurance Co.*, the court held that the parties' contractual expectations were the most significant factor.<sup>187</sup> Finally, in *K.J. Quinn & Co., Inc. v. Continental Casualty*, the court emphasized the contract factors because the parties expected "the consistent application of Massachusetts law to any controversies arising under these contracts."<sup>188</sup>

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<sup>182</sup> See, e.g., *Lumbermens Mut. Cas. Co. v. August*, 530 So. 2d 293, 295 (Fla. 1988) (asserting that even though the insured was involved in a tort action with an uninsured motorist, the place of contract applied because any action between the insured and the insurer arose out of the insurance policy between the parties); *Herndon v. Gov't Employees Ins. Co.*, 530 So. 2d 516, 518–19 (Fla. Dist. Ct. App. 1988) (holding that North Carolina law, the law of the place of contract, applied to the case instead of Florida law, the place of the car accident); *Baxter v. Sturm, Ruger & Co.* 644 A.2d 1297, 1301–02 (Conn. 1994) (asserting that Connecticut law applied to the case that involved the accidental discharge from a gun manufactured by the defendant by characterizing Oregon's eight-year statute of repose that prevented plaintiff's claim as procedural instead of tort); *Perkins v. Doe*, 350 S.E.2d 711, 714–15 (W. Va. 1986) (holding that Virginia law, the place of the tort, applied to an accident involving West Virginia residents, preventing recovery by plaintiffs); *Lee v. Saliga*, 373 S.E.2d 345, 352 (W. Va. 1988) (applying Pennsylvania law, the place of contract, to an accident in West Virginia involving a Pennsylvania insured, preventing recovery); *Buchanan v. Doe*, 431 S.E.2d 289, 292 (Va. 1993) (applying Virginia law, the place of contract, to an accident in which a Virginian was forced off the road in West Virginia by a truck); *Haumschild v. Cont'l Cas. Co.*, 95 N.W.2d 814, 818–20 (Wis. 1959) (holding that the place of domicile determines applicable law when the issue is the capacity of one spouse to sue the other); *Grant v. McAuliffe*, 264 P.2d 944, 949 (Cal. 1953) (asserting that tort survival is characterized as either procedure or administration of decedent's estate, but not tort); *Levy v. Daniels' U-Drive Auto Renting Co.*, 143 A. 163, 164–65 (Conn. 1928) (characterizing the suit as contract which allowed recovery for a tort that occurred in Massachusetts); *Dyke v. Erie Ry. Co.*, 45 N.Y. 113, 119 (N.Y. 1871) (characterizing the suit as contract in a suit based on a tort that occurred in Pennsylvania).

<sup>183</sup> Cf. William Patry, *Choice-of-Law and International Copyright*, 48 AM. J. COMP. L. 383, 405 (2000) (discussing characterization of foreign author's rights under the Berne convention's national treatment and how that characterization can be manipulated to achieve a specific result).

<sup>184</sup> *Id.* at 436.

<sup>185</sup> 749 N.E.2d 1, 9 (Ill. App. Ct. 2001).

<sup>186</sup> *Id.* at 10.

<sup>187</sup> 691 A.2d 383, 391 (N.J. Super. Ct. App. Div. 1997).

<sup>188</sup> 806 F. Supp. 1037, 1041 (D.N.H. 1992).

On the other hand, in *Reichhold Chemicals, Inc. v. Hartford Accident and Indemnity*,<sup>189</sup> the court initially stated there was a rebuttable presumption in favor of the law of the place of the pollution.<sup>190</sup> Since this presumption was not rebutted, the law of Washington was applied.<sup>191</sup> Furthermore, in *In re Clark Equipment Co. v. Liberty Mutual Insurance Co.*,<sup>192</sup> the court emphasized that uniformity would be preserved more effectively if it applied the law of the state where the site was located.<sup>193</sup> Finally, in *Hartford Accident & Indemnity Co. v. Dana Corp.*,<sup>194</sup> the court stated that application of the law of the place of the waste-site establishes uniformity and predictability.<sup>195</sup>

Both rationales assert the values of consistency and predictability. However, because the two rationales regularly conflict, consistency and predictability are not achieved. This practice inhibits predictable precedent because it turns *Restatement*—a factor-based or policy-based system—into a system where individual courts can decide the outcome of the case by emphasizing different factors.

## 2. *Vested-Rights and its Exceptions*

The vested-rights approach does not establish predictability or consistency either. As mentioned above, the traditional rule that a court apply the law of the place of contracting would seem to be an easy formula to follow. For example, in *Wysong & Miles Co. v. Employers of Wausau*,<sup>196</sup> the court held that North Carolina law, the place of contracting, controlled all substantive issues that arose in the case.<sup>197</sup> As a result, all the insurers were released from liability.<sup>198</sup> As the foregoing discussion demonstrates, however, the traditional rule that applies the law of the place of contracting is not used universally. For example, in *Commercial Union Insurance Co. v. Porter Hayden Co.*,<sup>199</sup> the court, instead of applying the law of the place of contracting, applied the *renvoi* doctrine, which resulted in insurance company liability.<sup>200</sup>

In both of the above cases, the court applied valid choice-of-law principles. As in the *Restatement*, however, because the traditional rule and its exceptions are inherently malleable, values such as consistency and predictability are lost.<sup>201</sup> This is especially important because parties and

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<sup>189</sup> 750 A.2d 1051 (Conn. 2000).

<sup>190</sup> *Id.* at 1059.

<sup>191</sup> *Id.*

<sup>192</sup> Civ. A. No. 89C-OC-173, 1994 WL 466325 (Del. Super. Ct. Aug. 1, 1994).

<sup>193</sup> *Id.* at \*6.

<sup>194</sup> 690 N.E.2d 285 (Ind. App. 1998).

<sup>195</sup> *Id.* at 290.

<sup>196</sup> 4 F. Supp. 2d 421 (M.D.N.C. 1998).

<sup>197</sup> *Id.* at 425–26.

<sup>198</sup> *Id.*

<sup>199</sup> 698 A.2d 1167 (Md. Ct. Spec. App. 1997).

<sup>200</sup> *Id.* at 1200.

<sup>201</sup> See *supra* notes 90–119 and accompanying text.

their drafters rely on the law in their contracting. Without consistency and predictability, courts undermine this reliance.

### *B. Ensuring resources for CERCLA Cleanup*

The CERCLA amendment should require payment by insurers because this furthers the goals of CERCLA: ensuring resources for the cleanup of hazardous waste sites.

#### *1. Argument Against Coverage*

The basic argument for insurers asserting they are not contractually bound under general liability clauses to fund their insureds' cleanup costs has been that cleanup costs or "response" costs within CERCLA constitute equitable relief, while the scope of the typical comprehensive general liability policy limits relief to "legal" damages (monetary compensation for injury or loss).<sup>202</sup> Such legal damages do not include costs incurred while complying with an agency directive, an injunction, or the reimbursement of a government agency.<sup>203</sup> Courts using this analysis stress the importance of looking at the text of the comprehensive general liability policy and the parties' expectations at the time it was executed.<sup>204</sup> Furthermore, these

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<sup>202</sup> Response costs include all of the following:

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) . . . .

42 U.S.C. § 9607(a)(4)(A–D) (2000). Furthermore, "respond" or "response" includes remove, removal, remedy, remedial action. 42 U.S.C.S. § 9601 (25); *see also* 42 U.S.C. § 9601 (23)–(24) (defining "remove," "removal," "remedy," and "remedial action").

<sup>203</sup> Crocca, *supra* note 7, at 453; *see also* C.C. Grisham v. Commercial Union Ins. Co., 951 F.2d 872, 875 (8th Cir. 1992) (stating that to extend the meaning of damages to include litigation costs and ordered relief would go against the limiting language of "legally obligated"); United States Fid. & Guar. Co. v. Morrison Grain Co., Inc., 734 F. Supp. 437, 449 (D. Ka. 1990) (finding that response costs are not covered by the comprehensive general liability policy); Cont'l Ins. Cos. v. Ne. Pharm. & Chem. Co., Inc., 842 F.2d 977, 986–87 (8th Cir. 1988) (applying Missouri law and holding that cleanup costs under CERCLA are not damages); Md. Cas. Co. v. Armco, Inc., 822 F.2d 1348, 1352–54 (4th Cir. 1987), (holding that costs to comply with the directives of a regulatory agency are not covered damages); Lindsay Mfg. Co. v. Hartford Acc. & Indem. Co., 911 F. Supp. 1249, 1251–52 (D. Neb. 1995) (holding that the policy did not require the insurance company to pay for cleanup costs), *rev'd* 118 F.3d 1263 (8th Cir. 1997); Becker Metals Corp. v. Transp. Ins. Co., 802 F. Supp. 235, 240 (E.D. Mo. 1992) (holding that "damages" did not include monies paid pursuant to agency directive).

<sup>204</sup> *Lindsay*, 911 F. Supp. at 1255; *Morrison*, 734 F. Supp. at 443. Another related argument against coverage is that insurance companies should not be responsible for unexpected CERCLA liability. United States v. Fleet Factors Corp., 901 F.2d 1550, 1560 (11th Cir. 1990) (holding that a bank that loaned money to a cloth printing facility could be held liable for CERCLA violations because it was potentially liable as an owner or operator, even though it was not an actual operator, but only participated in the financial management of the facility),

courts emphasize the need to pay attention to the exact language of the policy and not add to it.<sup>205</sup> It follows that if the parties included the word “legal,” the court should give it limiting effect and exclude equitable damages from the policy.<sup>206</sup> Thus, since “black letter insurance law holds that claims for equitable relief are not claims for damages under liability insurance contracts,”<sup>207</sup> the insurer should not be obligated to pay all sums of money that the insured could be liable for, but only those damages that were contracted for by the parties.<sup>208</sup>

## 2. Argument in Favor of Coverage

The insureds, on the other hand, argue that “the form of relief demanded should not determine coverage.”<sup>209</sup> Courts applying this reasoning stress that ambiguity or uncertainty in insurance policies should be resolved against the insurer and, whenever semantically permissible, the policy should be interpreted to provide coverage.<sup>210</sup> Like courts that hold that response costs are not damages within the comprehensive general liability policy, these courts stress it is important to look at the parties’ expectations at the time of contracting.<sup>211</sup> These courts, however, start with the premise that the policy’s words should be given their plain or ordinary meaning.<sup>212</sup> A plain and ordinary meaning of the word damages would not distinguish between legal and equitable.<sup>213</sup> Instead, “an insured may reasonably expect to be covered for any liability arising out of insured activities that unintentionally [cause] environmental contamination.”<sup>214</sup> Furthermore, it is irrelevant that CERCLA was promulgated after these policies were drafted because, from the insured’s perspective, “damages incurred as a result of

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*superceded in part by statute*, Comprehensive Environmental Response, Compensation, and Liability Act of 1996, Pub. L. No. 148–207, § 6(j)(1), 110 Stat. 3400, *as recognized in* *Monarch Tile, Inc. v. City of Florence*, 212 F.3d 1219 (11th Cir. 2000). This argument will most likely fail. Unlike in *Fleet* where the bank faced unexpected liability by its association with the cloth company, insurers contracting with potential polluters are specifically contracting for potential liability in environmental matters. In other words, the only liability that is unexpected, results from the ambiguity in the insurance contract that the insurer drafted.

<sup>205</sup> *Grisham*, 951 F.2d at 875.

<sup>206</sup> *Id.*

<sup>207</sup> *Becker*, 802 F. Supp. at 239 (quoting *Cont’l Ins. Cos. v. Ne. Pharm. & Chem. Co., Inc.*, 842 F.2d 977, 986 (8th Cir. 1988)).

<sup>208</sup> *Id.*

<sup>209</sup> *Crocca*, *supra* note 7, at 453; *see also* *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 594 S.E.2d 455, 460 (S.C. 2004) (holding that “damages” within the insurance policies included environmental cleanup costs); *TBG, Inc. v. Commercial Union Ins. Co.*, 806 F. Supp. 1444, 1450 (N.D. Cal. 1990) (asserting that insurance coverage included environmental damage); *Powerline Oil Co. v. Superior Court*, 128 Cal. Rptr. 2d 827, 842–43 (Cal. Ct. App. 2003) (holding that the scope of damages should extend beyond only the orders of the court); *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1270–71 (Cal. 1990) (en banc) (holding “damages” within the meaning of a comprehensive general liability policy included an insured’s obligation to pay response).

<sup>210</sup> *TBG*, 806 F. Supp. at 1446.

<sup>211</sup> *AIU*, 799 P.2d at 1264.

<sup>212</sup> *Helena*, 594 S.E.2d at 458.

<sup>213</sup> *Id.*

<sup>214</sup> *TBG*, 806 F. Supp. at 1448.

liability arising under CERCLA are no different than damages incurred as a result of any other legal action.”<sup>215</sup>

### 3. *Argument for Coverage is More Persuasive*

The argument for coverage contains more persuasive reasoning. First, the argument for coverage represents the majority view among courts.<sup>216</sup> Second, ambiguity should be construed against the drafter. While the argument against coverage asserts that courts should apply the legal definition of “legal damages” to the policy, the argument for coverage says that “legal damages” should be given a common meaning. The goal for the court is to give the reasonable expectations of both parties.<sup>217</sup> Because there is an ambiguity in the language, the court should construe the language against the insurance company as the drafter of the policy.<sup>218</sup> Finally, the argument for coverage represents the general policy behind CERCLA, which is to ensure resources for the cleanup of environmental pollution.

## V. CONCLUSION

Because of the need for predictability, uniformity, and the need to create reliable precedent in the highly volatile field of CERCLA insurance litigation, Congress should amend CERCLA. The amendment should require the application of the state law that ensures payment for CERCLA pollution, when insurance liability depends solely on that state law being applied. While the concerns of the insurance industry have some weight, they are

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<sup>215</sup> *Id.*

<sup>216</sup> *Helena*, 594 S.E.2d at 459.

<sup>217</sup> *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990); *see also* *Wheeler v. Dynamic Eng'g, Inc.*, 62 F.3d 634, 638 (4th Cir. 1995) (“We interpret an ERISA health insurance plan under ordinary principles of contract law, enforcing the plan’s plain language in its ordinary sense. . . . Where a term is ambiguous, we must construe it against the drafter . . . and in accordance with the reasonable expectations of the insured.”); *Saltarelli v. Bob Baker Group Med. Trust*, 35 F.3d 382, 386 (9th Cir. 1994) (concluding that the “reasonable expectations doctrine,” which grew out of the law of adhesion contracts and construction of ambiguities in insurance policies, has been formulated as follows: “In general, courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by insurance carriers even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer.”).

<sup>218</sup> *See, e.g., Klapp v. United Ins. Group Agency, Inc.*, 663 N.W.2d 447, 460 (Mich. 2003) (asserting that ambiguous language should be construed against the drafter); *Shelby County State Bank v. Van Diest Supply Co.*, 303 F.3d 832, 838 (Ill. 2002) (asserting that ambiguities should be construed against the drafter); *Certified Commodities Group, Inc. v. Roccaforte*, 444 So. 2d 1211, 1212 (La. 1984) (Watson, J., concurring) (asserting that ambiguities should be construed against the drafter); *Giacona v. Marubeni Oceano (Panama) Corp.*, 623 F. Supp. 1560, 1569 (D. Tex. 1985) (concluding that a tariff should be construed strictly against the drafter of the tariff, a corollary to the rule that written instruments will be construed strictly against their drafters); *Johnson v. General Am. Life Ins. Co.*, 178 F. Supp. 2d 644, 650–51 (W.D. Va. 2001) (holding that ambiguities should be construed against the drafter). Furthermore, when there are ambiguities, the language should not only be construed against the drafter, but also in line with the reasonable expectations of the insured.

outweighed by the general policy behind CERCLA, ensuring the cleanup of hazardous waste pollution and the need to look at the reasonable expectations of both parties when contracting, construing ambiguities against the drafter of the policy.