

THE DEAD HAND OF THE PAST IN OREGON CHOICE OF LAW

by
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This Essay considers the reception of Oregon's choice-of-law statutes in Oregon state and federal court.

First, this Essay discusses the reception of the choice-of-law-statutes for torts and contracts. For many years, federal courts ignored these statutes and continued to apply superseded common law choice-of-law doctrine. Published state court opinions typically misapply the statutes, perhaps on the assumption that they simply codified the common law, when in fact the statutes are a deliberate departure from the common law. To make matters worse, several state and federal court decisions explicitly use common law doctrines as default rules when applying the statutes, even though the statutes reject the common law approach entirely.

Next, this Essay examines Oregon's difficult relationship with the Uniform Conflict of Laws-Limitations Act (UCLLA). Most state and federal court decisions that apply Oregon's version of the UCLLA do so badly, with little or no understanding of how the statute is supposed to work.

The central argument of this Essay is that Oregon's state and federal courts should pay better attention to the statutes that they are applying. Courts should be applying these statutes in a manner that is faithful to their text and purpose. Proper application of the statutes will require judges to depart from older and ingrained habits of choice-of-law thinking and to give up the freewheeling discretion associated with those habits.

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I. INTRODUCTION

In 2001 and 2009, respectively, Oregon enacted choice-of-law statutes for contracts¹ and for torts and other non-contractual claims.² These statutes provide a comprehensive approach to choice of law that displaces Oregon's former common law choice-of-law doctrines (although the extent of that displacement is a matter of intense dispute³). The new statutes joined existing legislation that governs choice of law on specific topics, including the Uniform Conflict of Laws-Limitations Act.⁴

The new statutes ought to have made choice of law easier for Oregon litigants, lawyers, and judges.⁵ Until recently, however, the statutes have fallen short of their promise. With respect to the pre-existing UCLLA, that failure derives from the text of the statute, which leads to confusion about how it interacts with choice-of-law methodology, including the new statutes.⁶ But for torts and contract cases, the new statutes are not the problem. The problem, instead, is the dead hand of the past—the persistence of doctrines and habits of mind derived from the Restatement (Second) of Conflict of Laws. Discarded by the legislature, these doctrines have not gone gently into the night. Instead, they continue to animate conflicts thinking in Oregon appellate courts and in Oregon's federal district court.

The Oregon Supreme Court will have the opportunity to solve this problem when it hears *Portfolio Recovery Associates v. Sanders* in September of this year.⁷ This

¹ OR. REV. STAT. §§ 15.300–.380 (2017).

² OR. REV. STAT. §§ 15.400–.460 (2017).

³ See *infra* Section II.D.

⁴ OR. REV. STAT. § 15.305 (2017).

⁵ As James Nafziger wrote, “it is expected that the dead hand of the past—one clutching local law in the face of an unstable methodology—will no longer shape Oregon law.” James A.R. Nafziger, *Oregon's Conflicts Law Applicable to Contracts*, 38 WILLAMETTE L. REV. 397, 403 (2002). My use of Nafziger's phrase for the title of this Essay, more than 15 years later, indicates the difficulty of prying open that grip.

⁶ See *infra* Part III.

⁷ *Portfolio Recovery Assocs., LLC v. Sanders*, 425 P.3d 455 (Or. Ct. App. 2018), *review allowed*, 364 Or. 680 (Or. 2018).

online Essay explores and provides context for the choice-of-law disputes in *Portfolio*. Part II exposes the persistence of the common law and the Second Restatement approaches to choice of law in Oregon cases. Part III clarifies the application of the UCLLA and its interaction with the new choice-of-law statutes. Part IV is a brief conclusion. A revised print version of this Essay will appear in the *Lewis & Clark Law Review* after the Supreme Court decides *Portfolio*.

II. THE HALTING (AND SOMETIMES GRUDGING) ACCEPTANCE OF OREGON'S CHOICE-OF-LAW STATUTES

A. *What If Oregon Passed a Choice-of-Law Statute and Nobody Noticed?*

For many years, Oregon courts used a mix of homegrown common law doctrines and the Restatement (Second) of Conflict of Laws to address choice-of-law issues in contracts and torts cases.⁸ As in many states, application of the Second Restatement was frustrating, inconsistent, and often biased in favor of forum (Oregon) law.⁹ Drafted by the Oregon Law Commission under the leadership of Willamette Law School's Dean Symeon Symeonides and Professor Jim Nafziger, the choice-of-law statutes for contracts and for torts and other non-contractual claims were meant to replace a broken system with a method that would be more straightforward and determinate.¹⁰ The new statutes far surpass the common law doctrines they displaced. Nor should readers take my word for it. Drafts of the new Restatement (Third) of Conflicts of Law acknowledge the importance of the new Oregon statutes.¹¹

And yet, for years after their enactment, one could search almost in vain for discussion of the statutes in published state or federal court opinions. Unreported federal court opinions that mentioned or applied the statutes were easier to find. And, surely, unpublished orders by Oregon's circuit courts must have taken some

⁸ See James A.R. Nafziger, *Oregon's Project to Codify Choice-of-Law Rules*, 60 LA. L. REV. 1189, 1190–98 (2000).

⁹ See *id.* at 1193–95; see also Symeon C. Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts: An Exegesis*, 88 OR. L. REV. 963, 968–71 (2009) (describing problems and frustrations with the Second Restatement and other modern approaches in Oregon and other states).

¹⁰ See Nafziger, *supra* note 5, at 403 (“One of the purposes of the legislation is to displace the cumbersome methodology prescribed by the Second Restatement of Conflict of Laws that Oregon courts adopted for guidance.”).

¹¹ See RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 8.11–.12 (AM. LAW INST., Preliminary Draft No. 4, 2018) (stating these provisions are “based substantially on” or “inspired by” Oregon’s choice-of-law statutes for contracts); see also *id.* § 8.15, Reporters’ Note 7 (stating § 8.15(3) “is inspired in part” by the Oregon statutes). The materials on torts in Preliminary Draft No. 3 mention Oregon’s choice-of-law statutes several times. See RESTATEMENT (THIRD) OF CONFLICT OF LAWS (AM. LAW INST., Preliminary Draft No. 3, 2017).

notice of the new statutes. But anyone who searched for choice-of-law decisions that applied the new statutes in the early years after enactment would find far more opinions—especially in federal court—that used the common law and Second Restatement to resolve choice-of-law issues under Oregon law, even though those doctrines were no longer the law of Oregon. To make matters worse, some of the relatively rare decisions that purported to apply the statutes relied on common law and Second Restatement doctrines to interpret the new rules.

B. The New Choice-of-Law Statutes in Reported State Court Decisions

Discussion or citation of the choice-of-law statutes is rare in reported decisions from Oregon state courts. As of the end of 2018, the Oregon Supreme Court has cited the statutes twice, but both citations appear during discussions of other topics. In *Espinoza v. Evergreen Helicopters*, the court cited ORS 15.440 when noting that choice of law plays a role in *forum non conveniens* analysis, but it did not analyze or apply the statute to the wrongful death claims in that case.¹² In *ACN Opportunity, LLC v. Employment Department*, the court rejected the appellant's reliance on ORS 15.420(2) for a general definition of the word "maintain."¹³

The statutes turn up more frequently in Court of Appeals opinions, but that court's engagement with the statutes has been uneven. As of the end of 2018, at least three post-statutory decisions have discussed choice-of-law issues without mentioning the relevant choice-of-law statutes at all:

- *Mid-Century Insurance Co. v. Perkins* used the Second Restatement to analyze choice of law in a contracts case, with no citation to the statutes¹⁴—and the Supreme Court affirmed that decision.¹⁵
- *Yoshida's Inc. v. Dunn Carney Allen Higgins & Tongue* ignored the statutes and applied a pre-statutory case (i.e., a case that relied on the superseded common law) to hold that Oregon law applies when a false conflict exists between Oregon law and the law of another state.¹⁶
- *AS 2014-11 5W LLC v. Caplan Landlord, LLC* ignored the choice-of-law statutes and instead decided the choice-of-law issue by relying on a 2003

¹² *Espinoza v. Evergreen Helicopters, Inc.*, 376 P.3d 960, 992 (Or. 2016).

¹³ *ACN Opportunity, LLC v. Emp't Dep't*, 418 P.3d 719, 726, 726 n.3 (Or. 2018).

¹⁴ *Mid-Century Ins. Co. v. Perkins*, 149 P.3d 265, 267–68 (Or. Ct. App. 2006), *aff'd en banc*, 179 P.3d 633 (Or. 2008).

¹⁵ *Mid-Century Ins. Co. v. Perkins*, 179 P.3d 633, 638–39 (Or. 2008) (recognizing that the Court of Appeals used the "most significant relationship" standard, failing to cite the choice-of-law statutes, and stating "the Court of Appeals appears to have correctly determined that Oregon law governs Perkins's policy").

¹⁶ *Yoshida's Inc. v. Dunn Carney Allen Higgins & Tongue LLP*, 356 P.3d 121, 130 (Or. Ct. App. 2015) (citing *Angelini v. Delaney*, 966 P.2d 223, 227 (Or. Ct. App. 1998)).

case that had applied the Second Restatement.¹⁷

The *AS 2014-11* court's reliance on the 2003 decision is particularly odd, because the earlier opinion—*M+W Zander v. Scott Co. of California*¹⁸—took care to cite the choice-of-law statutes for contracts and to explain that it was not applying them because the case “was commenced before the effective date of the Act.”¹⁹ (A handful of other Court of Appeals opinions have also taken care to explain that the statutes do not apply because of their effective date or their limited application to contracts involving financial institutions.²⁰)

By the end of 2018, only three Court of Appeals decisions had used the statutes to decide a choice-of-law question. The first case is *Johnson v. J.G. Wentworth Originations, LLC*, in which the court considered whether to follow a settlement agreement's choice of California law.²¹ The court provided three citations to explain its decision to follow that directive:

ORS 15.350 (“[t]he contractual rights and duties of the parties are governed by the law or laws that the parties have chosen.”); see *M+W Zander v. Scott Co. of California*, 190 Or.App. 268, 78 P.3d 118 (2003) (when parties specify their choice of law in a contract, that choice will be effectuated subject to limitations under the *Restatement (Second) of Conflicts of Laws* (1971)); *Pinela v. Neiman Marcus Group, Inc.*, 238 Cal.App.4th 227, 251, 190 Cal.Rptr.3d 159 (2015) (contractual choice of law clauses are generally construed to designate the substantive law of the chosen jurisdiction as well as the interpretation of the agreement).²²

As had the court in *AS 2014-11*, the *Johnson* court cited *M+W Zander*. But unlike *AS 2014-11*, the court also cited the relevant choice-of-law statute. While *Johnson* is thus an improvement over *AS 2014-11*, it remains puzzling that the court bothered to cite *M+W Zander* and its Second Restatement analysis at all—let alone the California case—when the statute clearly controlled the analysis.

¹⁷ *AS 2014-11 5W LLC v. Caplan Landlord, LLC*, 359 P.3d 1225, 1235 (Or. Ct. App. 2015) (citing *M+W Zander v. Scott Co. of Cal.*, 78 P.3d 118, 121 (Or. Ct. App. 2003) and noting that *M+W Zander* cited RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (AM. LAW INST. 1971)).

¹⁸ *M+W Zander*, 78 P.3d at 118.

¹⁹ *Id.* at 121 n.1.

²⁰ See *Unifund CCR Partners v. DeBoer*, 277 P.3d 562, 563 n.1 (Or. Ct. App. 2012) (using the Second Restatement for choice of law in a contracts case because choice-of-law statutes for contracts did not apply to financial institutions); *CACV of Colorado, LLC v. Stevens*, 274 P.3d 859, 863 n.6 (Or. Ct. App. 2012) (same); *Capital One Bank v. Fort*, 255 P.3d 508, 510–11 n.3 (Or. Ct. App. 2011) (same); *Machado-Miller v. Mersereau & Shannon, LLP*, 43 P.3d 1207, 1210 n.3 (Or. Ct. App. 2002) (citing the choice-of-law statutes for contracts but noting the case commenced before those statutes went into effect).

²¹ *Johnson v. J.G. Wentworth Originations, LLC*, 391 P.3d 865 (Or. Ct. App. 2017).

²² *Id.* at 868.

The second Court of Appeals case to apply the statutes—*Peace River Seed Cooperative Ltd. v. Proseeds Marketing, Inc.*²³—is equally frustrating. A Canadian entity sued an Oregon corporation in Oregon court. After prevailing, the plaintiff sought attorney fees under the “English rule” that the losing party pays the attorney fees of the winning party. The Court of Appeals applied the Second Restatement’s “most significant relationship” test and held that Oregon law governed the attorney fees issue in this contract dispute.²⁴ Along the way, the court twice provided “see also” citations to ORS 15.360.²⁵ For the second of those citations, the court first cited the Second Restatement’s list of relevant contacts in contract cases and then noted ORS 15.360(1)’s broadly similar list.²⁶ The court did not state whether it meant to equate the approach of the Second Restatement and the approach of ORS 15.360. The Oregon Supreme Court granted review of the Court of Appeals decision and decided the case on other grounds without addressing choice of law.²⁷

The third Court of Appeals case, *Portfolio Recovery Associates, LLC v. Sanders*²⁸—which is now before the Supreme Court—provides the most extensive state court analysis of the choice-of-law statutes to date. In this action to collect a credit card debt, the parties to the original credit card agreement had chosen Virginia law.²⁹ Applying the choice-of-law statutes for contracts, the court found that ORS 15.350—which generally requires application of the law chosen by the parties—did not apply because the claim, which had been filed by the purchaser of the debt instead of the credit card issuer, was an action on an account stated, not an action for breach of the original credit card agreement.³⁰

This Essay does not consider whether the court’s decision on this specific issue was correct. But if the Oregon Supreme Court were inclined to avoid the important choice-of-law issues in the case, it could rule that the choice-of-law clause in the credit card agreement remains applicable. Doing so, however, would be a grave disservice to the bench and bar. As the following analysis demonstrates, the opinion of the Court of Appeals is deeply flawed and exhibits a negative attitude toward the choice-of-law statutes that appears in numerous other state and federal court opinions. Left unchecked, these decisions will undermine the choice-of-law statutes.

With the original contract and its choice-of-law clause inapplicable, the court applied ORS 15.360’s “most appropriate law” test to determine which statute of

²³ *Peace River Seed Coop., Ltd. v. Proseeds Mktg., Inc.*, 293 P.3d 1058 (Or. Ct. App. 2012).

²⁴ *Id.* at 1068–70.

²⁵ *Id.* at 1069.

²⁶ *Id.*

²⁷ *Peace River Seed Coop., Ltd. v. Proseeds Mktg., Inc.*, 322 P.3d 531, 531 (Or. 2014).

²⁸ *Portfolio Recovery Assocs., LLC v. Sanders*, 425 P.3d 455 (Or. Ct. App. 2018).

²⁹ *Id.* at 458.

³⁰ *Id.* at 460 (citing *Tri-County Ins., Inc. v. Marsh*, 608 P.2d 190 (Or. Ct. App. 1980)).

limitations would apply.³¹ Following ORS 15.360(1), the court identified states that had “a relevant connection with the transaction or parties.” The debtor, Sanders, lived in Oregon when the case was litigated, but he had lived in Washington at the time of default and the formation of the account stated contract, and he claimed to have lived in Utah when he obtained the credit card. Capital One, which is chartered in Virginia, issued the credit card. The court never mentioned where Portfolio Recovery—the purchaser of the debt—was located, but its website gives an address in Virginia.³²

Against this background, the court refused to consider any connections with Utah because the defendant had waived the applicability of Utah law in the trial court.³³ Also, although the court mentioned that Washington was “the place of formation of the alleged contract” (the account stated) and the place “where defendant resided” at that time, the court gave no further consideration to Washington contacts or policies. Instead, the court only considered the connections of Oregon and Virginia, and it found them both inadequate:

[A]s between Virginia and Oregon, the relevance of the connections does not resolve the conflict-of-law issue, as none of those connections is of the type that evidences a *state interest* in having its law applied to Portfolio’s claim. Also, the parties have not identified, and we do not readily perceive, any state policies underlying the length of time provided in the respective statutes of limitation of Virginia or Oregon that is relevant to the matters that the statute directs us to consider. *See* ORS 15.360(2) (determining appropriate law to apply includes identifying relevant state *policies*); ORS 15.360(3) (listing policy goals to be considered in evaluating the relative strength and pertinence of the identified state *policies*). In particular, Virginia would have *no substantial interest* in having its statute prevent Portfolio’s action because defendant was not a resident of Virginia.³⁴

In this passage, the court cited the choice-of-law statutes but did not apply them properly. The statutes use the word “policy,” but the court asked whether Oregon or Virginia had an “interest” and then doubled down on this error by asking whether Virginia had a “substantial” interest. The court may have believed that “policy” and “interest” are equivalent terms, but the Oregon choice-of-law statutes deliberately use the term “policies” to create a contrast with interest-based approaches to choice

³¹ None of the mandates or presumptions in the choice-of-law statutes applied to the case. *See id.* at 460 n.6.

³² *See* PORTFOLIO RECOVERY, <https://www.portfoliorecovery.com> (last visited June 10, 2019).

³³ *See Portfolio*, 425 P.3d at 458 n.1, 460 n.5.

³⁴ *Id.* at 461 (emphasis added). Note, again, that Portfolio may well be a Virginia company. *See supra* note 32.

of law.³⁵ The court's switch from the statutory word "policies" to the superseded common law/Second Restatement term "interests" likely derives from its reliance on a 1992 decision that applied the Second Restatement and used the language of state interests.³⁶

Having found no state interests, the Court of Appeals completed its revolt against the statutory analysis by applying superseded Oregon common law to hold that Oregon's statute of limitations would apply:

Where neither state has a connection to the transaction such that it has an interest in having its law applied, we will apply the law of Oregon as the forum state. *See Erwin v. Thomas*, 264 Or. 454, 459-60, 506 P.2d 494 (1973) ("It is apparent, therefore, that neither state has a vital interest in the outcome of this litigation and there can be no conceivable material conflict of policies or interests if an Oregon court does what comes naturally and applies Oregon law."); *see also Stubbs v. Weathersby*, 126 Or. App. 596, 604, 869 P.2d 893 (1994), *aff'd*, 320 Or. 620, 892 P.2d 991 (1995) ("There is no choice of law issue if, in a particular factual context, the interests and policies of one state are involved and those of the other are not or are involved in only minor ways.").³⁷

The court's reliance on *Erwin v. Thomas* is particularly jarring because, as Dean Symeonides pointed out several years before the *Portfolio* decision, most states have rejected *Erwin*'s "doing what comes naturally" approach, and the Oregon choice-of-law statutes for torts also reject *Erwin*.³⁸ If *Erwin* no longer applies to tort cases, it is difficult to see how it could survive for contracts, particularly when the choice-of-law statutes for contracts also reject the result in *Lilienthal v. Kaufman*, which

³⁵ Nafziger, *supra* note 5, at 424 (reproducing the Oregon Law Commission's Comment 2 to § 9 of the contracts choice-of-law statute); *see also id.* at 403 ("One of the purposes of the legislation is to displace the cumbersome methodology prescribed by the Second Restatement of Conflict of Laws that Oregon courts adopted for guidance."); Symeonides, *supra* note 9, at 1037 (observing that Oregon's choice-of-law statutes "avoid using the term 'interest' in order to disassociate the approach of this section and this Act from Professor Currie's 'governmental interest analysis' and other modern American approaches that seem to perceive the choice-of-law problem as a problem of interstate competition, rather than as a problem of interstate cooperation in conflict avoidance.").

³⁶ *Portfolio*, 425 P.3d at 461 ("In evaluating relevant connections, which apply only when there is no choice-of-law agreement between the parties, 'we look to those that show the state has some interest in having its law apply to the dispute. We are not concerned with the subjective desires of the parties.' *Manz v. Cont'l Am. Life Ins. Co.*, 117 Or. App. 78, 83, 843 P.2d 480 (1992), *adh'd to as modified on recons.*, 119 Or. App. 31, 849 P.2d 549, *rev. den.*, 317 Or. 162, 856 P.2d 317 (1993) (emphasis in original; citation omitted) (discussing application of similar list of contacts in *Restatement (Second) of Conflict of Laws* § 188 (1971)).").

³⁷ *Id.*

³⁸ Symeonides, *supra* note 9, at 1019. Dean Symeonides cited OR. REV. STAT. § 31.875(3)(a), which is now OR. REV. STAT. § 15.440(s)(a).

similarly held that an Oregon court must apply Oregon law when state policies were equally strong.³⁹ Significantly, Dean Symeonides noted the *Portfolio* court's error in his annual survey of choice-of-law decisions: "Apparently, the parties and the court were unaware that the Oregon codifications for contract and tort conflicts have both repudiated *Erwin*'s methodology and the tort codification overruled its result."⁴⁰ (Not to mention that the court's application of Oregon law to a case in which Oregon allegedly has no interest raises constitutional issues that the court never considered.⁴¹)

This halting approach to the new statutes by the Court of Appeals has several possible explanations. First, the judges in some of the cases—especially the early ones—may simply not have known about the new statutes, especially if the attorneys for the parties did not cite to them. Second, some judges might have made the casual but incorrect assumption that the statutory "most appropriate" law standard is roughly the same as the Restatement's "most significant relationship" test. This business-as-usual assumption means that courts would not perceive the issues created by citing the Restatement alongside the new statutes or relying on pre-statutory cases. These first two explanations are the most likely. But a third possibility also exists: some judges may be resisting the new statutes because they replace the open-ended and manipulable Restatement test with a more determinate approach. All of these explanations—even the third one—should disappear if the Oregon Supreme Court uses *Portfolio* to explain the proper application of the statutes.

³⁹ See *Lilienthal v. Kaufman*, 395 P.2d 543, 547 (Or. 1964) (stating "the public policy of Oregon should prevail" in a case in which state policies are equally strong, because "[c]ourts are instruments of state policy" and must "advance the policies or interests of Oregon" by "apply[ing] that choice-of-law rule which will 'advance the policies or interests of Oregon'" (quoting Alfred Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 474 (1960))). For the rejection of *Lilienthal* by the contracts choice-of-law statutes, see Symeon C. Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205, 239–45 (2007) (explaining why *Lilienthal* is inconsistent with the statutes and referring to that decision as an example of "forum chauvinism"). See also Nafziger, *supra* note 5, at 399 ("An ancillary purpose of the draft codification was to overcome the *lex fori* orientation of judicial decisions while protecting Oregon interests, especially those of its residents, to the greatest extent possible."); *infra* notes 60–69 and accompanying text.

⁴⁰ Symeon Symeonides, *Choice of Law in the American Courts in 2018: Thirty-Second Annual Survey*, 67 AM. J. COMP. L. § II.D.2 (forthcoming 2019), <https://ssrn.com/abstract=3308522>.

⁴¹ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality opinion) ("[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."); see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–19 (1985) (quoting the plurality in *Hague* and declaring that "[t]he dissenting Justices were in substantial agreement with this principle").

Oregon courts once took the position that statutes in derogation of the common law must be strictly construed.⁴² That doctrine is no longer valid.⁴³ Even if it were, the text of the new choice-of-law statutes should make clear enough the extent to which they purposely derogate the common law and bring a new dispensation to Oregon choice of law. Again, the Supreme Court has the opportunity to make this point plain in *Portfolio*.

C. *The New Statutes in Federal Court Decisions*

In contrast with state court decisions, numerous decisions from the United States District Court for the District of Oregon have addressed choice-of-law issues in the years since the statutes were adopted. Unfortunately, greater engagement has not produced greater clarity. Many decisions—including quite recent ones—continue to apply the Second Restatement or rely on Oregon cases that pre-date the statutes.⁴⁴ On the bright side, a growing number of district court opinions discuss

⁴² See *Naber v. Thompson*, 546 P.2d 467, 468 (Or. 1976) (interpreting Oregon's former guest statute and declaring that "[i]t is a cardinal rule of statutory construction that statutes in derogation of a common law right must be strictly construed.").

⁴³ The Oregon Supreme Court rejected the strict construction canon more than thirty years ago:

This formula, expressing in part resistance to changes in existing law and in part the profession's historical preference for caselaw over legislation, is long overdue to be put to rest. Every statute "derogates" from prior law, if it is adopted for any substantive reason at all. The "no-derogation" formula, coupled with the tendency to treat statutes, when possible, as codifications of prior caselaw, denigrates and confines the role of legislative examination, discussion, and enactment of public policies in those fields of law that traditionally have developed in private litigation. The statutes themselves direct, to the contrary, that "[i]n the construction of a statute the intention of the legislature is to be pursued if possible," ORS 174.020, and "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." ORS 174.010.

Beaver v. Pelett, 705 P.2d 1149, 1151 (Or. 1985) (Linde, J.). See also *Olcott v. Rogge Wood Prods., Inc.*, 932 P.2d 1204, 1206 (Or. Ct. App. 1997) ("Although it may be appropriate to use certain canons of construction in order to help determine [legislative] intent . . . the canon that statutes in derogation of the common law should be strictly construed is not one of them.").

⁴⁴ See, e.g., *Shah v. Meier Enters., Inc.*, No. 3:17-CV-00226-JE, 2018 WL 4374166, at *4 (D. Or. Sept. 13, 2018) (applying Second Restatement to employment-related claims for damages); *Hubbard v. Gardner*, No. 3:17-CV-450-PK, 2017 WL 4052183, at *3 (D. Or. July 25, 2017) (using Second Restatement to analyze choice of law in tort case); *Campos v. Bluestem Brands, Inc.*, No. 3:15-CV-00629-SI, 2016 WL 297429, at *6 (D. Or. Jan. 22, 2016) (using Second Restatement for contracts choice of law but finding no conflict); *Vesta Corp. v. Amdocs Mgmt. Ltd.*, 80 F. Supp. 3d 1152, 1158 (D. Or. 2015) (applying law chosen by the parties to the contract and citing *Young v. Mobil Oil Corp.*, 735 P.2d 654, 656 (Or. Ct. App. 1987) as support); *Doral Money, Inc. v. HNC Props., LLC*, No. 3:14-CV-00545-BR, 2014 WL 3512501, at *3 (D. Or. July 9, 2014) (using Second Restatement for contract choice of law issue); *U.S. ex rel. TBH & Assocs., LLC v. Wilson Constr. Co.*, 965 F. Supp. 2d 1215, 1219–21 (D. Or. 2013) (using Second Restatement for contracts choice of law but finding no conflict); *Am.*

and apply the statutes.⁴⁵ “Growing” is the operative word; the number of Oregon

Med. Response Nw., Inc. v. ACE Am. Ins. Co., No. 3:09-CV-01196-JO, 2011 WL 5056991 (D. Or. Oct. 21, 2011) (using Second Restatement to analyze choice of law in contract case), *rev'd* 526 F. App'x 754 (9th Cir. 2013) (finding no conflict but not disagreeing with use of Second Restatement); Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc., No. CV-09-320-HU, 2011 WL 13253445, at *20 (D. Or. Jan. 21, 2011) (using Second Restatement); Kincaid v. W. Coast Life Ins. Co., No. CV-09-547-ST, 2010 WL 5621378, at *8 (D. Or. Oct. 14, 2010) (using Second Restatement to determine law that applied to insurance contract); Bylsma v. Burger King Corp., No. CV 10-403-PK, 2010 WL 4702296, at *3 (D. Or. Sept. 3, 2010) (using “most significant relationship” test for choice of law in torts case), *adopted by* No. 10-CV-403-PK, 2010 WL 4695483 (D. Or. Nov. 12, 2010), *rev'd* 706 F.3d 930 (9th Cir. 2013) (holding Washington law allowed the cause of action but not addressing choice of law); Home Poker Unlimited, Inc. v. Cooper, No. 09-CV-460-BR, 2009 WL 5066653, at *3 (D. Or. Dec. 15, 2009) (using Second Restatement to analyze choice of law issues in contracts case); Malbco Holdings, LLC v. AMCO Ins. Co., No. CV-08-585-ST, 2008 WL 5205202, at *4 (D. Or. Dec. 11, 2008) (using Second Restatement to analyze choice of law in contract case); Partney Constr., Inc. v. Ducks Unlimited, Inc., No. 08-574-SU, 2008 WL 4838849, at *2 (D. Or. Nov. 3, 2008) (addressing motion to transfer venue and assuming Second Restatement controls choice of law in contract case); Till v. Am. Family Mut. Ins. Co., No. 06-CV-1376-BR, 2007 WL 1876511, at *2 (D. Or. June 26, 2007) (using Second Restatement for contract choice-of-law issue); Hallas v. Ameritrust Mortg. Co., No. CV-04-433-HU, 2005 WL 2044523, at *4 (D. Or. Aug. 24, 2005), *reconsid. denied*, 406 F. Supp. 2d 1176 (D. Or. 2005), *aff'd*, 280 Fed. Appx. 667 (9th Cir. 2008) (using Second Restatement to analyze contract choice-of-law issue).

⁴⁵ See, e.g., Alterra Am. Ins. Co. v. James W. Fowler Co., 347 F. Supp. 3d 604, 610 (D. Or. 2018) (insurance contract); Clement v. Ecolab, Inc., 341 F. Supp. 3d 1205, 1212–13 (D. Or. 2018) (contract); R.M. v. Am. Airlines, Inc., 338 F. Supp. 3d 1203, 1206 (D. Or. 2018) (tort claim); Pulse Health LLC v. Akers Biosciences, Inc., No. 3:16-cv-01919-HZ, 2018 WL 3094881, at *4 (D. Or. June 21, 2018) (contract); Walters v. Vitamin Shoppe Indus., Inc., No. 3:14-cv-1173-PK, 2018 WL 2424132, at *5 (D. Or. May 8, 2018) (fraud and unjust enrichment); Richmond v. Chrysler Grp. LLC, No. 3:16-CV-1936-PK, 2018 WL 2091356, at *7 (D. Or. Mar. 27, 2018) (tort claims), *adopted*, 2018 WL 2090474 (D. Or. May 4, 2018); Morasch Meats, Inc. v. Frevol HPP, LLC, No. 3:16-cv-0269-PK, 2018 WL 1434814, at *6 (D. Or. Mar. 22, 2018) (contract); Tarr v. USF Reddaway, Inc., No. 3:15-cv-02243-PK, 2017 WL 8895640, at *2 (D. Or. Nov. 7, 2017) (tort), *adopted*, 2018 WL 659859 (D. Or. Feb. 1, 2018) (also analyzing the issue); Meritage Homeowners' Ass'n v. Watt, No. 3:17-cv-00267-AA, 2017 WL 5615165 (D. Or. Nov. 20, 2017) (contract); Schedler v. FieldTurf USA, Inc., No. 3:16-CV-0344-PK, 2017 WL 341220, at *2 (D. Or. Aug. 9, 2017) (non-contractual claim); James v. Sapa Extrusions N. Am., No. 3:17-CV-00338-BR, 2017 WL 272669, at *8 (D. Or. June 23, 2017) (employment dispute); Kelly v. Ringler Assocs., Inc., No. 3:14-cv-00604-YY, 2017 WL 1363338, at *4–5 (D. Or. Feb. 21, 2017) (noting the existence of the choice-of-law statutes for torts and other non-contractual claims), *adopted*, Westrope v. Ringler Assocs., Inc., No. 3:14-cv-00604-YY, 2017 WL 1386012 (D. Or. Apr. 11, 2017) (also analyzing the issue); Makaneole v. Solarworld Indus. Am., Inc., No. 3:14-CV-1528-PK, 2016 WL 7856433, at *6 n.3 (D. Or. Sept. 2, 2016) (employment contract); Homeland Ins. Co. of N.Y. v. AAM, Inc., No. 3:15-cv-01745-PK, 2016 WL 2841944, at *4–5 (D. Or. May 13, 2016) (contract); Serenity Lane v. Netsmart Techs., Inc., No. 6:14-cv-00038-TC, 2016 WL 1555153, at *3–4 (D. Or. Mar. 20, 2016) (contract); Powell v. Sys. Transp., Inc., 83 F. Supp. 3d 1016, 1021–24 (D. Or. 2015); Tech. Sec. Integration, Inc.

federal court cases that apply the statutes has increased greatly over the past three years, to the point where—by the end of 2018—the vast majority of choice-of-law decisions by Oregon federal courts now rely on the statutes, not the Second Restatement.⁴⁶

Judge Marco Hernandez's opinion in *R.M. v. American Airlines, Inc.*,⁴⁷ provides a strong example of a federal court decision that follows the choice-of-law statutes. At issue was the law governing a tort claim arising out of sexual abuse committed against a minor by a passenger on a commercial airline flight that began in Texas and ended in Oregon.⁴⁸ The plaintiff was domiciled in Oregon at the time, while the defendant airline was domiciled in Texas.⁴⁹ The conduct took place in Texas

v. Phila. Indem. Ins. Co., No. 3:14-cv-01895-SB, 2015 WL 4603893, at *5–8 (D. Or. July 30, 2015) (contract), *aff'd*, 710 Fed. App'x 753 (9th Cir. 2018); Slayden v. Schulz Boat Co., Inc., No. 3:13-cv-02259-AC, 2014 WL 7642584 (D. Or. Oct. 28, 2014) (discussing choice-of-law statutes for torts in context of transfer motion), *adopted in relevant part by* No. 3:13-cv-02259-AC, 2015 WL 225731 (D. Or. Jan. 16, 2015); Seneca Ins. Co. v. James River Ins. Co., No. 03:14-cv-00108-HU, 2014 WL 3547376, at *2 (D. Or. July 16, 2014) (construction defect claim); Felix v. Guardsmark, LLC, No. 3:13-CV-00447-BR, 2014 WL 657177, at *5 (D. Or. Feb. 19, 2014); Indoor Billboard Nw. Inc. v. M2 Sys. Corp., No. 3:12-CV-01338-BR, 2013 WL 3146850, at *2 (D. Or. June 18, 2013) (attorney fees in contract case); Stella Maris, Inc. v. Cork Supply USA, Inc., No. 6:11-CV-954-HO, 2012 WL 1468488, at *4 (D. Or. Apr. 26, 2012) (contract); HTI Holdings, Inc. v. Hartford Cas. Ins. Co., No. 10-cv-06021-TC, 2011 WL 4595799, at *6 (D. Or. Aug. 24, 2011) (tort claims against insurance company), *adopted by* No. 10-6021-AA, 2011 WL 6205903 (D. Or. Dec. 8, 2011); Moreland v. World Commc'n Ctr., Inc., No. 09-913-AC, 2010 WL 4237302, at *2 (D. Or. Sept. 17, 2010) (employment contract); Thompson v. Walker, No. 09-508-JE, 2010 WL 3954930, at *5 (D. Or. July 6, 2010) (promissory note), *adopted by* No. 09-CV-508-JE, 2010 WL 3952894 (D. Or. Oct. 7, 2010); Farsi v. Sterling Jewelers, Inc., No. CV 07-131-PK, 2007 WL 2323317, at *3 (D. Or. Aug. 9, 2007) (arbitration agreement); Pulse Techs., Inc. v. Dodrill, No. CV 07-65-ST, 2007 WL 789434, at *5–6 (D. Or. Mar. 14, 2007) (employment contract and severance agreement); Superior Leasing, LLC v. Kaman Aerospace Corp., No. 04-3099-CO, 2006 WL 3756950, at *6 (D. Or. Dec. 19, 2006) (contract); Herron v. Wells Fargo Fin., Inc., No. 05-CV-659-ST, 2006 WL 2422831, at *9–10 (D. Or. Aug. 16, 2006) (contract); *see also* Moore v. Gulf Atl. Packaging Corp., No. 3:16-CV-886-PK, 2016 WL 8231142, at *7–8 (D. Or. Nov. 29, 2016) (using the choice-of-law statute in analysis of reasonableness of personal jurisdiction); Hanson v. Bravo Envtl. NW, Inc., No. 3:13-cv-00704-SI, 2013 WL 4859319, at *4 (D. Or. Sept. 11, 2013) (mentioning tort choice-of-law statutes in context of motion to remand); Richard v. Deutsche Bank Nat'l Tr. Co., No. 3:09-cv-00123-SI, 2012 WL 1082602, at *9 (D. Or. Mar. 30, 2012) (mentioning the contract choice-of-law statute but holding it does not apply to choice of law for damages); Gagnon v. Ryerson Inc., No. CV 07-68-AS, 2007 WL 473742, at *4 (D. Or. Feb. 1, 2007) (mentioning the contract choice-of-law statute when deciding a Fed. R. Civ. P. 12(b)(3) motion seeking dismissal for improper venue).

⁴⁶ Compare note 43, *supra*, with note 44, *supra*.

⁴⁷ *R.M.*, 338 F. Supp. 3d at 1206.

⁴⁸ *Id.* at 1207.

⁴⁹ *Id.* at 1210.

airspace, and the plaintiff suffered injury in Texas, Oregon, and Montana (where she moved two months after the flight).⁵⁰ Judge Hernandez detailed the conflicts between Oregon and Texas tort law, and he carefully explained the structure of the choice-of-law statutes for torts and even cited the Oregon Law Commission's commentary on the statutes.⁵¹ Judge Hernandez correctly determined that the issues were not presumptively governed by Oregon law and that the statutes' product liability provisions did not apply.⁵² Instead, because this was a split domicile case, ORS 15.440(3), which looks to the place of conduct and place of injury, provided the proper test.⁵³ The parties agreed that Texas was the conduct state, but they disagreed strongly about the location of the injury.⁵⁴ Judge Hernandez ruled that the injury either took place in Texas (the conduct state) or in Montana (where plaintiff suffered "the bulk of the injurious effects").⁵⁵ Either way, Texas law would apply.⁵⁶ Finally, Judge Hernandez rejected the plaintiffs' assertion that ORS 15.440(3)(c) allowed her to request Oregon law because defendant ought to have foreseen that she would suffer injury in Oregon.⁵⁷ Even if Oregon were the state of injury, Judge Hernandez ruled (relying again on Oregon Law Commission commentary), ORS 15.440(3)(c) would not apply because "Defendant could not have anticipated that its negligent acts would result in injury in Oregon specifically."⁵⁸

Whether or not one agrees with Judge Hernandez's conclusions about the state of injury or the foreseeability of injury in Oregon, there is no doubt that *RM v. American Airlines* faithfully follows the choice-of-law statutes for torts. Not all federal cases follow the same path, even when they purport to apply the statutes. Part D of this Essay describes some notable examples of cases that take a looser approach to the statutes.

The volume of federal court decisions and the paucity of state court opinions means that the District of Oregon has become the leading source of case law for application of the state's choice-of-law statutes. Commentators have begun to note and raise concerns about the nationwide phenomenon of federal courts displacing state courts as the leading expositors of state law, particularly contract law.⁵⁹ The

⁵⁰ *Id.*

⁵¹ *See id.* at 1210–11.

⁵² *Id.* at 1211.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1212.

⁵⁶ *See id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1213.

⁵⁹ *See* Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law* (N.Y. Univ. Sch. of L. Pub. L. & Legal Theory Working Paper Series, Paper No. 18-33, Oct. 2018), <https://ssrn.com/abstract=3261372>; Diego Zambrano, *Federal Aggrandizement and the Decay of State Courts*, 86 U. Chi. L. Rev. (forthcoming 2019), <https://papers.ssrn.com/sol3/>

same risk exists for the development of choice-of-law doctrine. (And, indeed, the two phenomena are linked; the majority of choice-of-law decisions by the District of Oregon involve contracts.) District court opinions, whether or not formally published, are widely available on legal databases, and their decisions on choice-of-law issues rarely face appellate review within the federal system. (Most cases settle, and choice of law may not be raised on appeal even in cases that are litigated to judgment.) Further, federal court decisions on choice-of-law issues are not subject to review by the Oregon Supreme Court, which means not only that errors may go uncorrected but also that repetition could turn “errors” into settled law, at least in federal court and at least until a state court rejects the federal court’s specific interpretation or its more general approach.

District of Oregon judges, in sum, are more likely than state appellate judges to encounter important issues relating to the choice-of-law statutes, and their decisions are likely to be influential even if never fully conclusive. Once again, *Portfolio* provides the Supreme Court with the opportunity to reject the erroneous federal decisions and reclaim authority over state choice-of-law doctrine.

D. The Role of Common Law in a Statutory Choice-of-Law System

Some state and federal opinions suggest that common law choice-of-law doctrines survive the new statutes. Notwithstanding the statements and analyses in these cases, the old common law no longer applies, and courts should resist its regressive grasp.

The statutes themselves are fairly clear on this issue. For contracts, ORS 15.305 provides, “ORS 15.300 to 15.380 govern the choice of law applicable to *any* contract, or part of a contract, when a choice between the laws of different states is at issue.”⁶⁰ Further, § 11 of the choice-of-law legislation for contracts states that the new rules “apply to all contracts, whether entered into before, on or after the effective date of this 2001 Act, unless that application would violate constitutional prohibitions against impairment of contracts.”⁶¹ The commentary declares:

Section 11 establishes a uniform choice-of-law regime in Oregon applicable

[papers.cfm?abstract_id=3378311](#).

⁶⁰ OR. REV. STAT. § 15.305 (2017) (emphasis added). The complete provision states, “ORS 15.300 to 15.380 govern the choice of law applicable to any contract, or part of a contract, when a choice between the laws of different states is at issue. ORS 15.300 to 15.380 do not apply if another Oregon statute expressly designates the law applicable to the contract or part of a contract. ORS 15.320 does not apply to any contract in which one of the parties is a financial institution, as defined by 15 U.S.C. 6827, as in effect on January 1, 2002.” *Id.*

⁶¹ Act of Apr. 12, 2001, ch. 164, 2001 Or. Laws § 11 (relating to conflict of laws); *see also* Nafziger, *supra* note 5, at 418. Although § 11 was enacted by the Oregon legislature, it was not codified in the Oregon Revised Statutes.

to all contracts, regardless of when they may have been made. The only exceptions would occur if the application of a choice-of-law rule would unconstitutionally impair a contract or if the choice of law is at issue in an action or proceeding commenced before the effective date of the Act.⁶²

Dean Symeonides has explained that the “most appropriate law” test for contracts choice of law “disassociates the Oregon Act . . . from a significant-contacts or significant-relationship analysis like the Second Restatement.”⁶³ Professor Nafziger has confirmed that “[o]ne of the purposes of the legislation is to displace the cumbersome methodology prescribed by the Second Restatement,”⁶⁴ and he has suggested that “Oregon’s new law itself will shape the content of the common law methodology applicable to any residual conflicts not specifically covered by the law itself.”⁶⁵ That is to say, the old common law is superseded. If there is any place for common law choice-of-law rules in contracts, it must be a new common law, developed under the principles of the new statutes.

For torts, ORS 15.405 provides that “ORS 15.400 to 15.460 govern the choice of law applicable to noncontractual claims when a choice between or among the laws of more than one state is at issue,” unless another Oregon statute “expressly designate[s] the law governing a particular noncontractual claim.”⁶⁶ This statement leaves no express room for common law. Further, Dean Symeonides has written that the approach of the torts statute “is intended to be—and *is*—different” from the Second Restatement and other modern approaches.⁶⁷ Indeed, the statutes

avoid using the term “interest” in order to disassociate the approach of this section and this Act from Professor Currie’s “governmental interest analysis” and other modern American approaches that seem to perceive the choice-of-law problem as a problem of interstate competition, rather than as a problem of interstate cooperation in conflict avoidance.⁶⁸

As with the contracts statutes, therefore, any common law rules for choice of law in torts must also develop under the guidance of the new statutes.⁶⁹ The old common law was the problem, and the legislature did not choose for it to be part of the solution.⁷⁰

⁶² Nafziger, *supra* note 5, at 425 (reproducing the Oregon Law Commission’s Comment to § 11).

⁶³ Symeonides, *supra* note 9, at 236.

⁶⁴ Nafziger, *supra* note 5, at 403.

⁶⁵ *Id.*

⁶⁶ OR. REV. STAT. § 15.405 (2017).

⁶⁷ Symeonides, *supra* note 9, at 1033.

⁶⁸ *Id.* at 1037.

⁶⁹ *See id.* at 1043–45 (explaining that courts should exercise their discretion in accordance with the statutes’ goals and structure).

⁷⁰ Discussing both statutes, Professor Nafziger is clear that the Oregon Law Commission’s

So far, however, courts have not paid much attention to the official or academic commentary. A few cases exhibit a hybrid analysis that combines statutory and common law analysis without discussing whether such an analysis is appropriate. The *Johnson* and *Proseeds* decisions from the Oregon Court of Appeals provide examples of this approach.⁷¹ The *Portfolio* opinion goes even further by expressly equating “policies” and “interests” and defaulting to the old common law rule when it finds that no state has an interest in having its law apply.⁷² In federal court, the analysis of *Powell v. System Transport, Inc.*⁷³ moves back and forth between the statutes and common law while analyzing a choice-of-law clause in a contract. Similarly, the court in *Indoor Billboard Northwest Inc. v. M2 Systems Corp.*⁷⁴ used a Second Restatement analysis supplemented by the public policy provisions of the choice-of-law statutes for contracts.

The analyses in all of these cases are incorrect. As explained above, the choice-of-law statutes provide new rules that displace the old common law. Where the statutory rules do not provide an answer, courts must develop new case law based on statutory principles, not based on the old doctrines that the legislature intentionally displaced. In short, there is no basis for concluding that the choice-of-law statutes allow courts to move back and forth between the old Restatement-derived common law and the new statutes.

Superior Leasing, LLC v. Kaman Aerospace Corp. provides a more complex federal court example of this error. The district court considered the choice-of-law statutes for contracts as well as the Second Restatement, as interpreted by the Oregon Court of Appeals, when deciding whether to apply a choice-of-law clause to a tort claim. The court ultimately held that the claim must be characterized as a tort claim, that as a matter of Ninth Circuit law tort issues are governed by state choice-of-law doctrine (not by choice-of-law clauses in contracts), and that the Second Restatement governed the tort choice-of-law analysis.⁷⁵ This analysis contains two errors. First, Oregon law, not Ninth Circuit law, governs the relationship between tort claims and choice-of-law clauses in diversity jurisdiction cases involving contracts.⁷⁶

initial study group explicitly “reject[ed] interest analysis” and that its Work Group rejected “several features of the Second Restatement, including its specific sets of connecting factors, its specific presumptive rules, and the matrix of substantive principles in Section 6 of that approach.” James A.R. Nafziger, *The Louisiana and Oregon Codifications of Choice-of-Law Rules in Context*, 58 AM. J. COMP. L. 165, 172 (2010).

⁷¹ See *supra* notes 20–26 and accompanying text.

⁷² *Portfolio Recovery Assocs., LLC v. Sanders*, 425 P.3d 455, 461 (Or. Ct. App. 2018).

⁷³ *Powell v. Sys. Transp., Inc.*, 83 F. Supp. 3d 1016, 1021–24 (D. Or. 2015).

⁷⁴ *Indoor Billboard Nw. Inc. v. M2 Sys. Corp.*, No. 3:12-CV-01338-BR, 2013 WL 3146850, at *2–4 (D. Or. June 18, 2013).

⁷⁵ *Superior Leasing, LLC v. Kaman Aerospace Corp.*, No. 04–3099–CO, 2006 WL 3756950, at *8 (D. Or. Dec. 19, 2006).

⁷⁶ Cf. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 487 (1941).

Second, Oregon law specifically addresses this issue. The choice-of-law statutes for contracts, and their commentary, make clear that a choice-of-law clause in a contract cannot control the law that applies to a related tort claim.⁷⁷ (Note, though, that the court's ultimate decision to use the Second Restatement for the tort analysis was correct in 2006, because the tort choice-of-law statutes did not yet exist.)

A second group of cases more self-consciously considers whether any of the old common law choice-of-law doctrines survive the enactment of the choice-of-law statutes. The Oregon Court of Appeals' decision in *Portfolio* does not expressly address this issue. But the court's extended analysis, combined with its deliberate decision to rely on the old common law rules when it reached an impasse,⁷⁸ is at least an implicit holding that the old doctrines survive.

Oregon's federal judges have confronted this issue directly, and they are divided. In the 2006 case of *Herron v. Wells Fargo Financial, Inc.*,⁷⁹ Judge Anna Brown noted the common law practice of applying Oregon law if there is no material difference among the laws of the states that have a connection with the case. She followed that doctrine for the non-contractual claims in the case (the choice-of-law statutes for torts did not exist in 2006). But, she determined, that approach did not survive enactment of the choice-of-law statutes for contracts: "Upon examining the language of the statutes, their exceptions and its goals, this court concludes that they were intended to replace the common law practice of applying Oregon law when there are no material differences between the interested states."⁸⁰ Using the statutes, Judge Brown found that the law of the Northern Mariana Islands would apply.

Judge Michael Simon took a divergent position in two cases. The first case, *Richard v. Deutsche Bank National Trust Co.*,⁸¹ raised the question of what law governs damages for breach of contract when the contract contains a choice-of-law clause. ORS 15.350(1) provides that "the contractual rights and duties of the parties are governed by the law or laws that the parties have chosen," but Judge Simon

⁷⁷ See OR. REV. STAT. § 15.350(1) (2017) ("The choice of law may extend to the entire contract or to part of a contract."); Nafziger, *supra* note 5, at 420 (reproducing the Oregon Law Commission's Comment 1 to § 7, which states that ORS 15.350(1) "makes clear that the exercise of party autonomy within this Act extends only to contractual rights and duties of the parties and not to non-contractual rights and duties such as those arising out of the law of torts and property."); see also Symeonides, *supra* note 9, at 223–26 (explaining the same point).

⁷⁸ *Portfolio Recovery Assocs., LLC v. Sanders*, 425 P.3d 455, 461 (Or. Ct. App. 2018).

⁷⁹ *Herron v. Wells Fargo Fin., Inc.*, No. 05–CV–659–ST, 2006 WL 2422831 (D. Or. Aug. 16, 2006), *reconsid. denied*, No. 05–CV–659–ST, 2006 WL 3803398 (D. Or. Dec. 22, 2006), *aff'd*, 299 Fed. App'x 713 (9th Cir. 2008).

⁸⁰ *Id.* at *10.

⁸¹ *Richard v. Deutsche Bank Nat'l Tr. Co.*, No. 3:09–cv–00123–SI, 2012 WL 1082602 (D. Or. Mar. 30, 2012).

reasoned that this language “does not . . . provide what law should govern the measure of damages.”⁸² Relying on a 1992 Oregon Court of Appeals decision, Judge Simon used the Second Restatement to decide this issue—although he ended up applying California law, the same law that the parties had chosen to govern their contractual “rights and duties.”⁸³

Judge Simon’s interpretation of ORS 15.350(1) is probably incorrect. First, the Second Restatement takes the position that contract and tort damages are controlled by the same law that governs the parties’ rights, duties, and liabilities.⁸⁴ Thus, reliance on the Second Restatement ought to have led the court back to the choice-of-law statutes. Second, the Oregon Law Commission’s report on the choice-of-law statutes for contracts explains that the phrase “contractual rights and duties” serves the function of distinguishing between contractual and non-contractual issues.⁸⁵ Further, Dean Symeonides pointed out that, for the new statutes, “the contractual choice of another state’s law [means] that state’s ‘substantive’ law”⁸⁶—and “substantive law” ordinarily includes damages issues.⁸⁷ Judge Simon’s analysis depends on the conclusion that the language of ORS 15.350(1) is intentionally narrower than the Second Restatement with respect to the contract-related issues in a case. That conclusion is at odds with the tenor of the Oregon statutes and assumes without explanation that they depart from other modern approaches to characterizing damages for choice-of-law purposes.

⁸² *Id.* at *9.

⁸³ *Id.* (“Although [the] Restatement (Second) [of] Conflict of Laws is not the law of Oregon, our courts refer to its provisions as a guide in resolving conflict of laws questions, especially in contract cases.” (quoting *Manz v. Cont’l Am. Life Ins. Co.*, 843 P.2d 480, 482 (Or. Ct. App. 1992))); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 207. Note that *Manz* is also the case that the Court of Appeals relied on in *Portfolio*. *See supra* note 7.

⁸⁴ “The measure of recovery for a breach of contract is determined by the local law of the state selected by application of the rules of §§ 187–188.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 207. Sections 187 and 188 provide the general rule for determining what law governs the “rights and duties” of the parties in contracts cases. For torts, § 171 provides that “[t]he law selected by application of the rule of § 145 determines the measure of damages.” Section 145 provides the general rule for determining what law governs the “rights and liabilities of the parties with respect to an issue in tort.” Comment a to § 171 observes that damages are distinct from issues of judicial administration that would be governed by forum law. Drafts of the Restatement (Third) have yet to address damages, but damages are not included in the “rules for the management of litigation” to which forum law presumptively applies. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS §§ 5.10–5.25 (AM. LAW INST., Preliminary Draft No. 4, 2018).

⁸⁵ *See* Nafziger, *supra* note 5, at 420 (reproducing the Oregon Law Commission’s Comment 1 to § 7, codified as ORS 15.350(1)); *see also* Symeonides, *supra* note 9, at 223.

⁸⁶ Symeonides, *supra* note 9, at 229.

⁸⁷ Judge Simon’s analysis in *Richard* assumed that damages are substantive. *See Richard*, 2012 WL 1082602, at *9. The Second Restatement takes the same view, although it seeks to avoid the substance-procedure distinction. *See supra* note 81.

The second case, *Schedler v. Fieldturf USA*,⁸⁸ is trickier. The issue in *Schedler* was whether Oregon or Washington law applied, where the parties had chosen Oregon law in an employment agreement but disputed whether plaintiff's claims were contractual or non-contractual. Magistrate Judge Papak applied the choice-of-law statutes and concluded Oregon law should apply.⁸⁹ The defendants sought review from Judge Simon.

Because the parties agreed that Oregon law would apply if the claims were contractual, Judge Simon considered whether the answer would be different under Oregon's non-contractual choice-of-law statutes. His analysis is very similar to that of the Court of Appeals in *Portfolio*. Judge Simon first quoted the statutes, but he then quoted a pre-codification Court of Appeals opinion as support for blending statutory and common-law analysis: "In addition, '[w]hen evaluating contacts, [courts] look to those that show that the state has some *interest* in having its law apply to the dispute.'" ⁹⁰ Although Judge Simon's subsequent analysis began with a focus on policies,⁹¹ the heart of his analysis was Oregon and Washington interests. Having determined that both states had an interest in seeing their law applied, Judge Simon turned away from the choice-of-law statutes altogether. Citing *Lilienthal v. Kaufman* and two other cases, Judge Simon declared, "When both states have a substantial interest, Oregon law applies."⁹² He went on to explain why he thought *Lilienthal's* approach remained relevant despite the existence of the statutes: "Although these cases were decided before Oregon codified its choice-of-law rules, the Court does not believe that their underlying reasoning on this point has been undermined by Oregon's statutory framework for choice of law analysis."⁹³

After this decision, the defendants sought to certify three issues to the Oregon Supreme Court, including the question whether the choice-of-law statutes "replace, in their entirety, Oregon's common law choice of law cases and their methodology,

⁸⁸ The case produced a series of opinions that discuss whether common-law choice-of-law rules survive the choice-of-law statutes. See *Schedler v. FieldTurf USA, Inc.*, No. 3:16-CV-0344-PK, 2017 WL 3412205, at *3 (D. Or. Aug. 9, 2017); (Simon, J.); *Schedler v. FieldTurf USA, Inc.*, No. 3:16-CV-344-PK, 2017 WL 8948593, at *6 (D. Or. Oct. 16, 2017) (Papak, J.); *Schedler v. FieldTurf USA, Inc.*, No. 3:16-CV-0344-PK, 2018 WL 451555, at *3 (D. Or. Jan. 17, 2018) (Simon, J.).

⁸⁹ See *Schedler*, 2017 WL 3412205, at *1.

⁹⁰ *Id.* at *3 (alteration in original) (emphasis added) (quoting *Manz v. Cont'l Am. Life Ins. Co.*, 843 P.2d 480, 483 (Or. Ct. App. 1992)); see also *St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co.*, 870 P.2d 260, 264 (Or. Ct. App. 1994), *adh'd to as modified on recons.*, 875 P.2d 537 (Or. Ct. App. 1994), *aff'd in part, rev'd in part on other grounds*, 923 P.2d 1200 (Or. 1996); *Straight Grain Builders v. Track N' Trail*, 760 P.2d 1350, 1352 (Or. 1988). For inappropriate reliance on *Manz* in other decisions, see *supra* notes 36 and 83.

⁹¹ See *Schedler*, 2017 WL 3412205, at *3.

⁹² *Id.* at *4 (citing *Lilienthal v. Kaufman*, 395 P.2d 543, 549 (Or. 1964)).

⁹³ *Id.*

including ‘governmental interest analysis’ and the Second Restatement of Conflict of Laws.”⁹⁴ Magistrate Judge Papak rejected certification,⁹⁵ and the defendants sought review by Judge Simon, who also rejected the request.⁹⁶ Judge Simon’s opinion rejecting certification also provided greater detail about his reliance on pre-codification cases:

Defendants try to frame the question broadly as whether pre-codification case law is at all relevant to post-codification choice of law analysis. But the issue for which these cases were cited is much narrower. Section 15.445(3) instructs courts to evaluate the relative strength of the policies of the relevant states. Although the term has changed from “interest” to “relative strength,” the underlying principle from the cited pre-codification cases is the same—courts must still weigh one state against the other. There is no indication (and Defendants point to no authority so indicating) that where, all other factors being the same, both states have an equal interest (or equal “strength”) in the case, Oregon’s policy of having its interest (or strength) prevail has changed. Nor do Defendants posit a different method for determining which state’s choice of law should prevail when both states’ interests are equal.⁹⁷

On the one hand, the discussion at the beginning of this section makes clear that Judge Simon’s reliance on pre-codification law—especially *Lilienthal*—was incorrect.⁹⁸ Those cases are no longer good law, not even as fallback options. On the other hand, Judge Simon raised valid concerns about how to apply the general provisions of the statutes. It is one thing to say that the old common law is dead and that new, statute-based common law must rise in its place. It is quite another to sort out how changes in terminology and modification of the relevant factors will generate new and different rules (or the same rules with new rationales). The commentary to the new statutes does not provide a great deal of concrete guidance.

On one issue, however, the statutes are clear. The new statutes reject parochialism as a residual approach. The statutes specify situations in which Oregon law automatically applies, and *lex fori* is no longer a default rule to be invoked the moment that Oregon and another state both have legitimate policies (or even interests) at stake. Instead, the statutes specifically direct courts to think in cooperative terms by instructing them to “minimiz[e] adverse effects on strong legal policies of other states.”⁹⁹

⁹⁴ Schedler v. FieldTurf USA, Inc., No. 3:16-CV-344-PK, 2017 WL 8948593, at *6 (D. Or. Oct. 16, 2017).

⁹⁵ See *Id.* at *6–7.

⁹⁶ Schedler v. FieldTurf USA, Inc., No. 3:16-CV-344-PK, 2018 WL 451555, at *4 (D. Or. Jan. 17, 2018).

⁹⁷ *Id.* at *3.

⁹⁸ See *supra* notes 60–69 and accompanying text.

⁹⁹ See OR. REV. STAT. § 15.360(3)(b) (2017); see also OR. REV. STAT. § 15.445(3)(b) (2017).

So far, the judicial record is mixed on the issue of implementing the new statutes by rejecting the old common law and pursuing a cooperative approach to conflicts. Most of the federal district court opinions that apply the statutes do so in a straightforward way, with no overt use of the superseded common law rules but also with little express appreciation for the goals of the statutes. A few federal court opinions and most of the Oregon Court of Appeals opinions are more ambiguous. Some, such as *Portfolio* and *Schedler*, resist the statutes and their purpose by overtly embracing the old common law. As Judge Simon's opinions in *Schedler* make clear, the decision to stick with the common law is rational, because those old rules provide a supplemental default framework that frees judges from having to do the kind of express weighing and balancing that the statute requires but that they may not wish to do. Whatever the intentions or logic of these decisions, however, their reasoning creates tension with the choice-of-law statutes and contradicts the purposes of those statutes.

In short, the legal framework created by the statutes ought to be clear, but some courts and judges have resisted embracing it. Full implementation of the statutes requires judges to change their attitudes and assumptions about Oregon choice of law and also requires them to engage openly in evaluating and balancing policies. Clear as these goals may be, Oregon courts have yet to embrace them. Legislative reform sometimes runs aground on the shoals of ingrained common-law thinking and contemporary judicial disinclination to evaluate policies openly. Hopefully, the Oregon Supreme Court will push the state and federal courts in the proper direction

("minimizing adverse effects on strongly held policies of other states"). As Dean Symeonides put it, the court

should (1) always be mindful of the *adverse consequences* of the choice-of-law decision on the strongly held policies of the involved states; and (2) choose the law of the state which, in light of its relationship to the parties and the dispute and its policies rendered pertinent by that relationship, would sustain the most serious legal, social, economic, and other consequences of the choice-of-law decision.

Symeonides, *supra* note 9, at 1037. Note, however, that the statutes do not expressly foreclose a default to Oregon law if everything remains in equipoise after this analysis.

This effort to avoid adverse consequences to the policies of other states has a clear kinship to the comparative impairment method developed by Professor Baxter and applied to some degree by California courts in torts cases, despite the fact that the Oregon Law Commission's Work Group rejected that approach as a general framework. See Nafziger, *supra* note 70, at 172. For general discussion of the comparative impairment method, see William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 20 (1963). For the current status of this approach in California, see Michael H. Hoffheimer, *California's Territorial Turn in Choice of Law*, 67 RUTGERS L. REV. 167, 170 (2015). For criticism of the comparative impairment method, see William H. Allen & Erin A. O'Hara, *Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1015 (1999), and Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577, 578 (1980).

when it issues its decision in *Portfolio*.

III. THE UNIFORM CONFLICT OF LAWS-LIMITATIONS ACT: A STUDY IN CONFUSION

A. Introduction

The distinction between substance and procedure for choice-of-law purposes has been a difficult topic for courts and scholars. Although some issues seem clearly substantive, and others clearly procedural,¹⁰⁰ a vast array of topics come closer to the line,¹⁰¹ including statutes of limitations.

The traditional view has been that a statute of limitations is procedural, with the result that a court will apply the forum's statute of limitations to a claim, even if the claim itself would be governed by the law of another jurisdiction.¹⁰² Although the traditional approach remains prominent,¹⁰³ many states have modified it or moved away from it altogether. Numerous jurisdictions, for example, have "borrowing statutes": if the cause of action arose in another state, the forum will "borrow" the statute of limitations for that state.¹⁰⁴ Other courts follow the Second Restatement, which provides that the notoriously open-ended "principles of § 6" will determine the statute of limitations,¹⁰⁵ but also provides two presumptions that favor forum law:

In general, unless the exceptional circumstances of the case make such a result unreasonable:

¹⁰⁰ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (AM. LAW INST. 1971) ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.").

¹⁰¹ For example, the issue of damages. See *supra* note 77 and accompanying text.

¹⁰² See PETER HAY ET AL., CONFLICT OF LAWS § 3.9, at 134–35 (6th ed. 2018); Robert A. Leflar, *The New Conflicts-Limitations Act*, 35 MERCER L. REV. 461, 461 (1984).

¹⁰³ See Hay, *supra* note 102, § 3.9, at 135; Louise Weinberg, *Choosing Law: The Limitations Debates*, 3 U. ILL. L. REV. 683, 691–701 (1991) (providing extensive discussion of this characterization and the Supreme Court's acceptance of it in *Sun Oil v. Wortman*, 486 U.S. 717 (1988)).

¹⁰⁴ See Hay, *supra* note 102, § 3.11, at 139–41; see also *Givens v. Quinn*, 877 F. Supp. 485, 491 (W.D. Mo. 1994) (applying borrowing statute in case involving multi-state defamation claim and the single publication rule).

¹⁰⁵ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971) ("[T]he factors relevant to the choice of the applicable rule of law include (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.").

- (1) The forum will apply its own statute of limitations barring the claim.
- (2) The forum will apply its own statute of limitations permitting the claim unless:
 - (a) maintenance of the claim would serve no substantial interest of the forum; and
 - (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.¹⁰⁶

A few states, including Oregon and Washington, have chosen a fourth approach: the Uniform Conflict of Laws Limitations Act (UCLLA). Section 2 of the UCLLA, as adopted by the Oregon legislature, states:

- (1) Except as provided by ORS 12.450, if a claim is substantively based:
 - (a) Upon the law of one other state, the limitation period of that state applies; or
 - (b) Upon the law of more than one state, the limitation period of one of those states, chosen by the law of conflict of laws of this state, applies.
- (2) The limitation period of this state applies to all other claims.¹⁰⁷

These provisions are not completely clear. When, for example, does subsection (1) apply, and when does subsection (2) (the “all other claims” provision) apply? One commentator suggests that the “all other claims” provision applies “where there is no conflict between the law of the forum and the law of a foreign state,” with the result that “the forum applies its statute of limitations regardless of its connection to the cause of action in any case that involves only a conflict between statutes of limitation.”¹⁰⁸ Whatever the merit of that guidance, Oregon courts have not

¹⁰⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (AM. LAW INST. 1988). The current draft of the Restatement (Third) simplifies this approach by replacing § 142(2)(b) with “[t]he forum will apply the foreign statute of limitations if that statute bars a claim unless maintenance of the claim would serve a substantial interest of the forum.” RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.29(2) (AM. LAW INST., Preliminary Draft No. 4, 2018); *see also id.*, comment d (expressing a desire “to provide more definite rules” and avoid “a standard-based choice-of-law analysis for limitations periods”).

¹⁰⁷ OR. REV. STAT. § 12.430 (2017). Other relevant provisions of the UCLLA (1) provide that where another state’s statute of limitations apply, the tolling and accrual rules of that state also apply, *see* OR. REV. STAT. § 12.440 (2017), and (2) provide an escape clause if application of another state’s statute of limitations is unfair to either the plaintiff or the defendant, *see* OR. REV. STAT. § 12.450 (2017).

¹⁰⁸ Christopher R. M. Stanton, *Implementing the Uniform Conflict of Laws-Limitations Act in Washington*, 71 WASH. L. REV. 871, 887 (1996). Stanton criticizes this aspect of the statute because “it does nothing to discourage forum shopping.” *Id.* at 893. Stanton suggests that courts in UCLLA states should determine the applicable statute of limitations by applying “conflicts

adopted this analysis.

The UCLLA is clearer when a conflict exists over which state's law governs a claim. In that situation, as the same commentator observes, "the limitation issue is not generally subject to an independent conflicts analysis. Instead, it is tied to the law that forms the substantive basis for the claim," unless "no single substantive base for the case can be identified."¹⁰⁹ Critically, however, the text of ORS 12.430 does not say how to determine which state's (or states') law provides the substantive basis for the claim, and this textual ambiguity has created problems for Oregon courts. The commentary to the UCLLA appears to fill this gap; it provides that "the enacting state, as forum, will apply its own conflicts law, whatever it may be, to select the substantive law that governs the litigated claim."¹¹⁰ Unfortunately, no Oregon court has cited the commentary on this issue, and the cases go in different directions.

B. Determining What Law Provides the Substantive Basis for a Claim Under the UCLLA

Applying ORS 12.430, several published state and federal court decisions have considered what state's law provides the substantive basis for a claim.¹¹¹ Significantly, however, none of those decisions cite the UCLLA commentary. In general, the cases advance two different approaches to this issue. One approach is formalist, or at least is an approach that does not include any policy or interest-based analysis. The second approach is a contemporary choice-of-law analysis. The first approach creates tension with Oregon conflicts law in its pre-and post-statutory forms. The second approach, by contrast, follows state conflicts law and accords with the purposes of the UCLLA. Nonetheless, judges who take the second, correct approach sometimes apply ORS 12.430 in strange ways.

In *Cropp v. Interstate Distributor Co.*,¹¹² two Oregon truck drivers sued a Washington truck company and its Nevada driver in Oregon state court over a collision in California. The only conflict mentioned by the court was between California's one-year statute of limitations and Oregon's two-year statute. In a footnote, Judge

methodology to laws between which no actual conflict exists." *Id.* at 895.

¹⁰⁹ *Id.* at 883; see also Leflar, *supra* note 102, at 476 (explaining the reasons for this link); Weinberg, *supra* note 103, at 703 (observing, and criticizing, the decision of the UCLLA drafters to "avoid[] renvoi, and opt[] for the limitations law of the chosen state whether that state 'would' apply it or not. Thus, that state's borrowing statute must be ignored, although its tolling and accrual rules will be adopted with its statute of limitations").

¹¹⁰ UNIFORM CONFLICT OF LAWS-LIMITATIONS ACT § 2 CMT. (UNIF. LAW COMM'N 1982); see also Leflar, *supra* note 102, at 468 ("[T]he forum state's own conflicts law will always choose the limitations law that is substantively governing.").

¹¹¹ The Oregon Supreme Court provided a general explanation of the UCLLA in *Miller v. Ford Motor Co.*, 419 P.3d 392, 398–99 (Or. 2018), but the explanation was illustrative only, and the court did not apply those statutes.

¹¹² *Cropp v. Interstate Distrib. Co.*, 880 P.2d 464, 464 (Or. Ct. App. 1994).

De Muniz (later Oregon's Chief Justice) wrote for the Court of Appeals that "the proper inquiry . . . is what law forms the substantive basis of the claims, not which state has a more substantial interest in the application of its law."¹¹³ Having dismissed the relevance of interest analysis to the "substantive basis" question, the majority concluded that California's statute of limitations applied because the claims "concern the parties' rights and responsibilities in operating motor vehicles in California. California law, including its Vehicle Code, defines and regulates those rights."¹¹⁴ By contrast, "Oregon motor vehicle laws do not define or regulate the operation of motor vehicles in California and thus have no bearing on plaintiffs' claims."¹¹⁵

Judge Rossman, in dissent, correctly asserted that Oregon choice-of-law rules (at that time, the Second Restatement) provided the proper method for determining what state's law provided the substantive basis for the claim.¹¹⁶ Judge Rossman then analyzed the dispute as a common-domicile case: because Nevada and Washington had statutes of limitations "equal to or longer than" Oregon's, "defendants are considered to be Oregon domiciliaries," and all of their contacts would be "treated . . . as if those contacts were grouped in a single state."¹¹⁷ Judge Rossman also asserted that the relevant conduct was not just the accident, but also "the freight contracts and dispatch instructions [which] occurred in Oregon, Nevada and Washington."¹¹⁸ Finally, he concluded that "the important contacts—where the parties live or are deemed to live and the economic impact of the litigation—are Oregon contacts."¹¹⁹ By contrast, "[t]he less consequential contact—where the accident occurred—is a California contact. I would conclude that contact does not create a substantial interest in California."¹²⁰ Because "Oregon substantive law therefore applie[d]" to the claim, Judge Rossman also concluded that Oregon's statute of limitations should apply.¹²¹

The accident in *Cropp* took place in California among non-Californians who resided in different states and who had no prior relationship.¹²² No party asserted a conflict with respect to the conduct-regulating or loss-allocating rules of California

¹¹³ *Id.* at 466 n.3.

¹¹⁴ *Id.* at 465.

¹¹⁵ *Id.* at 465–66.

¹¹⁶ *Id.* at 466 (Rossman, J., dissenting).

¹¹⁷ *Id.* at 467 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, cmt. i (AM. LAW INST. 1971)).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 468.

¹²⁰ *Id.*

¹²¹ *Id.*; see also *id.* at 466 ("Under a choice-of-law analysis, I would conclude that plaintiff's tort claims are substantively based only on the law of Oregon.").

¹²² *Id.* at 464.

and Oregon, yet neither opinion suggested that the absence of a conflict meant that forum law, including Oregon's statute of limitations, should apply under the UCLLA.¹²³ Instead, the majority and dissent insisted that the claim arose under the law of a single state, but of course, they differed on which state.

The majority's formalist approach to determining the substantive basis for the claim was incorrect as a matter of Oregon conflicts law. But Judge Rossman's Second Restatement analysis was also flawed. He inflated the Oregon contacts by insisting without explanation that the places where freight contracts were signed and dispatch instructions were given were significant in a personal-injury case and should be attributed to Oregon. He would have held that California, the place of the accident, had no interest at all in the litigation and that Oregon law should apply to all issues in the case, apparently including—had there been a conflict—the standard of care and other rules of the road (that is to say, conduct-regulation issues).¹²⁴ Surely that conclusion pushes interest analysis too far. To reach these conclusions, moreover, Judge Rossman relied solely on Second Restatement § 145 and never cited § 146's presumptive rule that "the local law of the state where the injury occurred determines the rights and liabilities of the parties."¹²⁵ Judge Rossman's UCLLA analysis was also incorrect, because he considered the states' interests in application of their statutes of limitations,¹²⁶ even though those interests are not relevant to which state's law provided the substantive basis for the claim.¹²⁷

The Ninth Circuit was the next court to try its hand at the UCLLA, in *Fields*

¹²³ See *supra* note 101 and accompanying text (suggesting this approach would be faithful to the UCLLA's "all other claims" language); see also Leflar, *supra* note 102, at 476 (noting "[d]ifferent substantive issues involved in a single claim may be found to be governed by the substantive laws of different states," and providing an example in which one state's conduct-regulating rules would apply but another state's loss-allocating rules would govern).

¹²⁴ See *Cropp*, 880 P.2d at 468 ("A complete analysis of all the factors relevant to the question of which state's substantive law applies can lead to only one result: Because of Oregon's substantial interest in the outcome of this case and California's negligible interest, Oregon's substantive law is applicable . . .").

¹²⁵ Depending on how one defines the conduct at issue in *Cropp*, § 146 could have created a strong presumption for California law. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 cmt. d (AM. LAW INST. 1971).

¹²⁶ *Cropp*, 880 P.2d at 467–68.

¹²⁷ See *supra* note 109 and accompanying text. For other assessments of *Cropp*, compare Stanton, *supra* note 108, at 704 (favoring the majority's approach), with Nafziger, *supra* note 8, at 1198 (endorsing the dissent). Louise Weinberg analyzes a similar Eighth Circuit case and notes that a state's separate interest in applying or not applying its statute of limitations is irrelevant under the UCLLA, thus implicitly confirming that Judge Rossman's approach was incorrect. But Weinberg also criticizes this result, and the UCLLA's approach, as irrational, thus also implicitly supporting Judge Rossman's decision to depart from the statutory analysis. See Weinberg, *supra* note 103, at 704–05.

v. Legacy Health System.¹²⁸ Plaintiff filed identical wrongful death actions in the District of Oregon and the Western District of Washington. Both courts applied the Oregon statute of limitations and dismissed the case. The Court of Appeals cited *Cropp*, but it conducted a Second Restatement analysis and correctly determined that Oregon law, and therefore Oregon's statutes of repose and limitations, should govern the wrongful-death claims.¹²⁹ Judge Gould's analysis took the same form as Judge Rossman's dissenting analysis in *Cropp*, however; he did not mention the § 146 presumption and instead relied on an open-ended § 145 analysis.¹³⁰ Also troubling is the court's assertion, at the beginning of its analysis, that "UCLLA states like Washington and Oregon treat statutes of limitations as procedural for the purposes of conflict of law analyses."¹³¹ This statement directly contradicts the UCLLA commentary, which declares that the Act "treats limitation periods as substantive, to be governed by the limitations law of a state whose law governs other substantive issues inherent in the claim."¹³²

¹²⁸ *Fields v. Legacy Health Sys.*, 413 F.3d 943 (9th Cir. 2005).

¹²⁹ *Id.* at 953; *see also id.* at 951 (citing *Cropp*).

¹³⁰ *See id.* at 952–53. In this case, however, the result was consistent with the § 146 presumption. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 cmt. d (AM. LAW INST. 1971).

¹³¹ *Fields*, 413 F.3d at 951.

¹³² UNIFORM CONFLICT OF LAWS-LIMITATIONS ACT § 2 CMT. (UNIF. LAW COMM'N 1982); *see also* Sam Walker, *Forum Shopping for Stale Claims: Statutes of Limitations and Conflict of Laws*, 23 AKRON L. REV. 19, 24 (1989) ("[T]he Uniform Conflict of Laws-Limitations Act . . . treats statutes of limitations as substantive, the state providing the substantive law governing the case providing also the statute of limitations."); Weinberg, *supra* note 103, at 702 (making the same observation but also criticizing the link between the statute of limitations and the law that provides the substantive basis for the claim). Christopher Stanton has attempted a more nuanced characterization, which also roughly accords with Weinberg's criticism of the UCLLA:

One commentator has referred to the *Uniform Act's* approach to statutes of limitation as "substantive." This is true to the extent that the *Uniform Act* rejects the traditional rule characterizing statutes of limitation as procedural and thus subject to forum law. A truly substantive issue, however, would not be tied to any other choice of law determination. Under the *Restatement*, for example, the statute of limitation is handled as a separate issue to be determined independently under the "significant relationship" test. Therefore, it would be possible under the *Restatement* to have one state's laws governing the substantive claim and another state's laws governing the limitation period. The analytical method under the *Uniform Act* is more appropriately characterized by another commentator as a "unitary approach."

Stanton, *supra* note 108, at 878 (citations omitted). Remember, however, that these criticisms have less force if more than one state's law provides the substantive basis for the claim, because in this subset of cases the statute of limitations results directly, not derivatively, from a choice-of-law analysis. *See* UNIFORM CONFLICT OF LAWS-LIMITATIONS ACT § 2(a)(2) (UNIF. LAW COMM'N 1982); OR. REV. STAT. § 12.430(1)(b) (2017).

So far, then, the courts have reached correct results with flawed analysis. The third case, which returns us to the Oregon Court of Appeals, is a significant improvement. In *Spirit Partners v. Stoel Rives*,¹³³ plaintiff had invested in a company that later went bankrupt. It sued the Oregon law firm that handled the initial public offering for that company, claiming fraud, negligent misrepresentation, and breach of fiduciary duties.¹³⁴ The question was whether Oregon's statute of limitations would apply, or whether the longer statutes of California or New York would apply.¹³⁵ Judge Ortega began the court's analysis by stating, "[t]o determine which statute of limitations applies, we apply Oregon's conflict-of-law principles to determine which state's law is the basis of plaintiff's claims."¹³⁶ The court used a Second Restatement analysis to determine which state's or states' law provided the substantive basis for the claims (the court analyzed the claims as tort claims, and the case was decided before the choice-of-law statute for torts was enacted).¹³⁷ Note, as well, that Judge Ortega's opinion relied on the fraud analysis outlined in § 148 of the Second Restatement as well as the general analysis of § 145.¹³⁸ After deciding that Oregon substantive law applied to and provided the substantive basis for the claims, the court affirmed dismissal of the claims as time-barred under the Oregon statute of limitations.¹³⁹ *Spirit Partners* provides a valuable example of how to apply the UCLLA correctly (whether or not one endorses the UCLLA approach).

The next two cases present nearly identical issues. Both *Avery v. First Resolution Management Corp.*¹⁴⁰ and *CACV of Colorado, LLC v. Stevens*¹⁴¹ involved Oregon residents who obtained credit cards, accumulated debt, and defaulted. The credit card agreements in both cases included choice-of-law clauses, and the parties accepted the validity of those provisions and agreed that the chosen law provided the substantive basis for the claim.¹⁴² Both courts applied ORS 12.430 in a cursory fashion.¹⁴³ In *Avery*, the Ninth Circuit stated that "because New Hampshire law covers First Resolution's claim against Avery, New Hampshire law also controls the applicable statute of limitations, as well as tolling and accrual provisions."¹⁴⁴ And in

¹³³ *Spirit Partners v. Stoel Rives*, 157 P.3d 1194, 1196 (Or. Ct. App. 2007).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1198.

¹³⁷ *Id.* at 1200.

¹³⁸ *Id.* at 1200–01.

¹³⁹ *Id.* at 1201.

¹⁴⁰ *Avery v. First Resolution Mgmt. Corp.*, 568 F.3d 1018 (9th Cir. 2009).

¹⁴¹ *CACV of Colorado, LLC v. Stevens*, 274 P.3d 859, 861 (Or. Ct. App. 2012).

¹⁴² *Id.*; *Avery*, 568 F.3d at 1020.

¹⁴³ *CACV*, 273 P.3d at 863; *Avery*, 568 F.3d at 1021.

¹⁴⁴ *Avery*, 568 F.3d at 1021–22. The premise for the Ninth Circuit's entire analysis, set out below, was flawed:

Under Oregon law, applied by the district court sitting in diversity, if a claim is based upon

CACV, the court said, “Delaware’s substantive law applies to plaintiff’s claim, and, accordingly, pursuant to ORS 12.430 and ORS 12.440, Delaware’s limitations period . . . applies to the claim.”¹⁴⁵

For both courts, the choice-of-law clause determined the law that provided the substantive basis for the claim. Pursuant to the UCLLA, the applicable statute of limitations followed *a fortiori*. At first glance, this simple analysis suggests a formalist approach to the substantive-basis question. But such a conclusion would be premature. The parties in both cases accepted the validity of the choice-of-law clauses, and the courts’ straightforward approach presumably rests on that concession. Put differently, neither court had to interpret a choice-of-law clause or address the validity of such a clause. Both courts’ analyses likely would have been different had the clauses themselves been at issue. In addition, the *CACV* court went out of its way to note that the case arose before the effective date of the amended choice-of-law contracts statutes.¹⁴⁶ The choice-of-law statutes for contracts address the applicability of choice-of-law clauses,¹⁴⁷ and the 2011 amendments to those statutes limit the financial-institutions exception that had made the statutes inapplicable in *CACV*.¹⁴⁸

Both cases also included a final twist. The applicable statute of limitations was effectively infinite, because Delaware and New Hampshire each have provisions that toll the statute if the debtor cannot be served in the state. Both courts held that an infinite statute of limitations “imposes an unfair burden” on debtors, with the result that Oregon’s six-year statute of limitations applied instead, and the conclusion that

the law of another state, the limitations period of that state applies, as do the laws of that state governing tolling and accrual. . . . Accordingly, because New Hampshire law covers First Resolution’s claim against Avery, New Hampshire law also controls the applicable statute of limitations, as well as tolling and accrual provisions.

Id. (citations omitted). The court’s references to diversity jurisdiction and First Resolution’s claim are confusing. Avery, the plaintiff, brought a Fair Debt Collection Practices Act claim against First Resolution and the attorneys who attempted to collect the debt. Thus, the court had federal question jurisdiction over the case. First Resolution brought a state-law counterclaim to collect the debt, over which the court would have had supplemental jurisdiction, not diversity jurisdiction. (The debt was less than \$3000. *See id.* at 1020.) Moreover, the district court declined to exercise jurisdiction over that claim, and neither the district court nor the Ninth Circuit ever addressed the merits of that claim. *See id.* at 1021. The statute of limitations was at issue because plaintiff’s FDCPA claim turned on whether the underlying debt was time-barred, and that issue was controlled by state law.

¹⁴⁵ *CACV*, 274 P.3d at 863. Both courts also discussed ORS 12.440’s tolling provisions and made clear that the text of ORS 12.440 mandates the tolling rules of the state that also supplies the statute of limitations. *See Avery*, 568 F.3d at 1022–23; *CACV*, 273 P.3d at 863 n.8 (quoting UCLLA § 3 Comment).

¹⁴⁶ *See CACV*, 273 P.3d at 863 n.6.

¹⁴⁷ *See OR. REV. STAT.* § 15.350 (2017).

¹⁴⁸ *See CACV*, 273 P.3d at 863 n.6; *OR. REV. STAT.* § 15.305 (2017).

neither debt was time-barred.¹⁴⁹

The last case is the decision by the Oregon Court of Appeals in *Portfolio Recovery Associates v. Sanders*,¹⁵⁰ which received extensive discussion in Part II and is now before the Oregon Supreme Court. The basic facts are similar to those of *Avery* and *CACV*: a person defaulted on credit card debt, and a third party acquired the debt and tried to collect on it.¹⁵¹ This time, however, the credit card agreement provided, first, that Virginia law applied to interpretation issues and, second, that “the statute of limitations [period] . . . will be the longer period provided by Virginia or the jurisdiction where you live.”¹⁵² The debtor lived in Oregon when the case was litigated, but apparently lived in Washington when he defaulted, and claimed to have lived in Utah when he obtained the credit card.¹⁵³ The credit card company was chartered in Virginia, while Portfolio (the purchaser of the debt) appeared also to be from Virginia.¹⁵⁴

In *Avery* and *CACV*, the plaintiffs had two good statute-of-limitations options. First, the plaintiffs, neither of whom were parties to the original credit card agreements, could insist on the contractual choice of law, which arguably led to an infinite statute of limitations. Second, if the chosen law proved to be unfair under the UCLLA, the plaintiffs could fall back to forum (Oregon) law, in which case the actions were still timely. By contrast, in *Portfolio*, the choice of law in the credit card agreement might have led to a statute of limitations (Utah’s four-year statute or Virginia’s three-year statute) that would bar the claim. Thus, the plaintiff never wanted to invoke the choice-of-law clause in the underlying contract and always wanted to argue for Oregon’s six-year statute. Hence, the plaintiff argued that its claim was not based on the underlying credit card agreement but instead was an action on a new agreement—an account stated—that did not incorporate the terms of the old agreement.¹⁵⁵

I’ve already criticized the *Portfolio* court’s choice-of-law analysis under the new statutes.¹⁵⁶ For purposes of the UCLLA, the court correctly understood that it should use Oregon’s choice-of-law methodology. But the rest of its analysis is

¹⁴⁹ *Avery*, 568 F.3d at 1023; *CACV*, 274 P.3d at 868–69; see also *Unifund CCR Partners v. DeBoer*, 277 P.3d 562, 563 (Or. Ct. App. 2012) (relying on *CACV*). Professor Leflar referred specifically to tolling statutes of this kind when explaining the application of the UCLLA’s fairness provision. See Leflar, *supra* note 102, at 479–80.

¹⁵⁰ *Portfolio Recovery Assocs., LLC v. Sanders*, 425 P.3d 455, 455 (Or. Ct. App. 2018).

¹⁵¹ *Id.* at 458.

¹⁵² *Id.* at 460.

¹⁵³ *Id.* at 458.

¹⁵⁴ See *supra* note 31 and accompanying text.

¹⁵⁵ See *Portfolio*, 425 P.3d at 460; see also *supra* notes 30–22 and accompanying text.

¹⁵⁶ See *supra* notes 28–41 and accompanying text.

flawed, because the court never determined which state's law provided the substantive basis for the claim, even though that is the question the UCLLA requires a court to answer. Instead, the court analyzed Oregon and Virginia's interests in having their statutes of limitations apply.¹⁵⁷ Thus, the *Portfolio* court's analysis provides a more concentrated example of the error that Judge Rossman made in his *Cropp* dissent.¹⁵⁸ Again, the UCLLA—adopted by Oregon as ORS 12.430—links the statute of limitations to the law of the state on which the claim is “substantively based,” unless the claim is based on the law of more than one state.¹⁵⁹ Thus, the only question for the court in *Portfolio* was the substantive-basis question, and the interests of Oregon and Virginia in applying their statutes of limitations were irrelevant.

The UCLLA, as adopted by Oregon, has several problematic features. First, when applied properly, it incorporates all of the flaws, difficulties, or confusions of whatever choice-of-law analysis a state uses, as *Portfolio* makes plain. Second, the difference in language between the “one other state” and “more than one state” clauses of UCLLA § 2(a) (codified in Oregon as ORS 12.430(1)) can confuse courts into thinking that a formalist analysis applies to the substantive-basis question if only one other state is involved—as evidenced by the analysis of the *Cropp* majority.¹⁶⁰ Third, courts frequently overlook the strong link that the statute forges between the law that provides the substantive basis for the claim and the law that provides the statute of limitations.

This third problem is understandable, because courts easily—and quite properly, according to some commentators¹⁶¹—see the statute-of-limitations issue as necessarily separate from the claim itself and subject to a distinct choice-of-law analysis. The UCLLA rejects this view for three reasons. The first two are general concerns about predictability and ensuring that forum states do not privilege their interests over those of other states.¹⁶² The third is a substantive assertion:

It would have been possible to treat limitations as a completely separate issue, to be decided on its own choice of law merits regardless of how other conflicts questions in the case are decided. This result would be wrong because the limitations issue in any given case exists and has meaning only as it relates to

¹⁵⁷ See *Portfolio*, 425 P.3d at 461–62.

¹⁵⁸ See *supra* notes 126–127 and accompanying text.

¹⁵⁹ See *supra* note 109 and accompanying text. The *Portfolio* court also did not consider whether the case presented an “all other claims” situation to which Oregon law automatically would apply. See OR. REV. STAT. § 12.430 (2017); *supra* note 123 and accompanying text (noting the *Cropp* court's failure to ask this question); see also *supra* note 108 (criticizing this aspect of the statute).

¹⁶⁰ See *supra* notes 112–115 and accompanying text.

¹⁶¹ See Weinberg, *supra* note 103, at 703.

¹⁶² See Leflar, *supra* note 102, at 472–74.

the other issues in that case.¹⁶³

A strong inference exists that, by adopting the UCLLA, the Oregon legislature also adopted this view. If that inference holds, then judicial opinions that stray from this view undermine the purposes of Oregon statutory law.¹⁶⁴

In sum, properly applied, the UCLLA introduces a measure of predictability into the relationship between statutes of limitations and choice of law. Yet the Oregon experience demonstrates that the UCLLA's method risks confusing courts that favor a thoroughgoing combination of *dépeçage* and interest (or policy) analysis. If Oregon courts wish to follow the statute, then they must be willing (1) to accept its focus on the law that provides the substantive basis for the claim, as well as the strong link between that law and applicable statutes of limitations, and (2) to forgo analysis of the interests or policies relating to the statutes of limitations themselves. Here, too, *Portfolio* provides the Supreme Court with the opportunity to provide greater clarity about how the UCLLA ought to operate.

IV. CONCLUSION

For decades, Oregon judges were full participants in the development of an open-ended common-law approach to choice of law. The Oregon legislature put an end to that approach when it passed the choice-of-law statutes for contracts and for torts and other non-contractual claims. The legislative experiment has its own flaws, and many judges appear not to have welcomed this intrusion into an area of law that had always been the province of the courts. Like most people, moreover, judges are path-dependent; they had already learned how to do choice-of-law, and the new statutes required them to think differently. Doubt, confusion, and even some resistance were inevitable. Be that as it may, the choice-of-law statutes, along with the UCLLA, are the positive law of Oregon, and at least some judges have started coming to grips with this new statutory approach to choice of law. This Essay points out and seeks to clear away some of the obstacles to that process. Much work remains to be done, however, if Oregon's courts are to be faithful to the text and purposes of the new statutes. Perhaps that work will begin in earnest when the Oregon Supreme Court decides *Portfolio*.

¹⁶³ *Id.* at 475–76.

¹⁶⁴ *Cf. supra* note 42–43 and accompanying text (discussing the demise in Oregon of the adage that statutes in derogation of the common law must be strictly construed).