# "Arbitrary and Fortuitous"? The Revival of Territorialism in American Choice of Law

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## I. INTRODUCTION

Most Americans probably take it for granted that the United States is a collection of territorially defined states.[1] They would be surprised to hear the opinion of certain legal academics—that when deciding which state's law applied, it shouldn't matter where the plaintiff was injured or where the contract was formed, because state boundaries are "arbitrary and fortuitous."[2] But this seems to be the opinion of a number of American Conflict of Laws professors,[3] who have spread this idea to American judges over the last several decades.[4] The time is ripe for the revival of an important concept in American choice of law: territorialism.

In the academy, territorialism has been *passé* since about the middle of the last century.[5] That was when the "choice of law revolution" swept away the old-fashioned ways of doing things, embodied in the *First Restatement of Conflict of Laws*.[6] This housekeeping created space for modern approaches to choice of law.[7] The theoretical vacuum left behind by the rejection of the *First Restatement* was quickly filled by a collection of related approaches that might collectively be called "policy analysis."

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1. Although the Constitution does not directly address the choice of law issues being discussed here, it does offer some support to the views of the person-on-the-street: the existing boundaries of the fifty states of the United States are constitutionally protected in Article IV, § 3, which provides,

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

U.S. CONST. art. IV, § 3, cl. 1. The single best treatment of the importance of territorialism in choice of law is undoubtedly Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

2. *See infra* Part IV.

3. *See, e.g.*, Robert A. Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394, 410 (1971) ("My fundamental quarrel with territorialism . . . is that it necessarily attaches significance to the existence of a state line."). We acknowledge that not all policy analysts reject any and all reliance on territorial factors. But even when modern theories do consider territorial connections, these are often discounted or secondary to other factors. *See infra* Part II.

4. *See infra* Part IV.

5. The trend towards adoption of modern theories of choice of law is well documented in the annual surveys. *See* John F. Coyle, William S. Dodge & Aaron D. Simowitz, *Choice of Law in the American Courts in 2021: Thirty-Fifth Annual Survey*, 70 AM. J. COMPAR. L. 318, 321 (2022).

6. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF L. § 132 (AM. L. INST. 1934). For further discussion of the revolution and its targets, see *infra* Section III.A.

7. *See generally* Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years after Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847, 1859 (discussing the effects of the choice of law revolution and its progeny).

Since the middle of the twentieth century, this choice of law revolution reoriented the entire field.

The cloud that still hangs over territorialism is a direct consequence of its earlier close association with the *First Restatement*. The old *First Restatement* system was the brainchild of Harvard Professor Joseph Beale, an avowed territorialist. The values that influenced him, and that drew his critics' ire, included such virtues as honoring sister-state sovereignty, preventing forum shopping, and ensuring predictability.[8] The general rejection of Bealeanism was treated as a rejection of all of the values that Beale had once promoted. With Beale discredited, territorialism became a collateral casualty. It is now conventional wisdom that territorialism is long gone, replaced with policy-focused approaches to choice of law.[9] We argue that, to the contrary, territorialism is not dead; it's just gone dormant.[10] We show that, while territorialism was closely associated with Beale and his *First Restatement*, the two are not the same. And many of the objections that were leveled against Bealeanism have nothing to say about the merits of territorialism generally.

Having cleared the field of these criticisms, there is one that still remains. It arises time and again in the literature and in the cases: it is the complaint that territorialism is "arbitrary and fortuitous."[11] We give this claim the attention it deserves and demonstrate why complaints of this sort are not the fatal flaws that the critics of territorialism make them out to be.

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8. The best general overview of Beale's philosophy is Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1194–205 (1987) (defining "vestedness" and "vested rights theory" and defending a particular variant of this theory).

9. *See, e.g.*, RESTATEMENT (THIRD) OF CONFLICT OF L. ch. 5, intro. note (AM. L. INST., Tentative Draft No. 3, 2022) ("Modern choice-of-law theory discarded the territorialist premise and asked the questions that territorialism had avoided.").

10. A small but vocal group of scholars have labeled themselves "neo-territorialists." This label appears to have originated with Professor Aaron Twerski, whose writing in the 1970s is a prominent exception to the generalizations in this Article about the general disapproval of territorialism by some conflict of laws scholars. *See, e.g.*, Aaron D. Twerski & Renee G. Mayer, *Multistate Choice-of-Law Rules: Continuing the Colloquy with Professors Trautman and Sedler*, 7 HOFSTRA L. REV. 843, 858 (1979). Professors David Cavers and Willis L. M. Reese also fall within this select group. *See* DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 139–80 (1965); David F. Cavers, Cipolla *and Conflicts Justice*, 9 DUQ. L. REV. 360, 362 (1971); Willis L. M. Reese, *Choice of Law Rules or Approach*, 57 CORNELL L. REV. 315, 328 (1972). Many of these authors make compelling normative arguments in favor of territorialism. Rather than repeating these arguments, this Article focuses on territorialism's relationship with the prevailing modern policy theories.

11. *See infra* Part IV.

With this complaint addressed, we take a closer look at the interplay between policy analysis and territorialism. Policy analysts consistently undervalue territorial connections. We demonstrate that, far from being a secondary factor, territorial connections seep into policy analysis in ways that even policy analysts seem unaware of. Building on this insight, we explore some of territorialism's distinctive features to carve out the necessary theoretical space for its revival. A new American territorialism could avoid the traps that lured Professor Beale, while preserving an obvious truth about the American federal system: State borders matter. They matter more frequently and more profoundly than policy analysts care to admit.

Territorialism need not be as foolish and formalistic as Beale imagined it in the *First Restatement*. But a new territorialist initiative will need an answer to the complaint that "we tried that once and it didn't work." The first objective of this Article is to provide that answer. The second objective is to explore the similarities and differences between territorialism and policy analysis. How would things be different if territorialism was rescued from its current state of intellectual banishment?

Some choice of law experts may wonder if full-length treatment of this topic is really necessary. There is already substantial literature on the relative merits of traditional (that is, territorial) versus modern (that is, policy-based) choice of law theories. And the excesses of the choice of law revolution are no longer fashionable; few current commentators advance the claim that state borders should be completely disregarded. If nothing else, laws with an intended deterrent effect are treated as "conduct-regulating" and subject to territorially defined choice of law rules.[12] Why

12. *See generally* John T. Cross, *The Conduct-Regulating Exception in Modern United States Choice-of-Law*, 36 CREIGHTON L. REV. 425, 443–58 (2003) (discussing the justification behind the conduct-regulating exception and the proper scope of this exception). The *Draft Third Restatement* also observes the distinction between personal and conduct-regulating laws; the latter is governed in accordance with territorialist principles. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.01 (AM. L. INST., Tentative Draft No. 3, 2022); RESTATEMENT (THIRD) OF CONFLICT OF L. § 6.06 (AM. L. INST., Tentative Draft No. 4, 2023) (discussing the rule for "conduct regulation"). Policy analysts will often emphasize that their theory can accommodate territorial concerns through conduct-regulating rules. *See, e.g.*, Jeffrey M. Shaman, *The Choice of Law Process: Territorialism and Functionalism*, 22 WM. & MARY L. REV. 227, 234 (1980) ("The interest analysis easily accommodates those laws that should be acknowledged as territorially based because their purpose is to regulate occurrences within a certain area." (citing Sedler, *supra* note 3, at 394)). But for a criticism of the notion of conduct-regulating rules, and of the ability to distinguish such rules from so-called loss-allocating rules that attach significance to the parties' domicile, see Wendy C. Perdue, *A Reexamination of the Distinction Between "Loss-Allocating" and "Conduct-Regulating Rules*," 60 LA. L. REV. 1251, 1253 (2000); Joseph W. Singer, *Choice of Law Rules*, 50 CUMB. L. REV. 347, 348 (2020).

reopen old debates with new arguments when the issue has more or less now come to closure?

Despite the concessions made to territorialism by some more moderate policy analysts, territorial connections continue to be treated as inherently suspect. The cases and literature suggest that the relevance of domiciliary-connecting factors seized upon by policy analysts—those connections that tie a party to her home—is self-evident. The claim that "Colorado has an interest in applying its law because the plaintiff is from Colorado" is generally regarded as meaningful and well-grounded. But the more extreme policy analysts have convinced the world that to say "Ohio has an interest in applying its law because the injury occurred in Ohio" is not meaningful in the same way. Such a claim is suspect; it does not rest on a secure foundation because "the location of state boundaries is arbitrary and fortuitous." As we endeavor to show, territorial considerations simply *cannot* be given their due under the traditional understanding of policy analysis; the theoretical framework on which policy analysis is built is, by its very design, constrained in its ability to accommodate proper consideration of territorial connections.[13]

We target the fundamentalist core of policy analysis: the rejection of any reliance on the location of events. It is certainly true that moderate policy analysts have proposed modifications to this austere theoretical framework. These modifications would allow consideration of territorialism and its underlying values: predictability, uniformity, and respect for sister-state sovereignty.[14] However, fundamentalist policy analysis remains important because of the influence it continues to have on judicial reasoning.[15] Perhaps because it simplifies decision-making, judges applying policy analysis often stick with the simplest version of the theory—a version that treats states as interested only in assisting their domiciliaries[16] and often

13. *See infra* Part VI.

14. *See infra* Part III.

15. For a discussion and analysis of the cases that have rejected reliance on territorial connections, see *infra* Part IV.

16. *See* Luke Meier, *Simplifying Choice-of-Law Interest Analysis*, 74 OKLA. L. REV. 337, 345, 348 (2022) (noting that there are "countless examples of courts" recognizing an interest in protecting/rewarding their domiciliaries and only "infrequently" recognizing an interest to punish their domiciliaries); *see also* John H. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 175 (1981) ("[W]ithout Currie's basic methodological premise—that states are interested in protecting their own residents in a way they are not interested in protecting others—interest analysis is largely impotent."); Jack L. Goldsmith III, Note, *Interest Analysis Applied to Corporations: The*

uninterested in territorial connections.[17] In the interests of moving choice of law theory forward, revisiting the fundamentalist version of policy-oriented choice of law theory is also important because it sheds light on the truly distinguishing features of today's most prominent choice of law approach. By focusing on the theoretical core of policy analysis and territorialism, we hope to shed some valuable light on the way in which these two approaches interact.

We show that a theory with a basis in domicile is no more automatically secure than a theory with a basis in territorialism. Its axioms are no more automatically persuasive than the axioms underlying territorialism. Domicile, we show, is derivative of territory; it is simply not possible to discuss the relevance of domicile without also assigning relevance to state borders. Courts and commentators should be no less wary of conclusory statements about domicile than they are of similar claims about territorial connections.

Our position regarding territorialism is therefore cautiously supportive. We show that nothing about the choice of law revolution justified rejecting territorial reasoning in choice of law; that there is no reason to dismiss territorialism as being "arbitrary" or "fortuitous"; and that policy analysis actually still depends heavily on territorialism. The victory that policy analysis declared over Bealean ways of thinking is now half a century old. Without denying the worth of the last century's policy insights, the time for self-congratulation about ridding ourselves of Beale's *Restatement* is over. It is time to move on.

## II. WHAT IS TERRITORIALISM?

Territorialism in choice of law—the general dominance of territory—is a familiar idea, but one that is difficult to define. Territorial approaches to choice of law rest on the assumption that for choice of law purposes it makes a difference where people, events, or things are situated. As used here, an approach is "territorial" if and to the extent that it relies on territorial or locational considerations in making choice of law decisions.[18]

Territorialist choice of law approaches—like most other choice of law approaches—typically express this commitment to location through the

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*Unprincipled Use of a Choice of Law Method*, 98 YALE L.J. 597, 600 (1989) ("Interest analysis presupposes that each sovereign intends its laws to benefit *only* its domiciliaries and not out-of-staters similarly situated.").

17. *See, e.g.*, Saloomey v. Jeppesen & Co., 707 F.2d 671, 675 (2d Cir. 1983) (finding the place of injury to be "unimportant"). We discuss the argument that territorialism is "arbitrary" and "fortuitous" further below. *See infra* Part IV.

18. By territorial we mean the state in which the event in question is located. By locational we mean the physical location of the events (e.g., by GPS, latitude and longitude, or some other measuring device).

adoption of choice of law rules.[19] A choice of law rule designates one characteristic, event, or other factor as the "trigger"—the contact that identifies the applicable law. For example, the *First Restatement* designated the place of injury as the trigger for tortious liability[20] and the place of contracting as the trigger for determining the validity of a contract.[21] What makes a choice of law approach territorial is not that a court looks to some particular trigger—that it consults the location of the plaintiff's injury rather than the location of the defendant's tortious conduct, for example. Instead, simply put, an approach is territorial if it determines the governing law based on the *location* of the trigger.[22]

Although territorialist in concept, Beale's *First Restatement* is not identical to territorialism. Territorialism encompasses a wider and more general group, of which Beale's theory is a member. Importantly, the label "territorialism" is not reserved only for those approaches that rely exclusively on territorial considerations and eschew any consideration of other, non-territorial, factors. Even Beale's *First Restatement*, "rigidly territorial" though it was,[23] did not wholly reject other factors.[24] Most choice of law approaches can be expected to incorporate both territorial

19. The *Second Restatement* and *Draft Third Restatement* similarly use choice of law rules—including presumptive choice of law rules. While the *Second Restatement* generally embodies a system of "general principles" rather than strict black-letter rules, *see* Willis L. M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 324–25 (1972), it nevertheless operates via a set of "presumptive rules" that act as the starting point in choice of law analysis, *see* Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1270 (1997) (discussing the RESTATEMENT (SECOND) OF CONFLICTS OF L. §§ 146–55, 175, 189–93, 196 (AM. L. INST. 1971)). The *Third Restatement* has more wholeheartedly endorsed a system of choice of law rules. *See, e.g.*, RESTATEMENT (THIRD) OF CONFLICT OF L. § 6 (AM. L. INST., Tentative Draft No. 4, 2023) (rules for tort cases); *id.* § 7 (rules for property cases); *id.* § 8 (rules for contract cases).

20. RESTATEMENT (FIRST) OF CONFLICT OF L. §§ 377–79 (AM. L. INST. 1934).

21. *Id.* § 332.

22. Some choice of law approaches, such as the "center of gravity" approach, do not have a single identifiable trigger. On the unique position of the center of gravity approach, see Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1159–74 (2010).

23. Charles W. Taintor II, *"Universality" in the Conflict of Laws of Contracts*, 1 LA. L. REV. 695, 726 (1939).

24. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF L. § 132 (AM. L. INST. 1934) (requiring courts to consider the law of the state of domicile to determine whether a marriage is valid); *id.* § 422(2) (designating the law of the forum to govern the enforcement of liquidated damages).

and non-territorial (e.g., domicile-based) elements; in territorial approaches, however, territorial factors dominate.[25]

Territorialism's chief rival can be termed "policy analysis." Policy analysis emphasizes the role that choice of law plays in carrying out state substantive policies. Like territorialism, policy analysis denotes a class of approaches. Brainerd Currie set out the theoretical basis for policy analysis with an anti-territorial theory that came to be known as "governmental interest analysis."[26] Policy analysis has since greatly expanded to include more moderate versions of this theory which often consider territory a secondary factor relevant to a subset of choice of law cases.[27] These more moderate spins on policy analysis include Baxter's comparative impairment approach,[28] Leflar's better law approach,[29] the *Second Restatement*'s "most significant relationship" test,[30] and the *Draft Third Restatement*'s "scope" of the law system.[31]

It is not currently fashionable to dwell on Currie's more implausible claims, such as his argument that his choice of law approach was constitutionally compelled or that the Supreme Court had already adopted portions of his theory.[32] But Currie's views on the role of territorial connections within policy analysis have had an important effect on modern theorists. Currie was clear that, in his view, "[a] legislature is not likely to append to any statute dealing with a specific problem any such rule as that the law of the place where the contract is made shall control."[33] Instead, Currie

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25. We return to the question of territorialism's distinctive features later in this Article. *See infra* Part VI. In the text above we repeat the orthodox claim that policy analysis is different from territorialism because of its use of domiciliary factors. The discussion below reveals how this sort of claim can be misleading; domicile is, in fact, derivative of territorialism.

26. *See generally* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAW 188 (1963).

27. For example, some authors maintain that territory can be taken into account in "true conflict" cases, where several states are interested in having their law applied. *See* Meier, *supra* note 16, at 343; Harold P. Southerland & Jerry J. Waxman, *Florida's Approach to Choice-of-Law Problems in Tort*, 12 FLA. ST. U. L. REV. 447, 552–58 (1984); Michael S. Finch, *Choice-of-Law Problems in Florida Courts: A Retrospective on the Restatement (Second)*, 24 STETSON L. REV. 653, 703–04 (1995). We discuss the overlap and differences between territorialism and policy analysis in greater depth below. *See infra* Parts V and VI.

28. *See* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 33 (1963).

29. *See* Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1587 (1966).

30. RESTATEMENT (SECOND) OF CONFLICTS OF L. § 6 (AM. L. INST. 1971).

31. RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.01 (AM. L. INST., Tentative Draft No. 3, 2022).

32. *See* CURRIE, *supra* note 26, at 162–63.

33. *Id.* at 116.

encouraged his readers to "face the fact that the place of making is quite irrelevant."[34] Coming from "the leader of the American choice-of-law revolution,"[35] these foundational assumptions regarding the relevance of territorial factors should not be so quickly forgotten.

Over time, policy analysis has become much more open to territorial factors. But it never revisited the basic assumptions about the importance of domiciliary factors and the shadow hanging over territorial ones.[36] Territorialism is the "exception"; domiciliary factors are the norm.[37] Policy analysts consistently downplayed territorial factors such as the place of injury and turned almost reflexively to connections between people with only cursory attention to locations.[38] This tendency was explained as necessary to the furtherance of substantive policies in the multistate context. What these theories have in common is the defining characteristic of policy analysis: that choice of law should promote the substantive values of the contending laws, and that these substantive values relate largely to personal connections.

Although the trend towards greater openness to territorial considerations is welcome, it has not cured the unwarranted general discounting of territorial connections that has become a hallmark of policy analysis. The choice of law revolution could have preserved a co-equal role for territorial factors within the confines of policy analysis—recognizing that territorial connections were equally likely to give rise to state "interests"; instead, territorialism was given secondary status.[39] We now turn to the rejection of territorialism following the choice of law revolution.

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34. *Id.* at 88.

35. Symeonides, *supra* note 7, at 1921.

36. *See, e.g.*, Arthur Taylor Von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 946 (1975) ("[T]erritorial considerations . . . are seen as otherwise relatively unimportant by a policy-based analysis.").

37. *See* Singer, *supra* note 12, at 351 (2020) ("[T]he rule: apply the law of the common domicile unless the law at the place of conduct and injury is a conduct-regulating rule."); Cross, *supra* note 12, at 425 (discussing the "exception" of conduct-regulating rules); Symeon C. Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts: An Exegesis*, 88 OR. L. REV. 963, 1007 (2009) (same). *Contra* RESTATEMENT (THIRD) OF CONFLICT OF L. § 6.06 reps. notes (AM. L. INST., Tentative Draft No. 4, 2023).

38. *See* Aaron Twerski, *On Reading Cramton, Currie & Kay—Reflections and Prophecies for the Age of Interest Analysis*, 61 CORNELL L. REV. 1045, 1052 (1976) ("Even major shifts in the geographical nexus of the fact patterns rarely upset those interests.").

39. *See infra* Part III.

## III. TERRITORIALISM AND THE CHOICE OF LAW REVOLUTION

The *First Restatement* was not America's first brush with territorialism. Joseph Beale, reporter for the *Restatement*, built on an earlier approach to choice of law largely associated with Justice Joseph Story. There remains serious debate about the precise role that Justice Story played in the way that Beale formulated his views. But there seems to be little disagreement on the extent of Justice Story's contribution in general.[40] His seminal *Commentaries on the Conflict of Laws*, first published in 1834, started with a simple premise: a state can only bind people and property within its own territory.[41] But by appealing to Dutch notions of "comity," Justice Story suggested that courts should willingly adopt choice of law rules that defer to foreign law. In his *Commentaries*, Justice Story suggested what those rules might look like; many courts listened.[42]

When the *First Restatement* fell from grace towards the middle of the last century, many assumed that it took with it all of the values that the *Restatement* had been closely associated with. Given its historic ties with the discredited *Restatement*, territorialism was treated as a dead letter by most academics writing after about 1965.[43] Beale's philosophical approach was a chief reason for the rejection of his *First Restatement*; but, territorialism is not hopelessly inseparable from other aspects of Beale's general philosophy. It should stand or fall on its own merits.

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40. *See* Michael S. Green, Erie Railroad Company v. Tompkins *in a Private International Law Context*, *in* THE COMMON LAW JURISPRUDENCE OF THE CONFLICT OF LAW 43, 51 (Sarah McKibbin & Anthony Kennedy eds., 2023).

41. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 18, 20, at 21, 22 (Melville M. Bigelow ed., 8th ed. 1883) (1834).

42. The territorial rules in Justice Story's *Commentaries* were cited frequently in choice of law disputes in the nineteenth- and early twentieth-centuries. *See, e.g.*, Nichols & Shepard Co. v. Marshall, 79 N.W. 282, 282 (Iowa 1899); First Nat'l Bank v. Doeden, 113 N.W. 81, 83 (S.D. 1907). It certainly helped that Justice Story served as an Associated Justice on the Supreme Court from 1812 to 1845 and could author opinions advancing his understanding of comity. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. 539 (1842) (Justice Story authoring the opinion of the Court).

43. *See* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2464–65 (1999); Aaron D. Twerski, *One Size Does Not Fit All: The Third Multi-Track Restatement of Conflict of Laws*, 75 IND. L.J. 667, 673 (2000).

### *A. Beale's Philosophical Approach*

The *First Restatement* is often labeled the "territorial approach."[44] And Beale was, undeniably, a territorialist.[45] It should therefore not be surprising that courts and commentators frequently conflate territorialism and the *First Restatement*. But fundamentally, the two are not the same. While all Bealeans are territorialists, not all territorialists are Bealeans. The rejection of the *First Restatement* approach to choice of law had little or nothing to say about territorialism.

#### *1. Universal Truth, Vested Rights, and General Common Law*

The *First Restatement* suffered from several related defects, any one of which was adequate to justify its demise. The pretensions to necessary truth of the Bealean vested rights theory, together with its supposed basis in general common law, made the *First Restatement* an easy target. But neither of these deficiencies is attributable to territorialism.

The first of the *First Restatement*'s vulnerabilities was an assumption that the *Restatement*'s principles captured some sort of universal truth.[46] The *First Restatement*'s rules could supposedly be derived, almost like mathematical theorems, from a small number of self-evident fundamental premises. Beale considered his first principles to be authoritative by virtue of their persuasiveness and purported to develop his more specific rules by reference to them.[47]

Beale reasoned that when a legal cause of action became complete through the occurrence of all of the necessary elements, a party's rights

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44. *See, e.g.*, Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 332 (1997); Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 467 (1985); Lea Brilmayer, *Hard Cases, Single Factor Theories, and a Second Look at the Restatement 2D of Conflicts*, 2015 U. ILL. L. REV. 1969, 1972.

45. *See* JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 4.12 (1935).

46. For an early criticism of Beale's "logical machine," see Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE. L.J. 457 (1924); Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE. L.J. 736 (1924); Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE. L.J. 468, 476–77 (1928).

47. *See* Joseph H. Beale, *The Necessity for a Study of Legal System*, 14 PROC. ASS'N AM. L. SCHS. 31, 38 (1914). For mixed commentary on Beale's approach, see Cook, *supra* note 46, at 470; H. L. McClintock, *Beale on the Conflict of Laws*, 84 U. PA. L. REV. 309, 310 (1936).

"vested" under the laws of the state where the last event took place.[48] The vested right would then exist as part of the "unwritten law" even before it was given effect; and much like personal property of the plaintiff, the right would be enforceable in any court in the United States.[49] Vestedness was an essential element in Beale's understanding of what it meant for one state to enforce the legal decisions of another. If no rights vested, there would be nothing for other judges to enforce.

There is much to be criticized in Beale's vested rights approach.[50] But vestedness is not territorialism. A choice of law approach can adopt a notion of "vestedness" while rejecting any reliance on the location of events: a right can also be said to "vest" in the state of the plaintiff's domicile, the state with the most significant connection to the case, or the state of the judge's favorite football team.[51] The reverse is also true: a territorial approach can operate perfectly well without subscribing to vested rights theory. A state may apply the law of the place of the injury but rebuff Beale's idea that, in so doing, it was enforcing any sort of metaphysical "right" that had arisen—or vested—in a foreign state.[52] In short, problems associated with vested rights tell us little about the merits of territorialism. Remaking territorialism today would provide ample opportunity to avoid the concept of vestedness altogether.

Vestedness was not the *First Restatement*'s only problem. An additional vulnerability was the *First Restatement*'s endorsement of a "general common law."[53] For Beale, the logic of conflict of laws principles stemmed from

48. *See, e.g.*, Michael S. Green, *The Return of the Unprovided-for Case*, 51 GA. L. REV. 763, 766 n.10 (2017) ("To Beale, the fact that the *last* event necessary to create the legal right at issue occurred within Mississippi's borders made it self-evident that Mississippi, and it alone, has lawmaking power.").

49. *See* Adam J. MacLeod, *Of Brutal Murder and Transcendental Sovereignty: The Meaning of Vested Private Rights*, 41 HARV. J.L. & PUB. POL'Y 253, 287–88 (2018).

50. *See* Lawrence K. Griffith, Note, *Conflict of Laws—The Supreme Court Deals Death Blow to "Vested Rights" Doctrine*, 57 TUL. L. REV. 178, 180 n.14 (1982); CURRIE, *supra* note 26, at 6; Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 21 CANADIAN BAR REV. 249, 254 (1943).

51. *See* Dane, *supra* note 8, at 1210 ("[A] choice of law rule, in order to be consistent with vestedness, need not invoke the notion of place at all."); Frederick J. De Sloovère, *On Looking into Mr. Beale's Conflict of Laws*, 13 N.Y.U. L.Q. REV. 333, 346 (1936).

52. Justice Story's *Commentaries* is one prominent example of such an approach. *See* SYMEON C. SYMEONIDES, CHOICE OF LAW IN PRACTICE: A TWENTY-YEAR REPORT FROM THE TRENCHES, at xv–xviii (2020) (contrasting Justice Story's comity-based approach with Beale's vested rights theory).

53. *See* Mark D. Rosen, *Choice-of-Law as Non-Constitutional Federal Law*, 99 MINN. L. REV. 1017, 1046 (2015) ("Beale's treatise, as well as his efforts in the American Law Institute that culminated in the Restatement of Conflicts, aimed at developing robust 'common elements'—a robust general common law—that he expected would be uniform for all common law jurisdictions.").

a "common law" that was "accepted by all . . . common-law jurisdictions" but which was "the particular and peculiar law of none."[54] The *First Restatement*, with Beale at the helm, purported to map the "general common law" of conflicts.[55]

But Beale's endorsement of a general common law was dealt a painful blow when the Supreme Court handed down *Erie Railroad Co v. Tompkins* and declared that "[t]here is no federal general common law."[56] While Beale did not consider conflict of laws principles to be *federal* common law,[57] he did consider conflicts principles to be composed of largely uniform "common elements" across the states.[58] Because the Supreme Court found that choice of law rules formed part of state substantive law[59]—and declined to endorse Beale's "common elements"—choice of law approaches were destined to become far more heterogeneous than the *First Restatement* had anticipated.[60] The *First Restatement*'s assumption about the convergence of the various bodies of state common law was symptomatic of an outmoded way of thinking.[61]

It is perfectly possible, however, to reject the Bealean general common law approach without also attacking territorialism. A state can adopt a territorial approach to choice of law as part of its substantive law, even if its sister states decline to do the same; uniformity across states may be desirable, but it is not a necessary component of a territorial approach. Beale's mistaken reliance on pre-*Erie* thinking can be jettisoned without much difficulty—and, in particular, without compromising one's views about territorialism.

### *2. The Rigidity of Rules*

These two objections—to the concept of vestedness and the notion of a general common law—are accompanied by a third: the rigidity of the *First*

54. BEALE, *supra* note 45, § 4.1, at 27.
55. *See* RESTATEMENT (FIRST) OF CONFLICT OF L., at viii (AM. L. INST. 1934).
56. 304 U.S. 64, 78 (1938).
57. BEALE, *supra* note 45, § 3.5, at 25–26.
58. *Id.* §§ 1.12, 2.3.
59. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).
60. Rosen, *supra* note 53.
61. Lea Brilmayer & Charles Seidell, *Jurisdictional Realism: Where Modern Theories of Choice of Law Went Wrong, and What Can Be Done to Fix Them*, 86 U. CHI. L. REV. 2031, 2042 (2019).

*Restatement*'s rule-based methodology.[62] The *First Restatement* neatly distilled complex multistate cases into a set of self-contained rules. Judges and practitioners, it promised, need only identify and apply the correct rule to make all of their choice of law problems go away. In exchange for this promise of simplicity and uniformity, the *Restatement* demanded strict adherence: its rules were close to absolute, and judicial discretion was too horrible a prospect even to consider.[63]

But strict rules sometimes yield unpleasant surprises. From the very start of the choice of law revolution, policy analysts attacked the *Restatement*'s black letter rules as "facile syllogisms"—obscuring true complexity with a one-size-fits-all approach to choice of law.[64] Brainerd Currie, the most prominent of the policy analysts, depicted traditional judges as chained to the *Restatement* rules, no matter how foolish the results.[65] Invariably antagonistic to rules, Currie proudly described his own method—governmental interest analysis—as enthusiastically ad hoc, and he remained true to this principle throughout his career.[66]

We can illustrate the problems created by the *First Restatement*'s rigidity with an example. In *Hataway v. McKinley*, the Tennessee Supreme Court decided to jettison the *First Restatement*'s *lex loci delicti* ("place of wrong") rule for choice of law in tort cases.[67] The decedent, Grady Hataway, had been enrolled in a scuba class taught by the defendant, Robert McKinley, at Memphis State University; both were long-time Tennessee residents.[68] The choice of law issue was whether to use the Arkansas comparative negligence rule or the Tennessee contributory negligence standard of recovery for wrongful death in a scuba diving accident in an

62. *See* Bruce Posnak, *Choice of Law: Interest Analysis and Its "New Crits*,*"* 36 AM. J. COMPAR. L. 681, 682 (1988); Patricia A. Carteaux, Comment, *Conflicts of Law and Successions: Comprehensive Interest Analysis as a Viable Alternative to the Traditional Approach*, 59 TUL. L. REV. 389, 394 (1984).

63. The *First Restatement* envisaged only a very limited "public policy" carve-out. *See* RESTATEMENT (FIRST) OF CONFLICT OF L. § 612 (AM. L. INST. 1934). For criticism of this carve-out, see John B. Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647 (1985); Holly Sprague, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 CALIF. L. REV. 1447 (1986).

64. *See* Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 259 (1958); *see also* Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 215 (1958) [hereinafter Currie, *Survival of Actions*] (analogizing *First Restatement* decision-making to an automated machine).

65. CURRIE, *supra* note 26, at 6.

66. *Id.* at 188–89.

67. 830 S.W.2d 53, 54 (Tenn. 1992).

68. *Id.*

Arkansas rock quarry.[69] The argument for application of Arkansas law under the principle of *lex loci delictus* was rejected and Tennessee law was applied.[70]

But for one thing, this holding could be treated as a decisive rejection of the place of injury rule.[71] The one difficulty with interpreting *Hataway* as a rejection of territorialism is what the Court chose as the replacement for the *lex loci delicti* rule. As replacement for the territorialist place of injury rule, the Court selected . . . *the Second Restatement place of injury rule*.[72]

In choosing to adopt the *Second Restatement*, the *Hataway* court confirmed that the law of the place of injury was presumptively the correct law to apply.[73] The court also recognized that the place of injury would ordinarily have the greatest interest in having its law applied.[74] This reasoning doesn't sound like much of a resounding rejection of the place of injury rule. And indeed, Tennessee courts have continued to assign substantial importance to the place of injury. Judges still come to the conclusion that the law of the place of injury should govern and still detail the interests that a state has by virtue of being the place where the injury occurred.[75]

The Tennessee Supreme Court seems in effect to have first rejected the place of injury rule, but then immediately enacted another version of it.

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69. Under Tennessee law, recovery would have been completely barred if the plaintiff was contributorily negligent; under Arkansas law, recovery would only be barred if the plaintiff's fault was equal to or greater than the defendant's fault. *Id.* at 55.

70. *Id.* at 54.

71. *See* Harold P. Southerland, *Conflict of Laws in Florida: The Desirability of Extending the Second Restatement Approach to Cases in Contract*, 21 NOVA L. REV. 777, 809 (1997); *see also* Kermit Roosevelt III, *Certainty Versus Flexibility in the Conflict of Laws*, *in* PRIVATE INTERNATIONAL LAW: CONTEMPORARY CHALLENGES AND CONTINUING RELEVANCE 6, 11 (Franco Ferrari & Diego P. Fernández Arroyo eds., 2019) ("Territoriality is considered to be rule based and certain, with the associated virtues and vices . . . .").

72. *Hataway*, 830 S.W.2d at 59.

73. *Id.*; *see also* David E. Seidelson, *Interest Analysis or the Restatement Second of Conflicts: Which Is the Preferable Approach to Resolving Choice-of-Law Problems?*, 27 DUQ. L. REV. 73, 81 (1988) ("[T]he [Second] Restatement . . . seems to manifest a territorial bias that often points toward *lex loci delicti*.").

74. *Hataway*, 830 S.W.2d at 59.

75. *See, e.g.*, *In re* Skelaxin (Metaxalone) Antitrust Litig., 299 F.R.D. 555, 586 (E.D. Tenn. 2014); McClendon v. N.C. Mut. Life Ins. Co., 406 F. Supp. 3d 677, 683 (M.D. Tenn. 2019). Indeed, *Hataway* has been cited for the proposition that "Tennessee applies the law of the place of the tort, or *lex loci delicti*." *In re* Conagra Peanut Butter Prods. Liab. Litig., 251 F.R.D. 689, 695 (N.D. Ga. 2008) (citing *Hataway*, 830 S.W.2d at 58).

The explanation is this. What the Court was rejecting was not the *place of injury* rule, but the place of injury *rule*. The true objection to the pre-existing Tennessee *lex loci delictus* principle was not so much the content of the place of injury rule as the rule's logical form. What the Court was rejecting was not territorialism, but rather the unique, almost talismanic, status that the place of injury was given under the *First Restatement*.[76]

### *B. Counterexamples and Exceptions: The Modern Strategy*

In contemporary domestic (substantive) law, exceptions to rules are created when anomalies make them necessary. The same is true in the modern approaches to choice of law. The modern strategy is to expressly recognize the need for flexibility—to welcome it in and make express provision for it. The *Second* and *Third Restatements* both adopt this strategy. There is no reason why a new territorialist theory could not emulate this approach.

The drafters of the *Second Restatement* appreciated the unhappy position that Beale's inflexible rules had forced on judges. To avoid replicating the unforgiving features of its predecessor,[77] the *Second Restatement* provided that the state chosen by the rules should yield if another state has a more "significant relationship."[78] The most significant relationship test is fairly open-ended; the drafters designed the *Second Restatement* to leave judges with plenty of freedom to make that call.[79] In other words, the drafters of the new *Restatement* deliberately allowed courts the flexibility to make their own case-by-case ad hoc exceptions by treating the *Restatement* rules as only rebuttable presumptions.

Other modern theories employ similar devices to deal with problems of imprecision inherent to general rules. Like the *Second Restatement* before it, the *Draft Third Restatement* adopts a hybrid methodology that combines black letter rules with general principles.[80] The content of the rules has changed somewhat, and the theoretical justifications have moved

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76. Rules are not a uniquely territorial tool. Policy analysis can also take the form of rules—as in the *Draft Third Restatement*. As we explore below, a new territorialist system could introduce the exceptions and judicial discretion necessary to avoid anomalous outcomes that a rigid system of rules will sometimes produce. *See infra* Section IV.B.

77. William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645, 662 (1983).

78. For tort cases, see RESTATEMENT (SECOND) OF CONFLICTS OF L. § 145 (AM. L. INST. 1971) (referencing the factors found in section 6).

79. *See id.* §§ 146 (personal injury), 157 (standard of care), 178 (damages).

80. *See* RESTATEMENT (THIRD) OF CONFLICTS OF L. § 5.01 (AM. L. INST., Tentative Draft No. 3, 2022); *id.* § 5.02(a); *see also* § 5.02 cmt. c. (distinguishing specifications of scope from determinations of priority).

on.[81] But the *Third Restatement* equips the judge with several different devices to avoid bad decisions.[82] Perhaps most clearly, the *Third Restatement* explicitly carves out an exception designed to deal with potentially "arbitrary result[s]": where black letter rules demand a "manifestly unreasonable" result, the judge may apply a more appropriate law.[83]

Considering its pretensions to universal validity, it is not surprising that the *First Restatement* did not invite judges to tinker around with the black letter rules. Faced with a case (such as *Hataway*) where the *First Restatement* required a counterintuitive result, the court's options were to (1) continue to adhere to the rule, regardless of how uncomfortable the conclusion; (2) to manipulate the rules to reach a different result; or (3) to renounce the *First Restatement* altogether in preference for a different approach. For quite some time, judges had opted for the second option. Rather than blindly adhering to even objectionable applications of the *First Restatement*'s black letter rules, courts employed a small number of devices to avoid application of the rules.[84] Well-known examples of these so-called "escape devices" include a public policy carve-out, the recharacterization of the nature of the case (from a contract dispute to a tort dispute, for example), the reimagination of a substantive issue as "procedural," and the doctrine of *renvoi*.[85]

However, as the use of these overrides became ever more brazen, they became increasingly difficult to square with a theory that pronounced its choice of law results a logical necessity.[86] Uncomfortable with Option

81. The *Third Restatement*'s rules are supposed to reflect the likely "scope" of potentially relevant state laws (instead of "policies" and "interests"). *See id.* § 5.01 cmt. c. For a discussion of the notion of "scope" and its connection to the theoretical underpinnings of policy analysis, see *infra* Part VI.

82. RESTATEMENT (THIRD) OF CONFLICTS OF L. §§ 5.03 (AM. L. INST., Tentative Draft No. 3, 2022) (manifestly more appropriate law), 5.04 (public policy), 5.05 (characterization and interpretation), 5.06 (significance of the choice-of-law rules of another state: renvoi).

83. *See id.* § 5.03 cmt. c. We return to the concern of arbitrariness below. *See* discussion *infra* Section IV.A.

84. *See* LEA BRILMAYER, JACK GOLDSMITH & ERIN O'HARA O'CONNOR, CONFLICT OF LAWS: CASES AND MATERIAL 175–78 (7th ed. 2015).

85. For a summary and analysis of these judicial escape devices, see Harold P. Southerland & Jerry J. Waxman, *Florida's Approach to Choice-of-Law Problems in Tort*, 12 FLA. ST. U. L. REV. 447, 458–63 (1984).

86. Critics of the *Restatement* held up these devices as evidence of its unworkability. *See generally* Roosevelt III, *supra* note 43, at 2472. Even those endorsing the traditional approach recognized the shortcomings of the haphazard collection of judicial exceptions. *See, e.g.*, Paul v. Nat'l Life, 352 S.E.2d 550, 556 (W. Va. 1986) (retaining the traditional

(2), and unwilling to accept the result demanded by Option (1), judges were driven into the arms of Option (3). As the accumulated weight of the counterexamples became intolerable, the *First Restatement*'s former friends abandoned it one by one.[87]

If the half-dozen judicially-created or expanded "escape devices" to the *First Restatement* teach anything, it is that judges will find a way to avoid anomalous results—whether the *Restatement* authorizes exceptions or not. There is no reason that a common law court carrying out a territorialist approach should not enjoy equal flexibility to make comparable exceptions to defeat the anomalies generated by territorial rules.[88] As the next Part of this Article shows, precisely this facility is needed when a court is faced with an "arbitrary or fortuitous" set of circumstances.

Years of experience watching states gradually abandon the *First Restatement* apparently taught the drafters an important lesson. Building flexibility into the system may result in a judge occasionally departing from what the drafters would have thought correct. But the cost of rigidity is higher, as state courts may abandon the *Restatement* rules altogether. With its built-in flexibility, the *Second* and *Third Restatement* will rarely require judges to reach results that they disagree with. The judge's motivation to switch to another brand largely evaporates.[89] This is the preferred modern strategy for dealing with the inevitable imprecision of rules, which otherwise might threaten the general acceptance of a choice of law approach.[90] The *Second* and *Third Restatements* take what would (under the *First Restatement*) be a counterexample (a dangerous thing!) and transform it into a meek—and authorized—exception.

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*lex loci delicti* but "generally eschew[ing] the more strained escape devices employed to avoid the sometimes harsh effects of the traditional rule").

87. *See generally* William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1201, tbl.1 (1997) (depicting the decrease by which states continue to employ the *First Restatement* for Tort or Contract).

88. *See* Roosevelt III, *supra* note 71, at 7 ("We can . . . imagine a flexible or approach-style territoriality.").

89. The *Second Restatement* has had incredible staying power, with twenty-five states aligning themselves with the *Restatement*'s "most significant relationship" test for tort cases in 2021. *See* Coyle, Dodge & Simowitz, *supra* note 5, at 320. The *Second Restatement* remains by far the most prominent choice of law theory.

90. For a general discussion of the merits of flexibility, see Roosevelt III, *supra* note 71. Of course, the flexibility of modern methods has its costs. In the hands of poorly qualified judges, added discretion may not be desirable. Where there are few and limited exceptions, the judge's obligation to apply the rules strictly keeps all decision-makers on the same page. As more discretion is introduced, the rules themselves no longer guarantee consistency. Added flexibility therefore presumes the fairness, integrity, and competence of judges—including judges interpreting the laws of another state. But given the alternative of *First Restatement*-like rigidity, flexibility seems worth these risks.

## IV. ARBITRARY PROCESSES AND FORTUITOUS OCCURRENCES

No argument did more to topple the *First Restatement* in the mid-twentieth century than the claim that the *First Restatement*'s choice of law approach was "arbitrary" and "fortuitous." This claim, the Supreme Court of Wisconsin declared, was the "common thread" that tied together "[a]ll of the commentators and all of the cases" that disagreed with the *First Restatement*'s territorialist rules.[91] Other words were sometimes used in lieu of "arbitrary" and "fortuitous," including "adventitious,"[92] "anomalous,"[93] "transitory,"[94] mere "happenstance,"[95] "insignificant,"[96] "insubstantial,"[97] and "random"[98]; or it was said that the chain of causation leading to the location of the injury was "coincidental" or "attenuated."[99] Regardless of the specific label, all of these formulations suggest that there was something artificial, unreal, or inauthentic about a state's connection to the dispute.

91. Wilcox v. Wilcox, 133 N.W.2d 408, 414 (Wis. 1965); *see also* Lilienthal v. Kaufman, 395 P.2d 543, 545 (Or. 1964) ("The strongest criticism [of the *lex loci* rule] has been that the place of making frequently is completely fortuitous . . . ."); Roosevelt III, *supra* note 43, at 2472 ("[T]he most obvious problem with territorialism is its tendency to produce arbitrary results.").

92. Beaulieu v. Beaulieu, 265 A.2d 610, 616 (Me. 1970); Mitchell v. Craft, 211 So. 2d 509, 513 (Miss. 1968); Babcock v. Jackson, 191 N.E.2d 279, 284 (N.Y. 1963); Tooker v. Lopez, 249 N.E.2d 394, 409 (N.Y. 1969) (Breitel, J., dissenting); Milam v. Davis, 123 So. 668, 676 (Fla. 1929) (Brown, J., concurring).

93. Ingersoll v. Klein, 262 N.E.2d 593, 596 (Ill. 1970); Kilberg v. Ne. Airlines, Inc., 172 N.E.2d 526, 527 (N.Y. 1961).

94. Armstrong v. Armstrong, 441 P.2d 699, 700, 703 (Alaska 1968).

95. Bishop v. Fla. Specialty Paint Co., 389 So. 2d 999, 1000 (Fla. 1980); Jaiguay v. Vasquez, 948 A.2d 955, 972, 975 (2008); Intelect Corp. v. Cellco P'ship GP, 160 F. Supp. 3d 157, 178 (D.D.C. 2016).

96. Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071, 1074 (Ind. 1987).

97. *Armstrong*, 441 P.2d at 703.

98. Costco Wholesale Corp. v. Liberty Mut. Ins. Co., 472 F. Supp. 2d 1183, 1205 (S.D. Cal. 2007).

99. O'Connor v. O'Connor, 519 A.2d 13, 20 (Conn. 1986); Grosskopf v. Chrysler Grp. LLC, No. A-14-CA-801-SS, 2015 WL 6021851, at *8 (W.D. Tex. Oct. 14, 2015). Various other terms have also been appended to indicate that an "arbitrary" or "fortuitous" choice of law would be unjust. *See* First Nat'l Bank v. Rostek, 514 P.2d 314, 317 (Colo. 1973) ("harsh"); Ginsberg v. Quest Diagnostics, Inc., 117 A.3d 200, 219 (N.J. Super. Ct. App. Div. 2015) ("unreasonable"); N. Tankers (Cyprus) Ltd. v. Backstrom, 934 F. Supp. 33, 38 (D. Conn. 1996) ("irrational"); Baffin Land Corp. v. Monticello Motor Inn, Inc., 425 P.2d 623, 627 (Wash. 1967) ("unjust").

In the choice of law context, neither "arbitrariness" nor "fortuity" has ever been defined.[100] While both terms suggest randomness and irrationality, the two phrasings—"arbitrary" and "fortuitous"—have slightly different uses. "Arbitrary" is typically used to describe the choice of law process as a whole. Thus, we might say that it is "arbitrary" to decide choice of law cases by spinning a roulette wheel or by asking a Ouija board.[101] It is decisions and decision processes that are "arbitrary." "Fortuitous" is more specific, referring to a particular feature of a dispute. For example, an event's location might be called "fortuitous." The two words might both be used to describe different aspects of the same phenomenon: "The boss's decision to hire Martha instead of George was *arbitrary;* it was based on the *fortuitous* fact that the boss and Martha went to the same high school."

Given the importance of the argument, the lack of authoritative explanation is unfortunate; we are left to take our best guess at what the courts have in mind when they use these terms. But one observation is probably true of any plausible interpretation of the word "arbitrary." It is that "arbitrariness" is relative to a certain body of assumptions; and not universally. While territorial conclusions might appear "arbitrary" when assessed against the values underpinning policy analysis, they are perfectly rational when evaluated against other, equally appropriate, values. Similarly, territorial connecting factors are not universally "fortuitous." Territorial factors appear "fortuitous" when the territorial connection stands alone: when, for example, a choice of law rule demands application of the *lex loci delicti* but no other features of the case point towards the place of injury. But this problem of "fortuitous" connections is not unique to territorialism; it is just as problematic where the balance of factors points in a direction other than the one chosen by policy analysts.[102] And, in those cases where the result

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100. Some authors have recognized the need for a working definition. *See* Roosevelt III, *supra* note 71, at 8 (emphasizing the complications that arise from a rigid definitional system with no discretion).

101. *See* Saharceski v. Marcure, 366 N.E.2d 1245, 1249 (Mass. 1977) (comparing the place of injury to "a sort of unknowing geographical Russian roulette"); ROGER C. CRAMTON, DAVID P. CURRIE & HERMA H. KAY, CONFLICT OF LAWS: CASES–COMMENTS–QUESTIONS 13 (3d ed. 1981) (criticizing "arbitrary" decisions reached under a territorial approach as no better than flipping a coin).

102. *See* Brilmayer, *Hard Cases*, *supra* note 44, at 1978–79 ("Cases that are hard for the First Restatement are easy for interest analysis, and cases that are hard for interest analysis are easy for the First Restatement. . . . The hard cases for interest analysis are ones where the parties are from different states . . . and the activities all took place in one of those two states."). Courts also use "fortuity" language to refer to residence and domicile when evaluating the minimum contacts necessary to exercise personal jurisdiction. *See, e.g.*, Patterson v. Dietze, Inc., 764 F.2d 1145, 1147 (5th Cir. 1985) (citing Prod. Promotions, Inc. v. Cousteau, 495 F.2d 483, 497 n.26 (5th Cir. 1974)) (finding that

does look "fortuitous," territorialism can adopt the same strategy that certain policy analysis approaches have: it can recognize the judicial authority to create exceptions when general rules prove inapposite in individual cases.

### *A. Arbitrary Processes*

It will be recalled that the Tennessee Supreme Court took the opportunity in *Hataway* to throw out the *First Restatement*'s place of injury rule; the rule was arbitrary and the territorial connection fortuitous:

> The plaintiffs argue that the doctrine of *lex loci delicti* should be abandoned by this Court because it is obsolete, unjust, and arbitrary. . . . We think the fact that the injury occurred in Arkansas was merely a fortuitous circumstance, and that the State of Arkansas has no interest in applying its laws to this dispute between Tennessee residents.[103]

In one sense, this conclusion is correct: the fact that the injury occurred on territory that happened to be a part of Arkansas was due entirely to historical contingency. But this is unavoidable; no matter what choice of law theory is used to decide the issue, that theory will produce some outcomes that appear to be arbitrary. Given their sensitivity to historical happenstance, we have to be realistic in our expectations when it comes to boundaries. We accept a certain arbitrariness because it is unavoidable and because that is what we are accustomed to. Boundaries follow rivers, mountains, and straight lines drawn on maps by people who didn't know (or didn't care) about the situation on the ground. Changes in law that these boundaries create are therefore often a consequence of historical accident. If the British official with a ruler had drawn the line slightly differently, the legal consequences may be significant. But this sort of arbitrariness cannot be what academics have in mind when they say that territorial approaches are arbitrary, for the policy analysts believe that they have solved the arbitrariness problem while this sort of arbitrariness is inevitable. Arbitrariness does not mean that the location of the border is arbitrary, but that using the border to decide a choice of law dispute produces arbitrary results.

One thing that seems clear is that policy analysts call decision-making arbitrary if it does not set out to advance the substantive goals of the

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purposeful availment requires something more than "the mere fortuity that the plaintiff happens to be a resident of the forum").

103. Hataway v. McKinley, 830 S.W.2d 53, 55, 60 (Tenn. 1992).

contending statutes.[104] Promoting these substantive goals is, in their view, *the raison d'être* of the choice of law process. Choice of law decision-making under a territorialist approach may indeed produce arbitrary results with regard to these substantive goals. But choice of law decision-making according to policy analysis is equally arbitrary from the point of view of territorialism.[105]

Simply put, "arbitrariness" depends on the relevant standards or objectives against which a decision is being assessed. We might criticize a judge in a figure skating competition for being arbitrary in their scoring because, for example, the number of points awarded does not seem to reflect the skaters' level of technical skill or the difficulty of the performance. However, once we learn that this particular judge assigns points more on the emotional sensitivity or aesthetic quality of the performance, it becomes clear that the "arbitrariness" is not really the issue. The real issue is a disagreement about what the values are that the figure skating competition is supposed to recognize and reward. An action might seem totally arbitrary and irrational, but once the actor's values are revealed the action is clearly purposeful and rational—even if we might disagree with it.

Policy analysis aspires to promote substantive values; territorialism, by contrast, promotes a different set of "choice of law values": interstate harmony, predictability and uniformity, respect for sister state sovereignty, and the like. When policy analysts call decision-making based on location of events arbitrary, they have in mind the substantive values underlying the contending statutes (as the policy analysts define them).[106] They take for granted that this is the purpose—indeed, the sole purpose—of the choice of law process.[107] Calling territorialism "arbitrary" sounds much

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104. *See, e.g.*, RESTATEMENT (THIRD) OF CONFLICT OF L. ch. 5, intro. note (AM. L. INST., Tentative Draft No. 3, 2022) ("[T]he exclusively territorial focus [of the *First Restatement*] prevented courts from considering relevant connecting factors (like domicile) and sometimes produced results that were arbitrary in terms of the relative policies and interests of the relevant states."); *see also* N. Tankers (Cyprus) Ltd. v. Backstrom, 934 F. Supp. 33, 38–39 (D. Conn. 1996) ("[I]t may be irrational or arbitrary to apply New York law when such application would . . . undermine an important policy of Connecticut . . . .").

105. *See* Roosevelt III, *supra* note 71, at 8 ("[W]hile some decisions may be clearly correct within particular systems, they may nonetheless appear arbitrary measured against the criteria that sensibly allocate regulatory authority among co-equal sovereigns.").

106. Whether the policy analysts' determination of these policies is correct is an open question. *See generally* Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393 (1980) (challenging the policy foundations underpinning interest analysis).

107. *See* Lea Brilmayer & Daniel B. Listwa, *A Common Law of Choice of Law*, 89 FORDHAM L. REV. 889, 897 (2020); Brilmayer & Seidell, *supra* note 61, at 2040; Lea Brilmayer & Daniel B. Listwa, *Continuity and Change in the Draft Restatement (Third) of Conflict of Laws: One Step Forward and Two Steps Back?*, 128 YALE L.J.F. 266, 271

more objective than merely disagreeing with policy analysis about what values to promote. But from the perspective of a system that values respect for sister state sovereignty, predictability, and so forth, territorialism is not arbitrary at all.[108]

### *B. Fortuitous Occurrences*

The fortuity argument is no more successful a challenge to territorialism than the claim that territorialism is arbitrary. Once again, we have no clear definition of the key term of interest. From one point of view, everything that is only contingently true is fortuitous.[109] But territorial factors are not uniquely contingent; domiciliary factors can be equally so. It may be purely coincidental and contingent that the accident happened in New Jersey; but it is no more coincidental and contingent than the fact that the pedestrian that the defendant happened to hit was from Pennsylvania, or that you hit him the day after he had just changed his domicile. The Ninth Circuit recently recognized as much in *Cassirer v. Thyssen-Bornemisza*.[110] Here, the court made short work of the plaintiff's argument that California law applied; the only connection to California, the court explained, was the "fortuity of the [plaintiff's] residence."[111] A handful of other cases have come to the same intuitive conclusion.[112]

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(2018); Patrick J. Borchers, *An Essay on Predictability in Choice-of-Law Doctrine and Implications for a Third Conflicts Restatement*, 49 CREIGHTON L. REV. 495, 498 (2016).

108. *Cf.* Dym v. Gordon, 209 N.E.2d 792, 796 (N.Y. 1965) ("To give domicile or an alleged public policy such a preferred status is to substitute a conflicts rule every bit as inflexible and arbitrary as its *lex loci* predecessor."), *overruled by* Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969).

109. *See* Fu v. Fu, 733 A.2d 1133, 1149 (N.J. 1999) ("In a broad sense, the *occurrence* of any automobile accident, and therefore its precise location, is always 'fortuitous' in that accidents by their very nature are unexpected and unpredictable.").

110. 89 F.4th 1226, 1242 (9th Cir. 2024).

111. *Id.* at 1239.

112. *See, e.g.*, Castro v. Budget Rent-A-Car Sys., Inc., 65 Cal. Rptr. 3d 430, 443 (Cal. Ct. App. 2007) (finding that Alabama has an "interest in not having vehicle owners and drivers in its jurisdiction subjected to different liabilities based on the fortuity of which state a plaintiff happens to be a resident"); Kell v. Henderson, 263 N.Y.S.2d 647, 650 (N.Y. Sup. Ct. 1965) ("[A]lthough the happening of an accident may be termed fortuitous, the place where the parties are when the accident happens may or may not be necessarily fortuitous."), *aff'd*, 270 N.Y.S.2d 552 (N.Y. App. Div. 1966); McCann v. Foster Wheeler LLC, 225 P.3d 516, 535 (Cal. 2010); *see also* Friedrich Juenger, *Choice of Law in Interstate Torts*, 118 U. PENN. L. REV. 202, 220–21 (1969) (arguing that the label "fortuitous" can "apply to any connecting factor, including domicile").

To shed some light on this popular yet elusive term, it might help to consider some cases where the fortuity argument has been raised. *Kilberg v. Northeast Airlines* offers a relatively standard illustration.[113] A plane that took off from New York's LaGuardia Airport crashed while attempting to land in Nantucket, Massachusetts. The ensuing tort litigation raised a choice of law question: did Massachusetts or New York law govern the calculation of damages? Massachusetts limited damages to $15,000; New York allowed unlimited recovery. The court held New York law applicable:

> Modern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they move. . . . An air traveler from New York may in a flight of a few hours' duration pass through several of those commonwealths. His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another. The place of injury becomes entirely fortuitous.[114]

Much of this language is reminiscent of the language in *Hataway*.[115] But *Hataway* and *Kilberg* have more than terminology in common.

The two cases also share a very specific pattern of factual connections. In both cases, the court was asked to apply a choice of law rule that singled out as the trigger factor a connection that was not supported by any other event in the case. In *Hataway*, the trigger factor—the place of the injury—pointed towards Arkansas. But no other factor in the case also pointed towards Arkansas. Arkansas was what has been referred to as a "stand-alone trigger";[116] aside from the trigger factor, all of the other connections —people, events, property, relationships, etc.—pointed towards Tennessee. The trigger thus stands on its own. Similarly, in *Kilberg*, the stand-alone trigger pointed to Massachusetts—the location of the plane crash. Everything else took place in New York: New York was the place of departure, the place where the ticket was purchased, and the place where the contract for safe carriage was formed.

The two cases' common structure is significant. Research reveals that cases in which the trigger is characterized as "fortuitous" all share this pattern of contacts.[117] A choice of law rule identifies a trigger factor—the

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113. 172 N.E.2d 526, 527–28 (N.Y. 1961).

114. *Id.* at 527.

115. *See supra* Section IV.A.

116. *See generally* Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 99 IOWA L. REV. 1125, 1145–50 (2010).

117. We examined over one hundred choice of law cases where "arbitrary," "fortuitous," or similar language was used. Our research reveals that judges overwhelmingly accept this argument in stand-alone trigger cases. The results of this research are reported in the Appendix to this Article. The tables in that Appendix list all cases that we were able to

place of injury,[118] the place of contracting,[119] etc.—that points to a particular state (State *A*). But this trigger factor is the only connection between State *A* and the dispute. All factors other than the trigger factor[120] point elsewhere. The court is left choosing between the state that the trigger factor has selected and the state that is supported by all other factors. While critics suggest that territorialism results in uniformly arbitrary and fortuitous choice of law decisions, these findings suggest that such cases are not only comparatively rare but also easily definable in advance. It is only a small subset of choice of law cases that a territorial result would be described as "fortuitous."

In sum, the label "fortuitous" therefore attaches in exactly those situations where the *First Restatement* rule is at its most vulnerable, where the factual support for the *First Restatement* rule is most attenuated and where resistance to application of the rule is likely to be strongest. Those are the cases in which the place of wrong rule will be the least acceptable. When the place of injury rule (the trigger factor) points towards State *A*, but all other factors point towards State *B*, there is a strong intuition in favor of applying the law of State *B*. If there were other connections between State *A* and the dispute, these connections would balance against the connections to State *B* and bolster the application of State *A* law—and, hence, the *First Restatement* rule. But there are no other connections that point toward that state. And there is another state, State *B*, that dominates the choice of law process by monopolizing all the other contacts, providing an intuitively preferable alternative.[121] If policy analysis was evaluated only

locate that used the terms "arbitrary," "fortuitous," or one of the synonyms listed in the text to notes 92–99 above, to decide a choice of law issue. We examined a total of 110 cases; almost all (101 out of 110) used the terms "arbitrary," "fortuitous," etc. only when referring to stand-alone trigger cases, and rejected the use of the terms where the case did not involve a stand-alone trigger. We did not include in the examination of cases any opinions that simply quoted other opinions using the words in question, unless it appeared that the opinion meant to be adopting the quote as part of its own reasoning. Of course, we also did not include opinions using the terms in discussion of a different legal problem (e.g., the arbitrary and capricious standard in administrative law).

118. RESTATEMENT (FIRST) OF CONFLICT OF L. § 378 (AM. L. INST. 1934).

119. *Id.* § 311.

120. Such other factors may include the parties' residence/domicile, where the relevant relationship between the parties was established or centered, where the estate of the deceased is being administered, etc.

121. For examples of stand-alone trigger cases where the court accepted arguments based on the fortuity of the place of injury, see Chambers v. Dakotah Charter, Inc., 488 N.W.2d 63, 68 (S.D. 1992); Fuerste v. Bemis, 156 N.W.2d 831, 833 (Iowa 1968); Wilcox

by reference to those "hard cases" that are the most difficult to deal with—those "true conflicts" that have sparked serious disagreement among policy analysis[122]—the results look quite "arbitrary and fortuitous" as well.

A number of cases come very close to explaining the "fortuity" argument in these terms—i.e., that a factor is fortuitous if no other connecting factor reinforcing the stand-alone trigger.[123] In such a stand-alone trigger case, an event appears "fortuitous" if it is not what we would have expected if we had looked at the events leading up to the injury—the facts *ex ante*. In *Hataway* it was a total fluke that the accident occurred in Arkansas. At the point that all of the other events were occurring, the most likely place for a scuba accident to have occurred was in Tennessee. The unpredictability of what *actually* happened injects an element of surprise into the facts of the case.

There are different ways that this "surprise" might enter the picture. Cross-continent airline flights present a classic example. Even if one knew that a particular plane was going to crash, it still would not be possible to predict where that would happen. Thus, one might say that it would be giving an undeserved windfall to the plaintiff to compensate him for a fact (the location of the injury) that he did not plan, did not choose, and was not responsible for.[124] The location was simply too far removed from the parties' expectations for them to have an entitlement to the law of the crash site.

Courts are generally hesitant to bind a party to the authority of a state whose involvement in the dispute would have come totally out of the

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v. Wilcox, 133 N.W.2d 408, 416 (Wis. 1965). A more thorough review of such cases can be found in the Appendix.

122. Currie advocated applying forum law in true conflict situations. *See* CURRIE, *supra* note 26, at 184. Others have advocated the application of the dominant interest, *see* Willis L. M. Reese, *Conflict of Laws and the Restatement Second*, 28 L. & CONTEMP. PROBS. 679, 688 (1963), a system of weighing interests, *see* Baxter, *supra* note 28, at 1, 33, the application of the "better rule," *see* Leflar, *supra* note 29, at 1587, and a system of different guiding canons, *see* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 319 (1990).

123. *See, e.g.*, Choate, Hall & Stewart v. SCA Servs., Inc., 392 N.E.2d 1045, 1048 (Mass. 1979) ("[T]he law of the place of making [the contract] can produce awkward or arbitrary results where that place had no or little other connection with the contract or the parties . . . ."); *In re* Air Crash Disaster Near Chi., Ill. on May 25, 1979, 644 F.2d 594, 615 (7th Cir. 1981) ("[A]ir crash disasters often present situations where the place of injury is largely fortuitous. . . . [But] in this case Illinois is more than merely the place of injury."); Black v. Toys R US-Del., Inc., No. 4:08-cv-3315, 2010 WL 4702344, at *9 (S.D. Tex. Nov. 10, 2010) ("[I]t was not fortuitous that B. Black was injured in California because she lived in California and was very unlikely to have been injured in any other place.").

124. *See Wilcox*, 133 N.W.2d at 416.

blue.[125] States whose authority one never agreed to, and which one had no ability to anticipate, should not apply their law to a dispute. In the choice of law context, one party should not be able to take advantage of the happenstance that an unpredictable event occurred in an unpredictable place.[126] In cases with fact patterns like this, the place of injury is fortuitous because it was out of the parties' control and contrary to their expectations: unknown and unknowable. Saying that the location of some event is fortuitous indicates that its location was attributable to luck or chance rather than planning.[127]

But, of course, the place of injury will not always be so unexpected. Compare *Kilberg* and *Hataway* to a somewhat different airline crash case: *In re Aircraft Disaster Near Roselawn, Indiana*.[128] Several Indiana domiciliaries boarded a flight that took off in Indianapolis and was headed to Chicago. The plane crashed before getting as far as the Illinois border.[129] Even if the flight had gone as planned, only a short fraction of the flight time would have been spent in Illinois airspace. The court therefore drew a distinction between the usual case and the problem it faced. After noting that the location of an airplane crash was often regarded as "fortuitous,"[130] the court observed that cases where the flight plan was entirely within a

125. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 304, 326–31 (1980) (concluding the application of forum law was permissible, in part, because it did not "frustrate[] the contracting parties' reasonable expectations"). This is also the essence of the personal jurisdiction requirement that the defendant must have somehow "purposefully availed" herself of the benefits of the forum's law. *See* J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 880 (2011).

126. Or, similarly, that a party happened to be (or not be) domiciled in a particular state.

127. This understanding of "fortuity" finds support in other cases that have used the term when considering the importance of a territorial connection. *See, e.g.*, Fu v. Fu, 733 A.2d 1133, 1149 (N.J. 1999) ("The *place* of an accident . . . may be considered fortuitous only when the driver did not intend or could not reasonably have anticipated being in that jurisdiction at the time of the accident."); Grosskopf v. Chrysler Grp. LLC, No. A-14-CA-801-SS, 2015 WL 6021851, at *3 (W.D. Tex. Oct. 14, 2015) ("Plaintiffs argue . . . Mrs. Grosskopf's injuries in Texas were merely fortuitous . . . [because] Defendant could not have reasonably foreseen this injury taking placing in Texas . . . ."); *In re* Air Crash Disaster at Sioux City, Iowa on July 19, 1989, 781 F. Supp. 1307, 1310 (N.D. Ill. 1991) (finding that place of the crash was "an entirely fortuitous, unforeseen emergency"). A more general report on the cases supporting this generalization can be found in the Appendix.

128. 926 F. Supp. 736 (N.D. Ill. 1996).

129. *Id.* at 742.

130. *Id.*

single state were typically spared this label.[131] Because the flight plan in *Roselawn* was almost wholly within Indiana, the court decided that the fact that the crash occurred in Indiana was not entirely fortuitous.[132] Therefore, the court discounted the place of injury only slightly:

> To some extent, the fact that the accident occurred in Indiana can be seen as fortuitous; however, when it is understood that the overwhelming majority of Flight 4184's air time was in Indiana skies, the force of the fortuity argument is somewhat diminished. Thus, while the place of injury may not deserve the full presumptive force to which it is due, *this Court will not entirely discount that factor*.[133]

Unlike *Kilberg* and *Hataway*, *Roselawn* is not a case of "dumb luck" or windfall to an undeserving party. All parties were domiciled in Indiana—the same state as the place of injury. And given the flight plan, the parties knew that they would be spending most of their flight over Indiana. Had these unlucky passengers given the issue any thought, they would have come to the conclusion that Indiana was the most likely place for a crash. If the most likely eventuality is what actually happens, it is not fortuitous. The parties' expectations were exactly right.

The events in cases like *Kilberg* and *Hataway* are most "fortuitous" when the location of the trigger factor is the most unpredictable; that is to say, where the place of injury is entirely disconnected from the other facts of the case. It would be a mistake to assume that any particular contact (such as the place of injury) is either intrinsically fortuitous or intrinsically not fortuitous; the characterization is contextual. Although the location of the injury may seem fortuitous in the abstract, it does not appear so fortuitous if all (or even a substantial plurality) of the other events in the case occurred in the same state as the place of injury.

Moreover, the possibility of fortuity in certain cases doesn't make territorial rules unworkable; it just demonstrates the need for judicial flexibility. In cases where the location of the injury stands alone, and is beyond the expectations of the parties, courts should create an exception to the territorial rule. The problem presented by such stand-alone trigger cases is by no means unique to territorialism. Cases where a factor such as the domicile of one party stands-alone poses similar problems for policy analysts.[134] Every theory is likely to run into hard cases; while the

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131. *Id.* at 742–43.

132. *Id.* at 743. The court drew on earlier authorities that had held that the place of accident in airline crash cases was not fortuitous where the flight was wholly domestic. *See, e.g.*, Price v. Litton Sys., Inc., 784 F.2d 600, 605 (5th Cir. 1986).

133. *Roselawn*, 926 F. Supp. at 743 (emphasis added).

134. *Cf.* Sedler, *supra* note 3, at 395.

fact patterns that generate the difficulty may vary from one theory to another, the occasional hard case is, unfortunately, a fact of life.

The *Kilberg* court was correct in its conclusions about modern conditions of travel and communications.[135] In earlier centuries, the number of unpredictable stand-alone trigger cases could have been expected to be disproportionately small. Rarely would the place of injury—the trigger—be left standing alone. For purely practical reasons, one could predict the location of the other events in the case if one knew where the injury itself took place. And (perhaps more importantly) one could predict the state that would be singled out by the trigger if one knew where the other events were all located.

But the speed of travel and communication have shrunk the world; it can no longer be assumed that the various factors will be clustered together, close to the place of injury. The place of injury has lost much of its predictive power. Due to modern advances in travel and communications, disputes featuring stand-alone triggers are much more likely and counterexamples to the place of injury rule, which used to be rare, are now everyday occurrences.[136] The very same phenomenon can also be observed with respect to policy theories that rely on non-territorial factors such as domicile: as people are less bound to their "home" state, and can travel and communicate more easily, a party's domicile may say little about the distribution of factors in a case.[137] Courts need the discretion to create exceptions for disputes in which the trigger turns out to be an unpredictable, unknowable, and uncontrollable occurrence—where the trigger factor stands alone.[138] The Bealean logic of the *First Restatement* may have been unable to stomach any sort of meaningful exception. But territorialism generally is not burdened by the same unreasonable convictions.

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135. *See* Kilberg v. Ne. Airlines, Inc., 172 N.E.2d 526, 527–28 (N.Y. 1961).

136. *See, e.g.*, Ray W. Campbell, *Personal Jurisdiction and National Sovereignty*, 77 WASH. & LEE L. REV. 97, 144–45 (2020); Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOB. LEGAL STUD. 475, 478–82, 491 (1998).

137. *See* Juenger, *supra* note 112, at 221 n.135 ("In view of the increasing mobility of people, the concept of domicile is losing reality and significance.").

138. Importantly, an exception to deal with these kinds of stand-alone cases would not seriously undermine the uniformity and predictability of a territorial system. Definitionally, a fortuitous occurrence is one which the parties did not foresee and which the parties realistically could not have foreseen. Parties will not be planning their lives around unforeseeable events.

## V. TERRITORIALISM: STEALTH EFFECTS

When policy analysis was first proposed, its reception was mixed at best.[139] But by the time of writing, it has been acknowledged as the dominant approach to choice of law in the United States.[140] The approach that is now taken by the *Draft Third Restatement* is strongly influenced by basic principles of policy analysis[141]—a radical change from the *Second Restatement*, which some policy analysts regarded as unfriendly to their approach.[142]

The wider acceptance of policy analysis occurred simultaneously with an increasing open-mindedness towards territorial factors; whether this was cause and effect is unclear. The literature, in addition, became more sophisticated and more clearly expressed.[143] But territorialism is still underestimated. So many of the effects of territorialism are deeply buried assumptions that go mostly unnoticed, that we call them "stealth effects." These stealth effects can be difficult to spot: territorial assumptions are often taken for granted that we don't even realize that we are making them. One place where the effect of these stealth factors can be seen at work is with what can be called "ghost factors."

### *A. Ghost Factors*

Although policy analysis denies that territorial connections are relevant, it often relies surreptitiously on territorial factors hiding in the background

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139. *See* Roosevelt III, *supra* note 43, at 2463 ("The jury is still out on interest analysis.").

140. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.01 cmt. b (AM. L. INST., Tentative Draft No. 3, 2022) ("Contemporary approaches [to choice of law] generally follow this two-step model."); Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 26 (2001) ("[T]he majority of modern American academic and judicial approaches recognize the concept of state interests as an important choice-of-law factor.").

141. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.01 cmt. a (AM. L. INST., Tentative Draft No. 3, 2022) (recognizing that evolving choice of law analysis entails review and examination of specific policies of relevant internal-law rules, general policies, and protection of parties' expectations).

142. *See* Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 755 (1963) ("[W]e certainly do not need a new [i.e., Second] *Restatement*, although we are threatened with one."); James P. George, *False Conflicts and Faulty Analyses: Judicial Misuse of Governmental Interests in the Second Restatement of Conflict of Laws*, 23 REV. LITIGATION 489, 493 (2004) ("Although the Second Restatement is itself eclectic, it is incompatible with the governmental-interest analysis developed by Brainerd Currie and others.").

143. *See* Kermit Roosevelt III, *Legal Realism and the Conflict of Laws*, 163 U. PA. L. REV. ONLINE 325 (2015); Larry Kramer, *The Myth of the "Unprovided-for" Case*, 75 VA. L. REV. 1045 (1989).

of a case. The territorial factor that is refused entrance at the front door is allowed to slip quietly in at the back. We call them "ghost factors"; they can be spotted by the unexplained differences in treatment that they cause.

Ghost factors may be at work when two cases that look identical are treated differently for choice of law purpose. Finding a ghost factor raises two questions. First, can the difference in treatment be explained by a different location of some event that is part of the case or its background?[144] And second, why does the presence of the ghost factor cause a difference in treatment? To take an easy example, imagine two cases that look identical in all substantive respects and differ only with regard to their choice of law characteristics. Case 1 involves a dispute that is entirely domestic to State *A*; Case 2 is identical except that the place of injury (or of contracting, or whatever) is in State *B*. Case 1 will obviously be treated as a domestic case—not raising multistate issues of any kind—because all of the contacts are with State *A*. Case 2, however, is likely to be perceived as a conflict of laws case because the injury occurred in a state different from the state of the other relevant factors. If Case 1 and 2 are treated differently, it is territorialism and territorialism alone that is influencing the disposition.

Insurance offers a useful example of such a territorial ghost factor operating in practice. Typically, the existence or nonexistence of insurance is completely irrelevant to the substantive resolution of a case—the jury is not even supposed to know whether a defendant is insured.[145] Certain policy analysts have nevertheless argued that, if the defendant is insured, their state of domicile lacks an interest in applying its protective policies.[146]

144. Currie offered his own definition of a "conflict of laws case" as those "cases in which two or more states are involved in potentially significant ways . . . ." Currie, *Survival of Actions*, *supra* note 64, at 214. This definition does not use the word "territory." But whether "two or more states are involved," so as to turn a purely domestic case into a conflict of laws case, will depend on some unspoken territorial factor: two or more states are involved either because the relevant event(s) occurred on the territories of different states or because some of the persons involved find themselves in the territory of a state other than their own.

145. FED. R. EVID. 411; *see also* Va.-Carolina Chem. Co. v. Knight, 56 S.E. 725, 728 (Va. 1907) (declining to allow juries to hear evidence about an employer's accident insurance).

146. *See, e.g.*, Sedler, *supra* note 3, at 400; *see also* Robert A. Sedler, *Interstate Accidents and the Unprovided for Case: Reflections on* Neumeier v. Kuehner, 1 HOFSTRA L. REV. 125, 138 (1973) ("[T]he only state interested in extending . . . protection is the defendant's home state, where the vehicle is insured and where the consequences of imposing liability will be felt.").

In this way, although the issue of insurance does not form part of the substantive merits of the case, it is brought into the litigation to justify a choice of law decision. Other examples of this phenomenon are not difficult to find. For example, it is often said that where local law favors the plaintiff, the medical bills owed to local doctors, hospitals, and so forth, give rise to an interest in applying local law in order to allow the plaintiff to recover.[147] This is a departure from the way that substantive law is treated in purely domestic cases. In a domestic case, liability does not stand or fall on the defendant's financial situation. If the contact that prompts the application of this "blood in the streets" rationale is the location of the injury, then territorialism has been allowed to quietly slink in the back door.

While these ghost factors influence the result covertly, their effect is very real. And by relying on these factors, policy analysts frequently and unabashedly rely on the location of the plaintiff's injury to justify their reasoning.

### *B. Domicile as a Territorialist Concept*

A second indication that territorialism is underestimated is the relative inattentiveness, in practice, to possible applications of territorial choice of law rules once territoriality has been recognized in principle. Beale displayed a comparable dismissiveness towards domiciliary connections; territorial factors were the default. For Beale, the parties' domiciles were dispositive only in certain specialized areas, such as estates and trusts or certain family law issues.[148] On the other end of the spectrum, Brainerd Currie's original, purist version of governmental interest analysis considered territorial connections only in certain atypical cases—such as traffic laws.[149]

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147. *See, e.g.*, Milkovich v. Saari, 203 N.W.2d 408, 417 (Minn. 1973) ("[P]ersons injured in automobile accidents occurring within our borders can reasonably be expected to require treatment in our medical facilities. . . . [M]edical costs are likely to be incurred with a consequent governmental interest that injured persons not be denied recovery . . . ."); Fu v. Fu, 733 A.2d 1133, 1149 (N.J. 1999) (finding that New York had an interest in the dispute because the plaintiff "incurred medical expenses . . . during her New York hospital stay" after her accident in New York and therefore "reject[ed] the characterization of the parties' contacts with New York as 'fortuitous'"); Bray v. Cox, 333 N.Y.S.2d 783, 785 (N.Y. App. Div. 1972) (finding New York had an interest in protecting medical creditors).

148. *See* RESTATEMENT (FIRST) OF CONFLICT OF L. §§ 303, 306–08 (testate and intestate succession), 470 (administration proceedings) (AM. L. INST. 1934).

149. Rules of the road are the classic example in which territorial connections are of undeniable importance. *See* Roosevelt III, *supra* note 43, at 2487; Symeonides, *supra* note 7, at 1894 n.235. The occasional brave plaintiff will argue that the applicable law should not be assessed based on the rules of the road in place where the accident occurred; these arguments don't get very far. *See* SYMEONIDES, *supra* note 52, at 232–36. For examples of Currie's tendency to elevate non-territorial connecting factors, see, for example,

Currie therefore recognized that it was an unsustainable position to argue that "the place of performance is *always* irrelevant."[150] He conceded, for example, that "a contract to dance naked in the streets of Rome can hardly be considered without reference to Roman law."[151] But cursory observations of this sort were quickly followed by more general language dismissive of territorial relevance.[152]

A certain favoritism towards domiciliary factors and distaste for territorial ones can still be witnessed, especially in the case law.[153] Unless a rule had been shown to be "conduct-regulating," the presence of events and activities in a state does not give rise to an interest.[154] As a result, domicile dominated almost completely and territorial factors were sidelined. This tendency not to discern conduct-regulating rules may be a consequence of the fact that widening the interests of the two states would make false conflicts less likely; and it was false conflicts that made the theory attractive.

Outside that limited context of conduct-regulating rules there were no additional ways for territorial factors to generate interests. This arrangement leaves territorial factors largely on the periphery. A few authors have argued that territorial connections should be factored into the choice of law calculus in all cases that could not be disposed of as a "false conflict."[155] But, again, territorial factors are then only brought in after an attempt to solve a true conflict in which both states had interests. For most of the early policy analysts, therefore, "governmental interests" in the application of a particular law existed because states had interests in protecting or

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CURRIE, *supra* note 26, at 103 ("It is obvious that . . . considerable emphasis has been placed upon the relationship of the parties to the states involved—*i.e.,* to their residence, or domicile, or nationality. That emphasis is indispensable in any consideration of the respective policies involved . . . ."); *see also id.* at 86–87 (arguing that Massachusetts was "primarily" concerned with the welfare of Massachusetts citizens).

150. CURRIE, *supra* note 26, at 103 (emphasis added).

151. *Id.*

152. *Id.* ("It is difficult to perceive any connection, however, between the law of the place where payment is to be made and the capacity of a [person] to contract.").

153. Even after finding a statute or rule to be conduct-regulating, courts will sometimes still limit its reach to only state domiciliaries. *See, e.g.*, Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 931 (Cal. 2006) ("[T]o protect the privacy of confidential communications of California residents *while they are in California* . . . .").

154. *See* Michael S. Green, *The Return of the Unprovided-For Case*, 51 GA. L. REV. 763, 773 (2017) (discussing the distinction between "conduct-regulating" and "loss-allocating" rules).

155. *See* sources cited *supra* note 27.

compensating their *own people*, and not because some event was a local occurrence.[156] Currie summarized this position early on:

> The focal point of California policy is the injured person; the imposition of liability on the local estate seems but a corollary of the purpose to provide compensation. California has an interest in the application of its law and policy whenever the injured person is one toward whom California has a governmental responsibility. California may legitimately assert such an interest when the injured person is domiciled in (or a resident of) California . . . .[157]

At a basic level, the state can be defined territorially, without even mentioning the people residing within it. Indeed, to qualify as a domiciliary, one must have a residence "within the state" and have a present intention to continue to live there indefinitely.[158] Territory is therefore a suitable axiom to start with. The converse is not true: it is not possible to identify a group of people as affiliated with a particular state until one knows what places are part of the state and what places are not. Domicile, in other words, is dependent on territory.

The definition of territory, by contrast, does not depend on domicile. Try to define a territory in terms of people and you'll find your map pocked with holes: areas within a state's boundaries that either belong to another state (because non-citizens reside there) or that belong to no state at all (because they are uninhabited). A little piece of land in the Bronx that an Iowan lived on could turn out to be a part of the Hawkeye State. More fundamentally, if you try to define the territory of Iowa as the land

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156. *See generally* John B. Corr, *Interest Analysis and Choice of Law: The Dubious Dominance of Domicile*, 1983 UTAH L. REV. 651, 653–54 (discussing the importance that modern choice of law theory attaches to domiciliary contacts). In the decades following the choice of law revolution, as more and more writers contributed to the literature on policy analysis, a greater open-mindedness emerged. The sort of purism exhibited by early writers such as Brainerd Currie has become increasingly rare. For example, the *Draft Third Restatement* shows a strong policy analysis influence, *see* RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.01 cmt. a, reps. notes (AM. L. INST., Tentative Draft No. 3, 2022) (recognizing that evolving choice of law analysis entails review and examination of specific policies of relevant internal-law rules, general policies, and protection of parties' expectations), but also recognizes the significance of territorial factors, *see id.* § 5.02 cmt. d. We nevertheless focus in this Article on the more purist approach because of the great variety of positions taken on this point, and because of the theoretical value of understanding basic principles. Unless otherwise stated, our generalizations deal mainly with the original, purists, version of policy analysis.

157. CURRIE, *supra* note 26, at 144–45.

158. *See generally In re* Estate of Jones, 182 N.W. 227, 228–29 (Iowa 1921) (discussing the different interpretations of domicile and residency). Of course, there is no shortage of disagreement about the precise meaning of "domicile" and "residence." *See* Willis L. M. Reese & Robert S. Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561, 563 (1953) ("Residence, on the other hand, is an extremely uncertain word. In its legal sense, it undoubtedly requires at least a rather well-settled connection with a community.").

that is owned by (or ruled by, or resided on by) the people of Iowa, the question immediately arises, how do we know which are the people of Iowa?

People also change their domiciles. If we defined territory in terms of the land belonging to the people of New York, what would we do when some of them moved to Florida—as 65,000 did in 2022?[159] While territorial borders often seem arbitrary from a historical perspective, practical reasons demand that borders be permanent—or very nearly so. There is simply no way to continuously amend the territorial boundaries for choice of law analysis as citizens happen to change affiliations from one state to another. The *First Restatement*'s critics made much of the difficulty that Bealean theory had with disputes involving rapid interstate travel; railroads trips, car rides, and airplane flights were the typical examples.[160] But people also move from one state to another—increasingly so.[161] And when they do, policy analysis is faced with challenging issues that are difficult to address by reference to party domiciles.[162] The core concept of "domicile" on which policy analysis relies therefore demands some background commitment to territorialism, and thus greater recognition of domicile's derivative status.

### *C. A Modern Place of Injury Rule*

Territorialism gives special status to land, treating the events that occur on a state's territory as being tied to the power of the state in some undefinable but significant way. It should therefore not be too surprising

159. *See* Swapna V. Ramaswamy, *New Yorkers Are the No.1 Movers to Florida. Find Out Why*, USA TODAY (Mar. 3, 2023, 6:16 PM), https://www.usatoday.com/story/money/personalfinance/real-estate/2023/03/03/new-yorkers-moving-florida-droves/11357516002/ [https://perma.cc/3HLW-TKN5].

160. One favorite example is the case of *Alabama Great S. R.R. Co. v. Carroll*, 11 So. 803, 804 (Ala. 1892), in which part of the train's braking mechanism broke in one state after a failure of inspection in another. Airplane crashes are also favorites. *See supra* Section IV.B (discussing *Kilberg v. Ne. Airlines*).

161. The number of interstate moves increased by more than 12% between 2011 and 2021 to over 7.8 million. *See State-to-State Migration Flows*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/geographic-mobility/state-to-state-migration.html [https://perma.cc/CEG2-AUFB].

162. If, for example, a plaintiff moves after the tortious conduct has occurred, does the plaintiff's old domicile or new domicile have the relevant interest in having its law applied? *Compare* Miller v. Miller, 237 N.E.2d 877, 880 (N.Y. 1968) (finding that new domicile is relevant), *with* Reich v. Purcell, 432 P.2d 727, 730 (Cal. 1967) (finding that domicile at the time of accident is relevant).

that when policy analysts attempt to explain their reliance on domiciliary factors, they invariably end up turning to territorialism to help craft the explanation.

Policy analysts typically rationalize their preference for domiciliary over territorial contacts by pointing out that governments are set up to serve the good of the population.[163] From this they proceed to the conclusion that courts should ordinarily provide the benefits of local law only to local people.[164] But it does not follow from their basic premise about serving the needs of the local population that there is a governmental "interest" only in applying a law to benefit that state's citizens. One way to advance the interests of the state's citizens is by specifying the regulations applicable to things going on anywhere within the state's territory. In fact, that might in any given instance be the most effective way to go about helping people. Just a moment's reflection reveals that the practicalities of regulation will in most cases point towards organization using spatial criteria: trash pickup, real estate taxes, and the criminal law are all organized around "territory."

Most relevant for present purposes, the *rationale* for treating domicile as an important connection to a state is also territorial. Attempting to explain the focus on domicile, Robert Sedler, for example, argues that "it makes far more sense to me to look to the place where the social and economic consequences of allowing or disallowing recovery will be felt rather than the place where an accident happened to occur."[165] He ties this observation to the increasing modernization of living conditions, concluding that, given the realities of modern travel, "[t]he place where the accident occurs . . . is certainly irrelevant."[166] Sedler also argues that state borders often fail to properly reflect sociological and economic communities. He cites, for example, a tri-state community that exists in the corner of land where Pennsylvania, West Virginia, and Ohio meet.[167] It is arbitrary, according to Sedler, to divide this area up in accordance with existing state boundaries, when the people living in the area experience it as a single unit.[168]

But Sedler does not explain how this observation can be operationalized in the choice of law process. How does a court faced with a dispute involving two or more states decide the merits of the case? If an accident

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163. *See* CURRIE, *supra* note 26, at 85.

164. *See* Ely, *supra* note 16, at 175 ("[W]ithout Currie's basic methodological premise—that states are interested in protecting their own residents in a way they are not interested in protecting others—interest analysis is largely impotent."); *see also* Corr, *supra* note 156, at 653 (describing the state's interest as protecting its citizens).

165. *See* Sedler, *supra* note 3, at 410.

166. *Id.*

167. *Id.* at 399.

168. *See id.*

in Pennsylvania involves a West Virginia plaintiff and an Ohio defendant, what law applies? Obviously, there is no "tri-state law" to use to decide whether the plaintiff can recover. One, *and only one*, of the three states can have their law applied to such a dispute. The judge still has to pick, and the choices are limited to the legal rules of the three entities that actually create law: the state governments of Pennsylvania, West Virginia, and Ohio.

As these examples demonstrate, when a firmly committed policy analyst attempts to unpack the concept of a state "interest," support for the idea that states should only attempt to protect and compensate their own residents is generally found in the principle that the state has an interest in conduct that impacts the state. The state, after all (the argument runs) is the one who will bear the economic and social consequences of the plaintiff's illness and death; the cost will be borne by the local tax base. It seems straightforward to conclude that Iowa has an "interest" in deciding cases that implicate the wellbeing of an Iowa decedent and her family. That is (according to this argument), Iowa has an interest in determining the legal rights of Iowans.

Gregory Alexander, in developing a theory of state "interests," neatly summarizes this rationale.[169] Alexander starts with the observation that "the authority to regulate multistate disputes is a resource that must be allocated among competing states in a rational manner."[170] To Alexander, a "state may be considered legitimately interested" if denying the state the right to regulate "would affect [that] state adversely."[171] He then continues:

> In making this determination [whether a state has been adversely affected by being denied the right to regulate], courts should focus when possible upon the actual effects that rules produce or advance. Such effects, when known, should form the basis for state interests even when the effects cannot be linked exclusively to the articulated objectives of the rulemakers. Indeed, when the goals and effects of a rule do not coincide, effects should be determinative.[172]

In articulating this logic, however, Alexander reveals his deep-seated territorialism. The people who the state will end up taking care of are only those persons who are domiciliaries. That is, they must be people who live in the state. To know whether someone is qualified to ask for

169. *See* Gregory S. Alexander, *The Concept of Function and the Basis of Regulatory Interests Under Functional Choice-of-Law Theory: The Significance of Benefit and the Insignificance of Intention*, 65 VA. L. REV. 1063, 1064 (1979).
170. *Id.*
171. *Id.*
172. *Id.*

governmental assistance, one must separate the insiders from the outsiders—and this requires using territorialist criteria.

Indeed, the policy analysts' line of reasoning is from a certain perspective identical to the "place of injury" rule that sits at the core of Beale's *First Restatement*. Both take the dispute's presumed injurious impact inside a state as a necessary condition for application of that state's law. The difference lies in the two different ways of identifying the relevant injurious impact. The first understanding of "injury" is the one that the *First Restatement* had in mind: the direct negative impact on the individual plaintiff who was harmed by the defendant's misconduct. The relevant state is the state where that injury was experienced. In this first definition of "injury" the chosen factor is an event—an injury is something that happens, and where it happens is in some particular place. "Jose was hit by a truck in Idaho" describes an injury in Idaho.

The second understanding of "injury" focuses on where the ultimate effects of the injury are experienced: injury is presumed to have been felt where the plaintiff lives rather than where she is injured. The claim is that the state has been harmed because it experiences the loss through reduced worker productivity, property damage, or emotional scarring to the family members of the deceased plaintiff. In order to protect the community's interests, the local domiciliary is entitled to compensation for this harm. "A domiciliary of Oregon was hit by a truck in Idaho" refers to an injury in Oregon.[173]

The parallelism between Currie's and the territorialist version of the "place of injury" rule arises because everything is connected in one long chain of causation. The defendant does something that causes the plaintiff's direct injury; the plaintiff's injury creates secondary effects as the harm impacts on the plaintiff's family and place of work; the impacts on the family and job then creates tertiary effects on *their* neighborhoods and workplaces, and so on *and infinitum.* It makes no sense to orient the choice of law process towards only one level of causation—to the secondary effect on the plaintiff's family and jobs, while ignoring the consequences causally closer to the plaintiff or further down the chain.

The difference is profound. On the most concrete level, there may be a factual difference over where the injury was actually experienced. Who was more impacted: the plaintiff's residence or the state where the injury occurred? But the importance is not limited to practical matters. On a

173. By reframing "place of injury" to refer to the harm to the community, policy analysis simply repeats the same question: Where does the harm to the community take place? The community in question might be either the community in which the plaintiff resides, or the various communities in which the plaintiff's community members reside. The result is, in principle, an infinite regress.

more theoretical level, who is believed to be the primary party who has been transgressed against: is the injury more importantly an offense against the state or against the individual? This issue raises important and challenging questions about what the true focus of our system of civil compensation should be. The difference between the policy analysts and the territorialists might be described in terms of the relative priorities given to community interests and individual interests.

The focus on compensation for the direct impact on the individual is arguably more in line with the individualistic values that underly our family law, tort law, contract law and all of the other areas of law that generate choice of law disputes.[174] But the matter is surely debatable. The important point for present purposes is that, regardless of which conception of injury you decide to use, the logic of both approaches focuses on a *place*: the place where the injury occurs or its impact is ultimately felt. It is undeniably territorialist either way. There is no reason that we should be concerned about the territorial nature of the *Restatement*'s place of injury rule, but not about the territorial nature of the sociological explanation of interests as harm within the state.

## VI. TERRITORIALISM AND POLICY ANALYSIS: BACK TO BASICS

Everywhere we look we find territorialism. Once we learn to recognize the tracks territorialism leaves behind, we can see them everywhere. The invisible gravitational pull of territorialism's "stealth factors" testifies to the policy analyst's recognition of the territorial appeal; policy analysis has not moved as far away from territorialism as is sometimes suggested. But what can we say about the nature and consequences of this territorialism? If the notion of "domicile"—at the heart of policy analysis—is derivative of territory, then are the two theories compatible or even largely identical? We think not. Part VI responds to such questions by identifying some of the key distinguishing characteristics of policy analysis and territorialism.[175]

174. Precisely which areas of law are served better by an "individual" or by a "community" approach is beyond the scope of this Article.

175. Throughout this Article we have generalized about "policy analysis" even though there can be substantial differences between the various authors writing within that school of thought. Where there is disagreement within the school of thought, we have focused on whichever perspective seems most closely aligned with the original fundamental premises. In Part VI in particular we focus on Brainerd Currie's original theory of governmental interest analysis, while indicating the ways in which later writers have diverged from some of Currie's opinions.

The first difference between policy analysis and territorialism is whether competing laws should be regarded as *self-limiting*. For policy analysis, the limits on substantive norms are intrinsic to the substantive norms themselves; for territorialism, the limits are extrinsic and stem from a set of external norms. Second, and relatedly, policy analysis treats choice of law norms as necessarily *content dependent*, meaning that the geographical extension of a state's authority into the multi-state context is a function of the content of the norm. Territorialism imposes no such requirement; the extrinsic norm that determines the multistate extension may be completely unrelated to the content of the substantive law. The third key difference between the two theories is the relationship between choice of law and substantive law. A policy analyst does not recognize any difference between them; a territorialist, on the other hand, treats them as quite separate matters.

### *A. Extrinsic Norms or Self-Limiting Substantive Law*

When policy analysis burst upon the scene, it brought with it a fresh insight: substantive norms are "self-limiting." This means that the limits on extension into the interstate context are derived from the contending laws themselves. Within a substantive law can be found the basis for an inference about the outer limits of the law's own application. In other words, the law's extension into the multistate environment is predetermined by the terms of the law itself. This assumption is important to policy analysis; without it, choice of law under a policy-based approach is hardly possible.[176]

The argument can be elaborated as follows. A statute takes its legal force from its adoption by a legislature; it therefore has the power that the legislature has chosen (expressly or impliedly) to give it. At a certain point, the statute reaches the outer limit of the authority that the legislature bestowed upon it. The purpose of the statute does not extend any further; past this point, the need for which the statute was created simply ceases to exist. So, in effect, the statute turns itself off—it stops.

At the core of the idea of self-limiting norms is the intuitive notion that an obligation only extends as far as its justification. Consider a simple example from the law-adjacent field of political philosophy. Governments generally claim the right to compel their populations to obey the law. The rationale sometimes given for this duty to obey is that citizens have a right to vote for the government in elections; this right to vote, it is said,

176. As is discussed further below, the self-limiting nature of substantive norms is indispensable to creating the false conflicts between substantive laws that policy analysis relies on. If substantive norms were not self-limiting, and consideration of extrinsic norms were permitted, then all cases would give rise to true conflicts.

amounts to indirect consent to be bound by the elected representatives.[177] Assuming that one accepts this (and only this) voting rationale, it is nevertheless not convincing against every challenge. The rationale applies only to persons who are allowed to vote.[178] It would not, at least without further elaboration, apply to the disenfranchised—convicted felons, the underage, visitors, and so on. The obligation to obey only reaches as far as its underlying rationale.

This same reasoning, it is said, can be used to determine whether a statute applies to a particular interstate case: the statute extends just as far as the policy justifications that give it purpose. The statute itself, through its underlying policy, tells us how far it reaches into the conflict of laws arena. The process of divining where those limits lie is, the policy analysts claim, no different from the ordinary legal analysis applied to ambiguous statutes in a domestic setting. It is the usual process of statutory interpretation. The *Draft Third Restatement* describes this process in detail, though it speaks in terms of the "relevance" and "scope" of a law in place of Brainerd Currie's more familiar "state interest" terminology:

> This Restatement . . . deems a state's law relevant if and only if the facts of the case bring an issue within the scope of the state's law. A law is relevant, on this understanding, if it reaches the facts of the case, i.e., if the law creates rights or obligations relating to the litigated events. This tracks ordinary legal analysis: if one is attempting to decide which of several possibly relevant legal rules . . . might govern in a purely domestic case, the relevant legal rules would be those that actually reached the facts of the case . . . . In ordinary legal analysis, determining whether a legal rule reaches the facts of the case is a matter of interpreting the rule.[179]

Many cases, it is argued, can be resolved easily by using these scope, or interests, determinations, and without resorting to any extrinsic choice of law norms. This scope determination—deciding which laws are "relevant" to the choice of law dispute—is where the self-limiting nature of the

177. *See* 1 JOHN PLAMENATZ, MAN AND SOCIETY 238–39 (1963); JOSEPH TUSSMAN, OBLIGATION AND THE BODY POLITIC 23–57 (1960). This rationale has been frequently challenged. *See, e.g.*, R. Kent Greenawalt, *Promise, Benefit, and Need: Ties that Bind Us to the Law*, 18 GA. L. REV. 727, 738 (1984) ("Receiving benefits from the state simply does not indicate acceptance of a regime and its laws in the way that starting a game of tennis indicates acceptance of the standard rules.").

178. *See* Matt. S. Whitt, *Felon Disenfranchisement and Democratic Legitimacy*, 43 SOC. THEORY & PRAC. 283, 304 (2017).

179. RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.01 cmt. b (AM. L. INST., Tentative Draft No. 3, 2022).

substantive laws takes effect: the substantive law only reaches cases where (for example) the plaintiff is from State *A* or where the injury was suffered in State *B*. Once the appropriate "scope" of all the contending statutes is determined—that is, once it is determined which states have interests—it is possible to characterize the case as a true conflict, a false conflict, or an unprovided-for case. A case is a true conflict when several conflicting laws reach the facts of the dispute; a case is a false conflict when only one law reaches the facts of the dispute; and a case is unprovided-for when no laws reach the facts of the dispute.[180] Policy analysis holds that "false conflicts" should be governed by the law of the only interested state.[181]

There are certainly situations in which norms can be accurately described as self-limiting. For example, a statute may include an express choice of law provision that defines the statute's reach in the interstate context. An express scope provision may provide that the statute only applies when the defendant is a domiciliary of the enacting state; in such a case, the statute would, straightforwardly, only extend into the choice of law field where this condition is met.[182] The idea that a statute is self-limiting also makes some sense when virtually unanimous expectations of the public at large are shared by legislators. For example, "everyone knows" that rules of the road are intended only for roads within the regulating state.[183] Or, a statute might fall within the reach of a particular presumption that makes its reach clear—as where extraterritoriality is presumed not to be intended if a statute is silent.[184] In any of these situations, the statute might properly be considered "self-limiting."

But for the policy analysis method to work as a general matter, it must solve all choice of law disagreements. *All* norms must be self-limiting. In the examples above, the self-limiting nature of the statute was fairly intuitive. In most cases, it is not. In cases where policy analysts don't have an express choice of law provision or statutory presumption to turn to, policy analysts advocate fall back on the *policy* underlying the statute.

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180. For a traditional formulation of the policy theory, see CURRIE, *supra* note 26, at 183–87.

181. *See id.* at 184.

182. The *Draft Restatement (Third)* in fact takes the position that it would violate the Full Faith and Credit Clause to take the substantive part of a contending law without also taking its scope provision. RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.02 cmt. a (AM. L. INST., Tentative Draft No. 3, 2022).

183. *See* discussion *supra* note 138.

184. The *Draft Third Restatement* provides that scope can be determined by a statutory provision in the substantive law. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.02 cmt. b (AM. L. INST., Tentative Draft No. 3, 2022). Statutes containing provisions for scope therefore qualify as self-limiting.

This supposedly reveals to the decisionmaker the proper scope of the legislative enactment even where the text itself is silent.[185] But will this approach always work? The familiar case of *Babcock v. Jackson* suggests not.

*Babcock* involved a conflict between an Ontario guest statute and a New York law allowing a passenger to sue the driver of the car after an accident.[186] No legislation from either side said anything about choice of law. The court was not discouraged by this silence; legislators, as policy analysts like to point out, generally don't think about the choice of law implications of the rules that they enact.[187] So, following policy analysis' instructions, Judge Fuld—writing for the majority in *Babcock*—dug a bit deeper, looking for the underlying policy.[188]

In making this shift from "statutory text" to "underlying statutory policy," policy analysis replaces the claim that "the statute will always give the answer" with the claim that "the underlying policy will always give the answer." But the latter is no more reassuring than the former. While it is certainly true that legislators generally don't think about the choice of law implications of their rules, they generally don't consider the choice of law limits of their *policies* either. In a typical case, the policies are likely to be just as uninformative as the statutory text they underlie. If the statutory language doesn't tell us anything, it's unlikely the underlying policy will be very enlightening.

This reality is evident in the *Babcock* court's discussion of the Ontario guest statute. Repeated in its entirety, Judge Fuld's reasoning went as follows:

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185. Ascertaining precisely what policies underpin a particular statute may also be easier said than done. *See* Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 511 (1983).

186. 191 N.E.2d 279, 284 (N.Y. 1963).

187. *See, e.g.*, CURRIE, *supra* note 26, at 742; Robert A. Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack*,*"* 46 OHIO ST. L.J. 483, 486 (1985); Andrew D. Bradt, *Resolving Intrastate Conflicts of Laws: The Example of the Federal Arbitration Act*, 92 WASH. U. L. REV. 603, 614 (2015); Green, *supra* note 154, at 772. *But see* Symeonides, *supra* note 7, at 1854–55 (arguing that evidence of legislative intent as to the territorial reach of statutes is "plentiful").

188. *See* Note, *The Impact of* Babcock v. Jackson *on Conflict of Laws*, 52 VA. L. REV. 302, 302–03 (1966).

> The object of Ontario's guest statute, it has been said, is "to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies" and, quite obviously, the fraudulent claims intended to be prevented by the statute are those asserted against Ontario defendants and their insurance carriers, not New York defendants and their insurance carriers.[189]

The court cites to the *Survey of Canadian Legislation*. But the *Survey* only tells us that the guest statute is designed to prevent fraudulent insurance claims—a question of *substantive* law.[190] Nothing about this underlying policy tells us anything useful about the statute's extraterritorial reach. To fill the gaping hole where the evidence supporting a choice of law conclusion should be, the court simply opines that its conclusion is "quite obvious."[191]

The success or failure of the policy analyst claim about the ubiquity of self-limiting norms has significant implications. The attractiveness of policy analysis depends on the existence of large numbers of self-limiting statutes because in policy analysis it is only through self-limits that a state can truncate the reach of its statutes, thereby creating false conflicts. Without self-limits, the judge must either rely on extrinsic norms (such as philosophical assumptions about the nature of state sovereignty and vested rights) or else apply all statutes universally. It is only if there are large numbers of false conflicts that policy analysis can resolve choice of law disputes without recourse to "arbitrary" external norms.[192] Policy analysis gives us no reason to believe that these large numbers of false conflicts exist.

### *B. Content Dependence Versus Content Neutrality*

The second issue on which territorialism differs from policy analysis concerns the relationship between the substantive laws competing for application and their multistate extension. Policy analysts see this relationship as quite intimate—the substantive policy predetermines the choice of law extension—while territorialists see the two as quite independent.

Policy analysis uses the substantive law to arrive at a unique conclusion about scope of the law; no other input is necessary. The substantive law, in other words, is adequate by itself to determine the correct extension; nothing else is needed to narrow down the list of possible multistate

189. *Babcock*, 191 N.E.2d at 284 (citing John J. Robinette, *Survey of Canadian Legislation*, 1 U. TORONTO L.J. 358, 366 (1936)).

190. Robinette, *supra* note 189, at 366.

191. For an extensive criticism of reliance on domicile as an approximation for state interests—calling into doubt *Babcock*'s assertion that this is "quite obvious"—see Corr, *supra* note 156, at 654.

192. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. § 5 intro. note (AM. L. INST., Tentative Draft No. 3, 2022).

extensions to a single correct answer. To a territorialist, however, a substantive law provision can be coupled with any one of a variety of different multi-state extensions. The choice of what extension to give the substantive rule is itself a policy choice and, contra policy analysis, not a derivation from the substantive statute.[193]

We use the term *content dependence* to refer to the position that policy analysis adopts concerning the relationship between the conflict of laws implications of a statute and its substantive content. For a theory to be content-dependent, the choice of law outcome must be a function of the substantive content of the norms competing for application. Under policy analysis, the reach of a state statute into the interstate arena is dependent on the content of the substance: as we have seen, a statute reaches a dispute if applying the statute would further its underlying purpose.[194] Therefore, choice of law results turn on the content of the substantive law.

Territorialism does not make this assumption, and for this it has been criticized. Readers will recall from Part IV that it was territorialism's failure to connect content and choice of law that supposedly rendered it arbitrary.[195] That is not to say that territorialism assumes that choice of law conclusions cannot in any circumstance be derived from substantive law, or that territorialism would compel the opposite choice of law conclusion from the one that policy analysis would require. It simply means that substantive law is, in effect, often agnostic about what the choice of law conclusion ought to be. Knowing the former just doesn't tell you much about the latter.

Comparing choice of law rules and statutes of limitation exposes the implausibility of strict content dependence. Both statutes of limitation and choice of law rules are what might be called "auxiliary rules." Auxiliary rules qualify substantive laws, indicating whether or not they apply. Statutes of limitations, specifically, dictate whether the time to bring a claim has expired. Sometimes a statute of limitations operates via a separate and general statutory enactment that applies to certain broad categories of causes of

193. Content dependence is a matter of degree: substantive considerations can be a more important or a less important ingredient in dispute resolution.

194. Indeed, any theory that relies on self-limiting norms—whereby the substantive norms determine their own reach in the choice of law context—will be necessarily "content dependent" as well.

195. *See* Kermit Roosevelt III & Bethan R. Jones, *The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer & Listwa*, 128 YALE L.J.F. 293, 296 (2018) ("[T]he *Restatement (First)* often dictated arbitrary and unsatisfying results because its rules were insensitive to the content of state laws.").

action (e.g., a five-year statute of limitations for contract cases). On other occasions, a substantive cause of action might have its own, individually drafted, statute of limitations written into the law (e.g., a shorter statute of limitations written into a statutory grant of a cause of action for defamation).

What is the relationship between a substantive law and the auxiliary choice of law provision specifying the substantive law's scope? Is the auxiliary rule uniquely determined by the content of the substantive rule? Or is the substantive law broad enough to accommodate a number of alternative auxiliary rules, any one of which could be matched to the substantive law in question? The policy analyst's answer to this question is that the auxiliary scope provision is determined by the substantive law and underlying policy.[196] The territorialist makes no such claim. They are agnostic: some substantive laws might dictate the auxiliary rules; others might not.

To evaluate these competing claims, consider a thought experiment. You are a state legislator in a state that has just passed a law creating a new cause of action. After the vote, all the legislators realize that it would be better to have included some sort of specification of the statute of limitations for this cause of action. The legislators decide that a second provision should be adopted to remedy this defect, and the task of drafting such a provision is given to a committee. Its members were all party to the substantive discussion leading up to adoption of the law and so they are quite familiar with the policies underlying the law. What is the posture of such a committee? How much freedom does it have in formulating the limitations provision?

A legislator acting as a member of the drafting committee would probably conclude that *if* there was guidance on this point in the statute, it should be followed. You are acting on delegated authority, after all. But there is no such explicit guidance in the statute: you were asked to draft a statute of limitations precisely because the current version of the substantive law lacks a statutory indication of the correct limitations. The text of the law does not answer the question.

Of course, insofar as they are informative, you would consider the policies that inform the statute. But you would also expect to take many other factors into account. The collected statutes, as a whole, may provide guidance

196. The purists deemed any compromise on substantive policy to further some non-substantive goal as unacceptable. *See* Robert A. Sedler, *On Choice of Law and the Great Quest: A Critique of Special Multistate Solutions to Choice-of-Law Problems*, 7 HOFSTRA L. REV. 807, 812 (1979) (questioning why "the forum should want to subordinate its own interest" for the sake of "conflicts justice"); Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 227 (1977) (arguing that it is not a court's function in a choice of law case to "polic[e] the interstate and international legal order").

on the matter. For example, there might be another substantive law that is similar to yours, which has a statute of limitations that can be borrowed. Moreover, how generous the statutes of limitations are for other claims may also inform your decision-making.

But you would likely *not* think of yourself as looking for some pre-existing "right answer"; and you would not assume that such a right answer could be determined simply by interpreting the existing statute. True, a court may be bound by an indication of legislative intent or clear legislatively approved policy regarding the statute of limitations. But when the legislative policy on a statute of limitations is vague or non-existent, few courts would limit their research to the legislature's often unhelpful policy in making their decision.

When considering statutes of limitations, it seems relatively obvious that a particular substantive statute can be matched with any one of a wide range of auxiliary limitations rules. The auxiliary rule will reflect both the policies underlying the substantive law and a variety of other legislative policies and preferences. There are no mandatory auxiliary provisions; a wide range of potentially pertinent policies can be taken into account or ignored, as the legislature likes.

Now repeat the same thought experiment using choice of law rules. Shouldn't the result be the same? Doesn't the multistate extension vary depending on both the substantive policies of the contending laws and on any other policies and preferences that might seem relevant? Are not the drafters of the auxiliary rule free to take whatever they please into account? Why should the substantive policies of the substantive rule be sacrosanct?

To unpack this thought experiment further, consider the different approaches our hypothetical committee may take on a continuum. At one end of the spectrum, it might be assumed that the committee has complete freedom (at least, within constitutional bounds). From this perspective, any choice of law provision—Bealean, modern, or something in between—can be attached to the substantive law. The committee is charged with making a substantive recommendation, and it can base its recommendation on any considerations that it finds persuasive. It should not adopt something that is inconsistent with the statute, because then it would be violating its mandate. But (under this view) it can adopt any choice of law provision that does not contradict the statute's terms. The committee's conclusion might rest on a desire to prohibit forum shopping, a policy of interstate comity, or an intention to further state interests to the greatest extent possible; any and all of these factors may well be consistent with the

substantive law of the statute. Where the statute is silent, there is likely to be a great deal of room for discretion.

At the other end of the spectrum, the committee's assigned task might be understood as determining what the existing statutory language already requires. From this perspective, there is a unique right answer to the committee's assignment to determine the choice of law effects of the statute, and the job of the committee is to determine what that unique right answer is. This answer is understood as an objective and purely logical derivation from the statutory provisions.

Differentiating between these two perspectives reveals an important difference between territorialism and policy analysis. The policy analyst subscribes to the second perspective. She assumes that the committee should be looking for a solution that is *the* corollary to the substantive provisions of the statute. A particular choice of law result follows ineluctably from the substance of the statute, determining the extent of the statute's impact. When policy analysis views the relationship between the substantive content of the enacted law and the new choice of law provision that our hypothetical committee is drafting, it assumes that the substance is determinative of the choice of law implications.

Territorialism makes no such assumption. The reason is that territorialism is not content-dependent. It is content-neutral, and it treats substantive rules as consistent with any and all choice of law provisions. A territorialist would admit that they often cannot derive much of anything about the extent of multistate application *just* by examining the substance, because the substance is equally compatible with all (or almost all) multistate extensions. Multistate extension and substantive law operate as independent phenomena.[197]

Which is the better model for choice of law? There is room for debate. It is clear, however, that the strict position of the policy analysts is not tenable. It sounds all well and good that the choice of law extension must match the substance of a case. But insisting that some scope provision is *required* by the substance of the case ties the hands of actual judges that may want or need the flexibility to take other considerations into account.

197. Of course, the differences between the two approaches can be largely collapsed if the policy analyst asserts that other considerations—such as consistency across the statutory code, prevention of forum shopping, etc.—all form part of a substantive law's underlying "policy." But at that point the process of "finding" the statutory policy has been wholly scrapped for a process of simply importing a desirable policy. It would be preferable for courts and commentators to be honest and transparent in what they are doing.

### *C. Choice of Law Jurisdiction and the Merits of the Case*

These observations lead to the final core difference between policy analysis and territorialism: whether there is any difference between a decision on the merits and a decision on jurisdictional grounds. Territorialism sees choice of law jurisdiction—a state's jurisdiction to apply its law to a dispute—as a threshold question that should be resolved prior to deciding the merits. Policy analysis regards the very same methodology—statutory interpretation—as the solution to both (domestic) substantive questions and questions of choice of law.[198] It is a fundamental principle of policy analysis that whether a state's law reaches the dispute (the choice of law question) and whether the elements of the state's law are satisfied (the substantive question) are not two questions but one.[199]

For policy analysts, the process for addressing a choice of law problem is no different from addressing a domestic issue of interpretation. In both cases, the purpose of the interpretative exercise is to determine whether the fact pattern is covered by the statute in question. We saw above that the *Draft Third Restatement* describes the process of determining whether a statute reaches an interstate dispute as deciding whether the facts of the case bring an issue within the "scope" of the statute.[200] The determination of scope divides the world into two categories: cases for which the statute creates rights or obligations and cases for which the statute does not.

For this reason, there is no difference between saying that the fact pattern is not covered because the court has no authority to apply a particular law and saying that the fact pattern is not covered because of some substantive defect in the case (the plaintiff cannot prove negligence but it is a required element under the applicable claim; the defendant has a defense of the statute of frauds, etc.).

Territorialism sees things differently. The first question is whether the statute is even applicable to an interstate dispute in the conflict of laws

198. The stated objective of the *Draft Third Restatement* was to "describe[] choice of law in a way that makes it similar to and consistent with the ordinary legal analysis used in purely domestic cases and in multistate cases involving statutes." RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.01 cmt. b (AM. L. INST., Tentative Draft No. 3, 2022).

199. This point is inseparably tied to the characterization of policy analysis as content-dependent: if domestic substantive analysis and choice of law analysis both employ the same methodology ("ordinary statutory interpretation") and both start with the same substantive policies, then the decision on the domestic merits and the decision on choice of law jurisdiction are necessarily linked.

200. *See* discussion *supra* Section VI.B.

sense. Only after this *jurisdictional* threshold is crossed does the court ask whether the statute applies in the *substantive* sense. This divides the world into three (and not two) categories: where the merits and jurisdiction are both satisfied, where the jurisdictional requirements are satisfied but the requirements on the merits are not, and where jurisdiction is not satisfied. This is a sharp contrast with policy analysis, which denies the existence of any meaningful distinction between the second and the third categories.

Policy analysis sees a jurisdictional decision to apply a legal norm and a substantive decision to apply a legal norm as the same thing. Policy analysis cannot differentiate between a denial on the merits and a denial for want of choice of law jurisdiction, and it denies that anything is lost by co-mingling the two. And yet, it is clear that the American legal system recognizes a difference between saying that jurisdiction does not extend to the fact pattern and saying that jurisdiction does extend to that fact pattern, but that recovery is not permissible on the merits. The questions are dealt with in a specific logical order; jurisdiction is logically prior to the merits; it is a threshold inquiry. Jurisdiction is what makes the court's view of the merits appropriate as a resolution to the parties' dispute.[201]

The distinction between jurisdiction and merits is a matter of common sense and is employed across our legal system. There is a difference between saying that "the plaintiff lost her case because the court decided that it lacked jurisdiction" and saying that "the plaintiff lost her case because she could not convince the court that the defendant was negligent." The distinction is important because it raises important questions regarding "who decides": Does the court decide the issue of substance (because the jurisdictional hurdle is met) or does the court decline to decide the issue of substance—and leave that decision to another (because the jurisdictional hurdle is not met)?

"Who decides?" can be extraordinarily contentious and important question in domestic law relating to adjudicative and legislative authority. Assume that State *A* adopts a constitutional amendment that prohibits governmental restrictions on abortion. Such a statute would not constitute an attempt to promote abortion (even if, as a practical matter, it happened to result in a larger number of abortions taking place). Instead, the constitutional amendment represents a specification of who has the right to decide: the woman, rather than the state, has the right to decide. It is irrelevant from this perspective what State *A* would decide, since under the state constitution, it is not for

201. *But see* Kermit Roosevelt III, *Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 512 (2013) ("Choice of law is not procedural; it is about the merits.").

the state to make the decision.[202] Such phenomena cannot be explained in substantive terms: State *A* is not introducing any substantive law prescribing how the issue is to be regulated. Instead, it is purposefully leaving the area untouched by state authority.

The same is true of the multistate context. Assume that State *B* now seeks to regulate in an area that State *A* has kept free from government intervention. State *A* continues to favor leaving the issue unregulated. Both states may have genuine concerns about the issue; and the issue can be phrased as "which state has the right to make the decision?" For policy analysts, this question boils down to an issue of which substantive law triumphs: identifying government interests and legislative policies is "simply a method of determining when positive law confers rights on the parties."[203] But the struggle between States *A* and *B* is not a question of the two states' substantive policies. State *A* is not objecting to the substantive policies underpinning State *B*'s law; State *A* may well be in full agreement with whatever policies motivate State *B*. Instead, State *A* is objecting to the very fact that State *B* is trying to extend its law into this area in the first place. The framing of the question as policy analysts would have it does not lead to a responsive answer. This is a question of jurisdiction in the abstract, divorced from any particular substantive dispute.

The territorialist would have no problem addressing this question. Territorialism has no requirement that everything be phrased in terms of substantive rights. Instead, the territorialist can recognize extrinsic limits —limits that cannot be explained by reference to the substantive policies of State *A*—on how far other states may justifiably extend their laws. The preference that some matters not be regulated at all is just as much a policy decision as a provision for tort recovery after a patient suffers from a doctor's malpractice. A state is entitled to be interested in such things as being free from sister state overreaching.

## VII. CONCLUSION

The courts and commentators who rejected Beale's *First Restatement* did so for reasons that would not necessarily apply to other forms of territorialism; indeed, the objectionable aspects of Beale's theory mostly

202. The same can be said of state decisions to deliberately leave areas of financial activity unregulated on freedom of contract grounds.

203. Roosevelt III, *supra* note 43, at 2521 (discussing Larry Kramer's theory for unprovided-for cases).

have nothing to do with it being territorial. The supposed "failure" of territorialism was nothing of the kind. Territorialism survives the standard objections raised by the choice of law revolution.

Part IV showed that those who criticize reliance on territorial factors as "arbitrary and fortuitous" are mistaken. First, criticism regarding arbitrariness boils down to a claim that territorialism does not advance the objectives of policy analysis. This claim proves nothing because territorialism is not trying to advance those objectives. When measured against the objectives territorialism *does* pursue, the theory looks far from arbitrary. Second, the argument that territorialism relies on fortuitous connections is limited to the small subset of cases which pose the most difficult, borderline, cases. Every theory has hard cases and territorialism is no exception. But rather than return to the rigidity of Beale's system, territorialism today should embrace the modern strategy of making legitimate exceptions to deal with these outlier disputes.

Part V showed that the policy analysts' claim that they have fully thrown off the territorialist yoke is mistaken. Upon closer inspection, it is clear how much policy analysis depends on territorialism—both as a background principle and to explain specific conclusions. This reliance demonstrates the fundamental nature of territorial ideas, and the more derivative nature of domicile, and therefore, policy analysis.

Finally, Part VI identifies some essential traits of policy analysis and territorialism in order to ascertain where the real incompatibilities lie. Ask the typical American what law would apply to their purchase of a Persian rug when she was in New York. They may not be able to cite a legal standard or theoretical grounding, but they will probably feel pretty confident that it was New York law. Don't tell them that New York has no interest in having its law applied because they are from New Jersey. Or that New Jersey law should apply because it is "the better law." Don't say that it all turns on interpreting a New Jersey statute that doesn't so much as mention choice of law, or that the location of events is arbitrary and fortuitous. And certainly don't mention "content dependence" or "self-limiting" norms. Save all that for the law reviews.

It is attractive for an academic to claim to know how things *must* be. But the reality is that no choice of law theory has a monopoly on good ideas. And neither policy analysis nor territorialism is the hands-down favorite for all possible purposes. As a practical matter, the American approach to choice of law is characterized by dipping into one pot or the other opportunistically. Maybe that makes the theory less exciting: it makes the field less about logic and more about choice. But for a field that is, by its very definition, all about choice, that may not be such a bad thing.

## VIII. APPENDIX A

This Appendix analyzes 110 cases that raise a choice of law issue and also use any of the following terms to describe the choice of law issue[204]: "arbitrary," "fortuitous," "adventitious," "anomalous," "transitory," "happenstance," "insignificant," "insubstantial," and "random," "coincidental" or "attenuated." The Appendix does not include any cases that simply quoted other opinions using the words in question, unless it appeared that the opinion meant to be adopting the quote as part of its own reasoning.[205]

Two tables are used to present the cases. The first table consists of seventy-seven cases where the fact pattern *was* deemed to be "arbitrary," "fortuitous," etc. The second table consists of thirty-three cases where the fact pattern was *not* deemed to be "arbitrary," "fortuitous," etc. Within each table, the cases are organized by key term and, under each key term, by date (most recent cases appearing first). *P* and *PP* are used to designate the plaintiff(s) or decedent(s); *D* or *DD* are used to designate the defendant(s). Although the table incorporates many famous choice of law cases, including all of the cases discussed in the body of this Article, it is not limited to these well-known examples. Across the board, the cases in which the court deems the application of a particular law "arbitrary," "fortuitous," etc. involve stand-alone triggers.[206]

Our findings can be briefly summarized as follows. First, the "arbitrary and fortuitous" argument is alive and well. It has been raised as an official

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204. Many cases use more than one of these terms in their analysis.

205. This means, for example, that the table does not include the (large body of) cases that quote language referring to "arbitrariness" or "fortuity" but then decline to specifically note whether or not the facts at issue raise these concerns.

206. Not all cases are equally thorough in identifying all potentially relevant factors. For example, while some cases involving automobile accidents mention only the place of the accident and the residences/domiciles of the parties, others will also mention where the automobile was licensed, insured, and/or garaged. Similarly, while some cases discussing cross-country movement emphasize the starting location and destination of the trip, *see, e.g.*, *In re* Disaster at Detroit Metro. Airport on Aug. 16, 1987, 750 F. Supp. 793, 807 n.22 (E.D. Mich. 1989) ("[T]he destination and point of departure of substantial air traffic, is not fortuitous, in that it is foreseeable that an accident might occur there."), other cases seem to explicitly reject the relevance of the starting and ending locations, *see, e.g.*, Ness v. Ford Motor Co., No. 89 C 689, 1993 WL 996164, at *3 (N.D. Ill. July 20, 1993) ("The fact that the car was headed toward Illinois when it rolled over is at least as fortuitous as the fact that it rolled over in Iowa. The laws of physics act upon a car without regard to where the trip began or where it was intended to end."). For purposes of this analysis, we treat a case as raising a stand-alone trigger issue where one and only one mentioned factor points towards the law selected by the relevant choice of law rule.

or unofficial exception in hundreds of cases. In our sample alone, the argument was raised in almost every year since 1960 and in almost every state, the District of Columbia, and Puerto Rico. As ever fewer states adhere to a choice of law theory that demands strict adherence to a single trigger factor,[207] and as states adopt choice of law theories that carve out workable exceptions, it may become less necessary to fall back on the vague "arbitrary and fortuitous" language. Nevertheless, despite this trend towards modern choice of law theories, there is little sign that courts are tiring of the arbitrariness argument.

Second, when a court uses the term "arbitrary," "fortuitous," etc. to describe a particular choice of law factor or choice of law outcome, it is almost always dealing with a stand-alone trigger.[208] Indeed, some cases come close to specifically recognizing the connection between the arbitrariness argument and stand-alone triggers.[209] Courts typically do not supply a reason why a particular choice of law conclusion or a particular factor should be deemed "arbitrary," "fortuitous," etc.[210] Indeed, several cases also recognize that, in some ways, all events are arbitrary and fortuitous.[211]

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207. *See, e.g.*, John F. Coyle, William S. Dodge & Aaron D. Simowitz, *Choice of Law in the American Courts in 2021: Thirty-Fifth Annual Survey*, 70 AM. J. COMPAR. L. 318, 322 (2022).

208. Of the seventy-seven cases analyzed, this was true in seventy cases.

209. *See, e.g.*, Choate, Hall & Stewart v. SCA Servs., Inc., 392 N.E.2d 1045, 1048 (Mass. 1979) ("[T]he law of the place of making [the contract] can produce awkward or arbitrary results where that place had no or little other connection with the contract or the parties . . . ."); *In re* Air Crash Disaster Near Chi., Ill. on May 25, 1979, 644 F.2d 594, 615 (7th Cir. 1981) (rejecting the characterization that the place of injury is "fortuitous" because "in this case Illinois is more than merely the place of injury.").

210. To justify applying the label "fortuitous," courts have occasionally distinguished between "fixed" and "transient" cases. *See, e.g.*, Zangiacomi v. Saunders, 714 F. Supp. 658, 662 (S.D.N.Y. 1989); Hotaling v. Smith, 406 N.Y.S.2d 627, 629 (N.Y. App. Div. 1978); Pounders v. Enserch E & C, Inc., 276 P.3d 502, 509 (Ariz. Ct. App. 2012), *aff'd in part, vacated in part*, 306 P.3d 9 (Ariz. 2013). However, this distinction still leaves unanswered why such "transient" cases should be regarded as raising "fortuity" concerns.

211. *See* Tooker v. Lopez, 249 N.E.2d 394, 399–400 (N.Y. 1969) (responding to the dissent's claim that the domicile of the defendant and the automobile's place of registration were "adventitious," the majority noted that "as a result of all these 'adventitious' occurrences, [the decedent] is dead and we have a case to decide. Why we should be concerned with what might have been is unclear."); Fu v. Fu, 733 A.2d 1133, 1149 (N.J. 1999) ("In a broad sense, the *occurrence* of any automobile accident, and therefore its precise location, is always 'fortuitous' in that accidents by their very nature are unexpected and unpredictable."); Kell v. Henderson, 263 N.Y.S.2d 647, 650 (N.Y. Sup. Ct. 1965) ("[A]lthough the happening of an accident may be termed fortuitous, the place where the parties are when the accident happens may or may not be necessarily fortuitous."), *aff'd*, 270 N.Y.S.2d 552 (N.Y. App. Div. 1966); Calhoun v. Yamaha Motor Corp., U.S.A., 216 F.3d 338, 346 (3d Cir. 2000) ("If we were to accept the [Plaintiff's] interpretation of

However, several cases do connect the use of this kind of language with party expectations: a fact pattern is "arbitrary," "fortuitous," etc. if it runs counter to party expectations.[212] Some cases also indicate that an event is fortuitous if it could have happened elsewhere.[213] Without further elaboration, however, this is not a particularly workable definition of "fortuitous" since it tells us little more than that a fortuitous event is one that is contingent: *ex ante*, every event could have occurred differently than it ultimately did. However, this understanding of fortuity again indicates that "fortuity" is associated with some degree of randomness: where the parties could not have expected or foreseen that an event occurred in the way that it did, the court is not inclined to give one party an unearned windfall.

Third, and the flipside of our second finding, cases that explicitly *reject* a suggestion that a characterization of "arbitrary," "fortuitous," etc. are generally not dealing with a stand-alone trigger. Of the thirty-three cases that fall within this group, thirty-one did not involve a stand-alone trigger fact pattern. Often without making any reference to the substantive policies underpinning the competing statutes, courts seem quite unreceptive to the "arbitrary" and "fortuitous" argument where the allegedly "arbitrary" and "fortuitous" trigger is bolstered by other factors.

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the . . . concept of fortuity, virtually every accidental injury would qualify as 'fortuitous' . . . .").

212. There is a relevant comparison to language sometimes used when considering personal jurisdiction, where courts have noted that "a defendant's actions must have been 'directed at the forum state in more than a random, fortuitous, or attenuated way.'" *In re* Reciprocal of Am. (ROA) Sales, Nos. MDL 1551, Civ.A. 04-2313, 2005 WL 1923156, at *3 (W.D. Tenn. Aug. 2, 2005) (quoting ESAB Grp., Inc. v. Centricut, Inc., 126 F.3d 617, 625 (4th Cir. 1997)).

213. *See, e.g.*, *In re* Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987, 720 F. Supp. 1445, 1452 n.14 (D. Colo. 1988) ("The use of the word 'fortuitous' in air crash cases stands for the proposition that an air crash could occur in any state over which a particular aircraft was scheduled to fly."); Burlington N. & Santa Fe Ry. Co. v. ABC-NACO, 906 N.E.2d 83, 92 (Ill. App. Ct. 2009) ("The derailment site itself was clearly random; a train could derail at any location along the rail system of this country.").

*1. Cases Where the Fact Pattern was Deemed "Arbitrary," "Fortuitous," etc.*

| CASE | FACT PATTERN | LAW APPLIED | TERMINOLOGY | STAND-ALONE TRIGGER? |
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| **"Abitrary"** | | | | |
| *Yalincak v. N.Y. Univ.*, No. 3:08cv773 (PCD), 2009 WL 10714654 (D. Conn. Sept. 3, 2009) | P (student) is a Connecticut resident;[214] D (university) is a New York domiciliary.[215] P filed several claims against D after P was charged with (and federally prosecuted for) defrauding D.[216] The fraud and fraud-related claims against P accrued in Connecticut. All relevant educational services took place in New York and P suffered his alleged injuries in New York. | New York law. | "[W]here [the lex loci] analysis 'would produce arbitrary, irrational results,' the approach set forth in the Restatement (Second) Conflict of Laws will be applied."[217] "In support of his assertion that Connecticut law applies, Plaintiff submits only that the [claims] 'all accrued in the State of Connecticut.'"[218] | Yes. |

214. Plaintiff Hakan Yalincak argued that he was a Connecticut resident because, although he attended New York University in New York, he "continued to consider Connecticut to be his state of permanent residence . . . ." Yalincak v. N.Y. Univ., No. 3:08cv773 (PCD), 2009 WL 10714654, at *5 (D. Conn. Sept. 3, 2009).

215. Although not discussed by the court, Defendant New York University is chartered and incorporated in New York.

216. Among other things, Plaintiff argued that Defendant breached an implied contract and its duty of good faith and fair dealing. *Id.* at *2.

217. *Id.* at *6.

218. *Id.* at *7.

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| *Howe v. Stuart Amusement Corp.*, No. 343407, 1991 WL 273637 (Conn. Super. Ct. Dec. 11, 1991) | PPs (passengers) and DDs (provider of alcoholic beverages) were all Massachusetts domiciliaries.[219] PPs' driver purchased alcohol from DDs in Massachusetts. While driving PPs to a different part of Massachusetts, the driver passed into Connecticut. While in Connecticut, PPs were injured in an automobile accident caused by the driver's intoxication. | Massachusetts law. | "[A] court [must] undertake a 'most significant relationship' analysis in order to determine whether its result is arbitrary or irrational."[220] | Yes. |
| *O'Connor v. O'Connor*, 519 A.2d 13 (Conn. 1986) | P (passenger) and D (driver) were Connecticut domiciliaries who planned to take a day trip that began, and was to end, in Vermont. As P and D were briefly passing through Quebec, P was injured in an automobile accident. | Connecticut law. | "The virtue of simplicity must . . . be balanced against the vice of arbitrary and inflexible application of a rigid rule."[221] | Yes. |

219. Defendants Stuart Amusement and Riverside Park Food Service were incorporated in Massachusetts. Howe v. Stuart Amusement Corp., No. 343407, 1991 WL 273637, at *5 (Conn. Super. Ct. Dec. 11, 1991).

220. *Id.* at *3.

221. O'Connor v. O'Connor, 519 A.2d 13, 19 (Conn. 1986).

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| *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979) | P (passenger) and D (driver) were both Texas residents who took a trip to Mexico. While in Mexico, P was injured in an automobile accident. | Texas law. | "The results reached [under the lex loci delicti rule] were most often arbitrary and unjust. . . . The only contact Mexico has with this case is the fact that the accident occurred there."[222] | Yes. |
| *Beaulieu v. Beaulieu*, 265 A.2d 610 (Me. 1970) | P (passenger) and D (driver) were both Maine residents. P and D planned to return to Maine after taking a short trip to Massachusetts. P was injured in an automobile accident while in Massachusetts. | Maine law. | "[D]oes the forum state properly discharge its duty to the litigants and to the states involved in the conflict-of-law choice when it follows the arbitrary stereotyped course of the lex loci delicti?"[223] | Yes. |
| *Blanchard v. Blanchard*, 180 So. 2d 564 (La. Ct. App. 1965) | P (passenger) and D (driver) were both Louisiana residents. The car was owned by a Louisiana resident (D) and was garaged and insured in Louisiana. P and D were briefly driving in Texas. While in Texas, P | Texas law.[224] | "[The lex loci delicti rule] is a principle which is being repudiated as arbitrary and not founded upon sound reasons of law | Yes. |

222. Gutierrez v. Collins, 583 S.W.2d 312, 317, 319 (Tex. 1979).
223. Beaulieu v. Beaulieu, 265 A.2d 610, 613 (Me. 1970).
224. The court assumed that Texas law applied on the motion for summary judgment since the court must assume, "most favorably to the defendants, that Texas law applies as the law of the place of the tort . . . ." Blanchard v. Blanchard, 180 So. 2d 564, 567 (La.

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| | was injured in an automobile accident. | | or policy . . . ."[225] | |
| *Dym v. Gordon*, 209 N.E.2d 792 (N.Y. 1965), *overruled by* Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969) | P (passenger) and D (driver) are both New York domiciliaries. P and D were both temporarily residing in Colorado and both were summer students at the University of Colorado. While both P and D were staying in Colorado, D agreed to drive P to another part of Colorado; the trip was to start and end in Colorado. During this drive, P was injured in an automobile accident. | Colorado law. | "To give domicile or an alleged public policy such a preferred status is to substitute a conflicts rule every bit as inflexible and arbitrary as its *lex loci* predecessor."[226] "In this case the parties were dwelling in Colorado when the relationship was formed and the accident arose out of Colorado based activity; therefore, the fact that the accident occurred in Colorado could in no sense be termed fortuitous."[227] | Yes. |

Ct. App. 1965) (Tate, J., concurring). However, it was separately noted that "there is in truth little reason for Texas law to furnish [the governing principle]." *Id.*

225. *Id.*

226. Dym v. Gordon, 209 N.E.2d 792, 796 (N.Y. 1965), *overruled by* Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969).

227. *Id.* at 794.

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| *In re Bauer's Tr.*, 200 N.E.2d 207 (N.Y. 1964) | P (testatrix) had been a New York domiciliary, but had, at the time of her death, been a long-time England domiciliary.<br>P had conferred a general power of appointment upon herself pursuant to a trust indenture executed in New York while P was a New York domiciliary. P exercised that general power of appointment by executing a will in England. In executing the will, P used an English solicitor, designated an English institutional executor and trustee as administers of the trust, and conferred benefits upon an English charity. | New York law.[228] | "The court's decision to apply New York law [the law of the place where the trust indenture was executed] . . . strikes me as an unfortunate example of adherence to mechanical and arbitrary formulae."[229] | Yes.[230] |
| **"Fortuitous"** | | | | |
| *Nat'l Jewish Democratic Council v. Adelson*, 417 | P (defendant in a SLAPP suit) is a D.C. | Nevada law. | "[W]here the locus jurisdiction has a 'merely fortuitous' relationship with the | Yes. |

228. Judge Fuld, dissenting, argues that English law should have governed. *In re* Bauer's Tr., 200 N.E.2d 207, 210 (N.Y. 1964) (Fuld, J., dissenting).

229. *Id.*

230. Judge Fuld, at least, seems to regard the case as a stand-alone trigger case, since the only connection to New York is the fact that the testatrix was a New York domiciliary when she executed the trust agreement containing the relevant powers of appointment. *See id.* The majority does not offer any supplemental connecting factors to New York. *See id.* at 208–09 (majority opinion).

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| F. Supp. 3d 416 (S.D.N.Y. 2019) | domiciliary[231]; D (plaintiff in the same SLAPP suit) is a Nevada domiciliary. D had brought a defamation suit against P in New York, relying on Nevada law; this case was dismissed as a SLAPP suit. P then brought a claim against D seeking compensatory and punitive damages for the prior suit. | | case, that jurisdiction's interest in the case is 'minimal.'"[232] "New York's interest, on the other hand, is relatively attenuated. Its sole connection to this suit is that the suit was filed here."[233] | |
| *In re Air Crash Near Clarence Ctr., N.Y. on Feb. 12,* | P (husband of decedent passenger) was a China domiciliary;[234] | New York law. | "[T]he fact the crash occurred in New York was largely fortuitous and 'much of the causative misconduct | No.[238] |

231. Plaintiff National Jewish Democratic Council was a District of Columbia 501(c)(4) non-profit corporation. Complaint at 2, Nat'l Jewish Democratic Council v. Adelson, 417 F. Supp. 3d 416 (S.D.N.Y. 2019) (No. 18-CV-08787 (JPO)). The court does not mention the citizenship of the Council in discussing its choice of law conclusions, but it does recognize that "the complaint properly alleges the citizenship of the Council . . . ." *Nat'l Jewish Democratic Council*, 417 F. Supp. 3d at 432.

232. *Id.* at 427.

233. *Id.* at 426.

234. Both Plaintiff Xiaojun Pan and his wife, the decedent, were domiciled in China. *In re* Air Crash Near Clarence Ctr., N.Y., on Feb. 12, 2009, 983 F. Supp. 2d 249, 252 (W.D.N.Y. 2013). The court does not specify whether Plaintiff's domicile or the decedent's domicile is key. *See id.*

238. The court found that, even though the crash in New York may have been fortuitous, this did not demand a departure from the *lex loci delicti* rule: "the fortuitousness of the aircrash alone does not necessarily warrant departure from the rule of *lex loci delicti*." *Id.* at 255 (quoting *In re* Air Crash Near Clarence Ctr., N.Y., on Feb. 12, 2009, 798 F. Supp. 2d 481, 489 (W.D.N.Y. 2011)). Therefore, while the court did not reject the characterization of the crash site as fortuitous, it rejected the implications that typically accompany this label. For this reason, the case is not much of an exception to the general trend seen throughout this table.

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| *2009*, 983 F. Supp. 2d 249 (W.D.N.Y. 2013) | DDs (airlines) were domiciled in several states.[235] DDs conducted extensive business in New York. Both P and the decedent were working in New York prior to the crash. The flight took off from Newark Liberty International Airport in New York and was flying to Buffalo Niagara International Airport also in New York. The plane crashed in New York. | | alleged by Plaintiff . . . occurred outside New York.'"[236] "New York law is not likely to take any party by surprise . . . ."[237] | |
| *Zimmerman v. Novartis Pharms. Corp.*, 889 F. Supp. 2d 757 (D. Md. 2012) | P (decedent) was a Maryland domiciliary.[239] D was incorporated in Delaware and had its principal place of business in New Jersey. P allegedly suffered an injury in | New Jersey law. | "The place where the injury occurred, Maryland, is 'simply fortuitous' with respect to punitive damages . . . ."[240] | Yes. |

235. The court does not mention the domicile of Defendants Colgan Air, Inc., Pinnacle Airlines Corp., and Continental Airlines, Inc. The docket reveals that Colgan Air was incorporated in Virginia and maintained its principal place of business in Virginia; Pinnacle Airlines was incorporated in Delaware and maintained its principal place of business in Tennessee; and Continental Airlines was incorporated in Delaware and maintained its principal place of business in Texas. All three airlines were engaged in business in New York. Third Amended Complaint at 1–2, *Air Crash Near Clarence Ctr.*, 983 F. Supp. 2d 249 (W.D.N.Y. 2013) (No. 09-md-2085).

236. *Air Crash Near Clarence Ctr.*, 983 F. Supp. 2d at 255.

237. *Id.* at 258.

239. Plaintiff Stacy Zimmerman, personal representative of the decedent's estate, was also a Maryland domiciliary. Zimmerman v. Novartis Pharms. Corp., 889 F. Supp. 2d 757, 759 (D. Md. 2012).

240. *Id.* at 762 (citing Meng v. Novartis Pharms. Corp., Nos. L-7670-07MT, L-6027-08MT, 278, 2009 WL 4623715, at *3 (N.J. Super. Ct. Law Div. Nov. 23, 2009)).

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| | Maryland as a result of her use of drugs produced by D. The relevant labeling and packaging of the drugs took place in New Jersey. The parties' relationship was also centered in New Jersey. | | | |
| *Meng v. Novartis Pharms. Corp.*, Nos. L-7670-07MT, L-6027-08MT, 278, 2009 WL 4623715 (N.J. Super. Ct. Law Div. Nov. 23, 2009) | PPs (patients) were Maine and Mississippi residents; D (manufacturer) was incorporated in Delaware and had its principal place of business in New Jersey. PPs allege that they suffered injury after taking drugs manufactured by D. PPs suffered injuries in several states. D's allegedly wrongful conduct occurred in New Jersey. | New Jersey law. | "[T]he place of plaintiffs' alleged injuries [is] 'fortuitous' because the place of injury bears little relation to Defendant's alleged punitive conduct toward the parties."[241] | Yes. |
| *Cervantes v. Bridgestone/ Firestone N. Am. Tire Co., LLC*, No. 07C–06–249 JRJ, 2010 | P (driver and decedent) was a Mexican resident; DDs (manufacturers) were domiciled in Delaware, | United States law.[243] | "The place of injury in this case is fortuitous. . . . Because Durango has no other contact with the claim other than the injury itself, the place of | Yes. |

241. *Meng*, 2009 WL 4623715, at *3.
243. Rather than Mexican law.

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| WL 431788 (Del. Super. Ct. Feb. 8, 2010) | Tennessee, Ohio, and Michigan.[242] P was driving within Mexico when P crashed owing to a defect in P's tire caused by DDs. The vehicle was designed in Michigan and the defective tire was designed in Ohio; the alleged wrongdoing therefore occurred in the United States. The parties' relationship was centered in Delaware (the place where the suit was filed). | | injury must be considered fortuitous."[244] | |
| *Piska v. Gen. Motors Corp.*, No. 02 C 7367, 2004 WL 2423830 (N.D. Ill. Oct. 28, 2004) | PPs (passengers) were Illinois domiciliaries; D (car manufacturer) was a Delaware domiciliary.[245] PPs traveled from Illinois to Indiana; PPs crashed while in Indiana, allegedly owing to a defect caused by D. D argued that PPs negligently | Indiana law. | "[W]hile it may have been fortuitous that the accident happened in Indiana, it was not fortuitous that the Piskas were in Indiana. They traveled there voluntarily, and while on Indiana roads the Piskas purposefully availed themselves of the benefits and restrictions of Indiana laws."[246] | No. |

242. Defendant Ford Motor Co. was incorporated in Delaware and had its principal place of business in Michigan. Cervantes v. Bridgestone/Firestone N. Am. Tire Co., LLC, No. 07C–06–249 JRJ, 2010 WL 431788, at *2–3 (Del. Super. Ct. Feb. 8, 2010). Defendant Firestone had several subsidiaries with principal places of business in Tennessee and Ohio. *Id.* at *2.

244. *Cervantes*, 2010 WL 431788, at *2.

245. Defendant General Motors Corp. was incorporated in Delaware. Piska v. Gen. Motors Corp., No. 02 C 7367, 2004 WL 2423830, at *1 (N.D. Ill. Oct. 28, 2004).

246. *Id.* at *5.

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| | entrusted the car to an inexperienced driver, giving D a claim for contribution; PPs' allegedly negligent conduct occurred in Indiana. | | | |
| *Schoeberle v. United States*, No. 99 C 352, 2001 WL 292984 (N.D. Ill. Mar. 26, 2001) | PPs (passengers and decedents) were Wisconsin residents; DDs are domiciled in several states, including Wisconsin.[247] PPs set out from Wisconsin for a short business meeting in Iowa before returning to Wisconsin. The plane crashed in Iowa. The plane was maintained and garaged in Wisconsin by a Wisconsin corporation. The parties' relationship was centered in Wisconsin. | Wisconsin law. | "[T]he place of the accident was fortuitous in the sense that the accident could have occurred in any of the three states that the aircraft planned to cross on the trip from Des Moines to Milwaukee."[248] | Yes. |
| *Cook v. United States*, No. 99 C 2599, 2001 WL 293085 (N.D. Ill. Mar. 26, | See *Schoeberle v. United States*, No. 99 C 352, 2001 WL 292984, at *4 (N.D. Ill. Mar. 26, 2001). | Wisconsin law. | "[T]he place of the accident was fortuitous in the sense that the accident could have occurred in any of the three states that the aircraft planned to | Yes. |

247. *See* Schoeberle v. United States, No. 99 C 352, 2001 WL 292984, at *3 (N.D. Ill. Mar. 26, 2001) ("Two defendants (the Leiske Estate and Monarch) are Wisconsin residents and none of the four defendants are Iowa residents.").

248. *Id.* at *4.

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| 2001)[249] | | | cross on the trip from Des Moines to Milwaukee."[250] | |
| *Martinez v. Smithway Motor Xpress, Inc.*, No. 99 C 6561, 2000 WL 1741910 (N.D. Ill. Nov. 24, 2000) | PPs (passengers and driver) were Colorado domiciliaries; D was incorporated in Iowa.[251] D also does business in Illinois. PPs were driving from Colorado to Idaho. PPs were injured in an accident in Wyoming. | Colorado law. | "[C]ourts have recognized that the place of injury may be largely fortuitous; and, in such cases, the location of the injury is not given its usual weight in the choice of law analysis."[252] | Yes. |
| *Phillips v. Gen. Motors Corp.*, 995 P.2d 1002 (Mont. 2000) | PPs (driver and passengers) were all Montana domiciliaries;[253] D (manufacturer) was domiciled in Delaware.[254] PPs were in a car originally sold in North Carolina. The car was allegedly designed and manufactured | Montana law. | "[T]he traditional lex loci rule . . . applies the law of the place of the accident which may be fortuitous in tort actions."[256] | Yes. |

249. Cook v. United States, No. 99 C 2599, 2001 WL 293085 (N.D. Ill. Mar. 26, 2001) was consolidated with *Schoeberle*, 2001 WL 292984 (discussed immediately above).

250. *Cook*, 2001 WL 293085, at *4.

251. Defendant Smithway Motor Xpress, Inc. was incorporated in Iowa and had its principal place of business in Iowa. Martinez v. Smithway Motor Xpress, Inc., No. 99 C 6561, 2000 WL 1741910, at *3 (N.D. Ill. Nov. 24, 2000).

252. *Id.* at *2.

253. One plaintiff, Samuel Byrd, was no longer a Montana domiciliary at the time of the suit. Phillips v. Gen. Motors Corp., 995 P.2d 1002, 1012 (Mont. 2000). However, the court concluded that applying Montana law "would further the purpose of that law regardless of the postaccident residency of the plaintiff." *Id.* at 1012–13.

254. Defendant General Motors was incorporated in Delaware. Neither party argued that Delaware had an interest in having its law applied to the dispute. *Id.* at 1012 n.1.

256. *Id.* at 1009.

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| | in Michigan.[255] PPs suffered injury in Kansas owing to an alleged design defect. | | | |
| *Clawans v. United States*, 75 F. Supp. 2d 368 (D.N.J. 1999) | PPs (passengers and decedents) were New Jersey domiciliaries; DDs (pilot and owner) were also New Jersey domiciliaries. PPs were flying from New Jersey to Maryland for a meeting in Maryland. The plane crashed in Maryland. | New Jersey law. | "Any interest that Maryland has in deterrence is diminished in this case because its contact with the situs of the accident was primarily fortuitous."[257] | Yes. |
| *Champlain Enters., Inc. v. United States*, 945 F. Supp. 468 (N.D.N.Y. 1996) | P (owner and operator) was a New York domiciliary; D (manufacturer) was a Kansas domiciliary.[258] The plane crashed in New York while en route to Adirondack Airport in Saranac Lake, New York. The plane was manufactured and | Kansas law. | "Here, New York's contacts are tenuous. . . . [I]n products liability cases involving mobile products, such as airplanes or automobile tires, courts applying New York choice-of-law rules often consider the mobility of the product. . . . [And] in air disasters, 'place of injury is largely | No. |

255. Defendant General Motors did not introduce "evidence of where the pickup truck was designed and manufactured" into the record. *Id.* at 1011. The court found that, even if Michigan was the place where the car was designed and manufactured, Michigan did not have an interest in the resolution of the case. *Id.*

257. Clawans v. United States, 75 F. Supp. 2d 368, 374 (D.N.J. 1999).

258. Defendant Beech Aircraft Corp. was incorporated in Kansas and had its principal place of business in Kansas. Champlain Enters., Inc. v. United States, 945 F. Supp. 468, 470 (N.D.N.Y. 1996).

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| | sold in Kansas. | | fortuitous.'"[259] | |
| *Northland Ins. Co. v. Truckstops Corp. of Am.*, 897 F. Supp. 1091 (N.D. Ill. 1995) | P (decedent) was a Wisconsin resident; D (repairer) is an Illinois domiciliary. P crashed and was killed in Tennessee, just outside of Illinois, owing to a defect allegedly caused by D. | Illinois law. | "The fact that the accident happened in Tennessee is, for damages issues, a fortuitous event."[260] | Yes. |
| *Perry v. Johnson Bros. Corp.*, No. 93 C 20064, 1995 WL 319538 (N.D. Ill. May 24, 1995) | P (decedent) was an Iowa resident;[261] D (contractor) was domiciled in Minnesota. P was killed after driving off a bridge connecting Illinois and Iowa that D was engaged in resurfacing. P died on the Illinois side of the bridge. The relevant construction project was paid for by Iowa. The relevant resurfacing contract was between D and Iowa. | Iowa law. | "[T]he location of the relationship between the parties is of no significance as the parties had no relationship beyond the fortuitous occurrence causing Perry's death."[262] | Yes |

259. *Id.* at 473 (quoting *In re* Air Crash Disaster Near Chi., Ill. on May 25, 1979, 644 F.2d 594, 615 (7th Cir. 1981)).

260. Northland Ins. Co. v. Truckstops Corp. of Am., 897 F. Supp. 1091, 1093 (N.D. Ill. 1995).

261. Plaintiff Luana Perry, administrator of the decedent's estate, was also an Iowa resident; the court does not indicate which domicile is of key interest. *See* Perry v. Johnson Bros. Corp., No. 93 C 20064, 1995 WL 319538, at *2 (N.D. Ill. May 24, 1995).

262. *Id.* at *4.

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| *Epps Flying Servs., Inc. v. Hartzell Propeller Inc.*, Civ No. 94CV4863, 1995 WL 612590 (E.D. Pa. Oct. 13, 1995) | P (owner) was a Georgia domiciliary;[263] D (manufacturer) was an Ohio domiciliary.[264] The allegedly defective component was manufactured in Ohio. All corporate decision-making regarding product warnings occurred in Ohio. | Ohio law. | "'[I]n aircraft accident cases the place of injury is almost always fortuitous and thus is not entitled to its usual weight in the choice of laws decision.' . . . Indeed, Hartzell concedes that the 'only relationship to Pennsylvania that appears to exist is that the alleged property damage to the aircraft occurred in Pennsylvania.'"[265] | Yes. |
| *Huddy v. Fruehauf Corp.*, 953 F.2d 955 (5th Cir. 1992) | P (driver) was a Texas resident; D (truck designer) was a Michigan domiciliary.[266] P was driving from Texas to Georgia; P crashed and was injured in Georgia allegedly owing to D's defective design. | Texas law. | "Both parties have indicated that the location of the wreck was fortuitous and that Georgia has no other interest in this case."[267] | Yes. |
| *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63 (S.D. 1992) | P (passenger) and D (owner) were both domiciled in | South Dakota law. | "With respect to that issue, South Dakota has all of the important contacts. . . . It was merely fortuitous that | Yes. |

263. Plaintiff Hartzell Propeller, Inc. was incorporated in Georgia. Epps Flying Servs., Inc. v. Hartzell Propeller Inc., No. 94CV4863, 1995 WL 612590, at *1 (E.D. Pa. Oct. 13, 1995).

264. Defendant Hartzell Propeller, Inc. was incorporated in Ohio and had its principal place of business in Ohio. *Id.* at *3.

265. *Id.* at *2 (quoting Foster v. United States, 768 F.2d 1278, 1283 (11th Cir. 1985)).

266. Defendant-Appellee Fruehauf Corporation had its principal place of business in Michigan. Huddy v. Fruehauf Corp., 953 F.2d 955, 956 (5th Cir. 1992).

267. *Id.* at 957.

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| | South Dakota.[268] D also had its principal place of business in South Dakota. P was traveling from South Dakota to Arkansas and stopped to refuel in Missouri. While in Missouri, P was injured owing to alleged negligence on D's part. | | Charlotte slipped while the bus was passing through Missouri."[269] | |
| *Hataway v. McKinley*, 830 S.W.2d 53 (Tenn. 1992) | P (student and decedent) and D (instructor) were both Tennessee residents. D taught P in a scuba class at Memphis State University in Tennessee. D and P went to Arkansas as part of that scuba class. While in Arkansas, P was killed in a scuba accident allegedly owing to D's negligence. | Tennessee law. | "We think the fact that the injury occurred in Arkansas was merely a fortuitous circumstance . . . ."[270] | Yes. |
| *Meyers v. Kallestead*, No. 91 C 20362, 1992 WL 280450 (N.D. Ill. Sept. 30, 1992) | PPs (passengers and driver) were Iowa residents; DDs (liquor shop and owner of liquor shop) are Illinois | Iowa law. | "[T]here is no direct relationship between the parties, as the car accident was a fortuitous event."[272] | No. |

268. Defendant Dakotah Charter, Inc. was a corporation incorporated in South Dakota. Chambers v. Dakotah Charter, Inc., 488 N.W.2d 63, 68 (S.D. 1992).
269. *Id.*
270. Hataway v. McKinley, 830 S.W.2d 53, 60 (Tenn. 1992).
272. *Id.* at *4.

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| | domiciliaries.[271] PPs were involved in a car accident on a highway in Iowa with another driver who had purchased alcohol from DDs. PPs claimed under the Iowa Dram Shop Act. | | | |
| *In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989*, 781 F. Supp. 1307 (N.D. Ill. 1991) | PPs (passengers) were Illinois and Michigan, and (potentially) Ohio domiciliaries;[273] D (designer and manufacturer) was incorporated and had its principal place of business in New York . PPs were flying from Colorado to Illinois. PPs were injured when the | Ohio law. | "Iowa's interests have not been accorded great weight in earlier choice of law determinations during these proceedings, principally because the eventual crash in Iowa was an entirely fortuitous, unforeseen emergency landing in Sioux City."[274] | Yes. |

271. Defendant Bette's Mom's Tavern had its principal place of business in Illinois; Bette L. Kallestead, owner of the tavern, had her residence in Illinois. Meyers v. Kallestead, No. 91 C 20362, 1992 WL 280450, at *1 (N.D. Ill. Sept. 30, 1992).

273. The domicile of Plaintiff White was disputed. While Plaintiff White argued that she was an Illinois domiciliary at the time of filing, Defendant General Electric argues she was an Ohio domiciliary. *In re* Air Crash Disaster at Sioux City, Iowa, on July 19, 1989, 781 F. Supp. 1307, 1310 (N.D. Ill. 1991). The court declines to resolve the issue since "the resolution would contribute little to the choice of law analysis because the domicile contact does not lead to a clear answer." *Id.* The court also stated that two of the plaintiffs were *citizens*, rather than *domiciliaries* or *residents*, of Illinois and Michigan. *Id.* ("The parties agree that plaintiff Brown is a citizen of Illinois and that the McGrady plaintiffs were citizens of Michigan at the time they filed their action."). The two concepts are not the same. The court goes on to say that "[t]he parties dispute the *domicile* of plaintiff White," but then states that the dispute is whether Plaintiff White is a "*citizen* of Illinois" or an "Ohio *citizen*." *Id.* (emphasis added). Since in this paragraph the court is purporting to analyze "the domicile and place of business of the parties," *id.*, it seems that the court is using the word "citizen" as a stand-in for "domicile."

274. *Id.*

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| | plane crashed in Iowa. The plane was manufactured in California. The allegedly defective component was manufactured and installed in Ohio. | | | |
| *Lewis-DeBoer v. Mooney Aircraft Corp.*, 728 F. Supp. 642 (D. Colo. 1990) | PPs (pilot and passengers) were Texas and Colorado domiciliaries; D (airline manufacturer) was incorporated in New Jersey and had its principal place of business in Texas. PPs took off from and intended to land in Colorado; PPs crashed in Colorado. The plane was owned by a Texas partnership and was hangared in Texas. The plane was designed, manufactured, promoted, and sold in Texas. The plane was certified as airworthy in Texas. | Texas law. | "The doctrine of fortuity has also been applied in this jurisdiction in at least one non-air crash products liability case. I conclude that the situs of the injury was fortuitous and warrants little weight."[275] | No. |
| *Vantassell-Matin v. Nelson*, 741 F. Supp. 698 (N.D. Ill. 1990) | PPs (passengers) were California domiciliaries; DDs (fellow passengers) were Minnesota | Illinois law. | "Although Illinois was the situs of some of Nelsons' complained-of statements, those made to members of the flight crew in the air really took place in no | Yes. |

275. Lewis-DeBoer v. Mooney Aircraft Corp., 728 F. Supp. 642, 644 (D. Colo. 1990) (citing Kozoway v. Massey-Ferguson, Inc., 722 F. Supp. 641, 643 (D. Colo 1989)).

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| | domiciliaries.[276] PPs were flying from West Germany to California, with a stopover in Illinois. PPs argued that DDs defamed them by making false statements to the flight crew and, later, to authorities in Illinois. | | particular state. Because the precise location of those statements was utterly fortuitous and likely unascertainable . . . ."[277] | |
| *Sommers v. 13300 Brandon Corp.*, 712 F. Supp. 702 (N.D. Ill. 1989) | P (passenger) was an Indiana resident; DDs (liquor store and driver) were Illinois domiciliaries.[278] D (liquor store) sold alcohol to an intoxicated D (driver); as a result, D had an automobile accident in Indiana in which P was injured. P claimed under the Illinois Dram Shop Act. | Indiana law. | "Where, as in the present case, the place of injury is a fortuitous event, that factor is given less weight."[279] | No. |
| *In re Air Crash Disaster at Stapleton* | PPs (passengers) were residents of several states, including Arizona, | Texas law. | "In our view, the crash at Stapleton International Airport was less than | Yes. |

276. Neither party argued that Minnesota law applied. Vantassell-Matin v. Nelson, 741 F. Supp. 698, 704 (N.D. Ill. 1990).

277. *Id.* at 703 n.7.

278. Defendant 13300 Brandon Corp. was incorporated in Illinois and had its principal place of business in Illinois; Defendant Daniel Funduck was an Illinois resident. Sommers v. 13300 Brandon Corp., 712 F. Supp. 702, 703 (N.D. Ill. 1989).

279. *Id.* at 705.

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| *Int'l Airport, Denver, Colo., on Nov. 15, 1987*, 720 F. Supp. 1445 (D. Colo. 1988) | Colorado, Idaho, New Jersey, and Washington; most PPs were Idaho residents. D (airline) was a Texas domiciliary.[280] PPs were flying from Colorado to Idaho; the plane crashed in Colorado. D's allegedly wrongful conduct (wrongful corporate conduct) occurred in Texas. The parties relationship was centered in Idaho. | | fortuitous. . . . [T]he combination of factors allegedly causing the accident could have occurred at any airport where pilots and the Houston dispatch center were forced to monitor preparations for take-off in inclement weather . . . ."[281] | |
| *Olmstead v. Anderson*, 400 N.W.2d 292 (Mich. 1987) | PPs (passenger and driver) were Minnesota residents;[282] D (other driver) was a Michigan resident. The administratrix of decedents estates was a Minnesota resident. PPs left Minnesota for a short camping trip in Michigan. While driving in Wisconsin, PPs crashed with D; | Michigan law. | "[In other cases,] [t]he plaintiffs' contacts with the forum states, whose laws were ultimately applied, could be described as neither fleeting nor fortuitous. That is not the case here. . . . The accident—a completely unplanned event—was the only contact with Wisconsin."[283] | Yes. |

280. Defendant Continental Airlines was incorporated in Texas and had its principal place of business in Texas. *In re* Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987, 720 F. Supp. 1445, 1451 (D. Colo. 1988). Continental argued that it had more than one principal place of business relevant to the court's choice of law analysis; the court rejected this argument. *Id.*

281. *Id.* at 1452.

282. The court initially specified that the decedents were Minnesota *citizens*, not domiciliaries. Olmstead v. Anderson, 400 N.W.2d 292, 292 (Mich. 1987). As was noted above, the two concepts are not the same. *See supra* note 273.

283. *Olmstead*, 400 N.W.2d at 302.

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| | PPs were killed in the crash. D's car was registered and insured in Michigan. | | | |
| *Dobelle v. Nat'l R.R. Passenger Corp.*, 628 F. Supp. 1518 (S.D.N.Y. 1986) | P (passenger) was a Pennsylvania domiciliary; D (railroad) was a D.C. domiciliary.[284] P took a train from New York to Pennsylvania. The train was involved in an accident in New Jersey; this accident caused P lasting psychological damage. D did business across the United States, but the allegedly wrongful conduct occurred in Pennsylvania. | Pennsylvania law. | "[T]he fact that the accident occurred in New Jersey was fortuitous. The likelihood of the accident occurring in New York or Connecticut was just as great."[285] | Yes. |
| *Wert v. McDonnell Douglas Corp.*, 634 F. Supp. 401 (E.D. Mo. 1986) | P (pilot) was an Indiana resident; DDs (contractors and manufacturers) were domiciled in | Arizona law. | "[T]here is more to Major Wert's presence in Arizona than the fortuitous flyover or transversing of Arizona | No.[288] |

284. Defendant National Railroad Passenger Corporation (Amtrak) was created by an Act of Congress and had its principal place of business in Washington, D.C. Dobelle v. Nat'l R.R. Passenger Corp., 628 F. Supp. 1518, 1520 (S.D.N.Y. 1986).

285. *Id.* at 1529.

288. The court finds plaintiff's presence in Arizona to be fortuitous but declines to reject Arizona law on that basis because there were other relevant connections to Arizona. *See id.*

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| | several states.[286] P crashed and died in Arizona owing to alleged defects in the plane. The plane was assigned to and maintained by the Indiana Air National Guard in Indiana. P was training in Arizona at the time of the accident; P took off from, and was planning to land, in an Arizona airbase. | | air space."[287] | |
| *Pardey v. Boulevard Billiard Club*, 518 A.2d 1349 (R.I. 1986) | PPs (passenger and driver) were Massachusetts residents; D (liquor store) was a Rhode Island domiciliary.[289] D, which was licensed in Rhode Island, served alcohol to an underage driver who was also a Massachusetts domiciliary. The underage driver drove P (passenger) from Rhode Island to Massachusetts; | Rhode Island law. | "[T]he place where the liquor was unlawfully sold is of greater significance than the location of the accident because, when an intoxicated person is driving, the actual site of the crash is largely fortuitous."[290] "[L]imitation of the statute's effect to those violations . . . that fortuitously result in an automobile accident within Rhode Island's borders would be inconsistent with legislative intent."[291] | No. |

286. The court does not mention the domiciles of the defendants. *See* Wert v. McDonnell Douglas Corp., 634 F. Supp. 401, 404 (E.D. Mo. 1986) ("[I]n a case such as this, where there is no domiciliary defendant, Indiana's interest should be discounted."). Defendant McDonnell Douglas Corporation was headquartered in Missouri; Martin-Baker Aircraft Co., Ltd. was headquartered in the United Kingdom; General Electric was headquartered in Massachusetts.

287. *Id.*

289. Defendant Boulevard Billiard Club was incorporated in Rhode Island. Pardey v. Boulevard Billiard Club, 518 A.2d 1349, 1351 (R.I. 1986).

290. *Id.* at 1352.

291. *Id.*

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| | while in Massachusetts, the underage driver crashed with P (driver), injuring PPs. | | | |
| *Foster v. United States*, 768 F.2d 1278 (11th Cir. 1985) | PPs (decedents) were Florida domiciliaries; D (air traffic control provider) is the United States. PPs were flying from Florida to Wisconsin. The plane crashed in Wisconsin. The alleged misconduct occurred in Illinois. The parties' relationship was centered in Illinois. PPs' sole heir and personal representative was an Illinois resident at time of the crash and subsequently moved to Florida. | Illinois law. | "It is not disputed that the injury in this case occurred in Wisconsin. However, as several courts have noted, in aircraft accident cases the place of the injury is almost always fortuitous and thus is not entitled to its usual weight in the choice of laws decision."[292] | Yes. |
| *Bushkin Assocs., Inc. v. Raytheon Co.*, 473 N.E.2d 662 (Mass. 1985) | PPs (banker and associated company) were New York domiciliaries.[293] D (defense company) was a Massachusetts | Massachusetts law. | "[T]he governing principles of law should hardly turn on a parsing of the disputed content of a telephone call or, more importantly, on the fortuitous fact that an oral offer was accepted orally in one | Yes. |

292. Foster v. United States, 768 F.2d 1278, 1282 (11th Cir. 1985). Neither party argued that Wisconsin law should govern. *Id.*

293. Plaintiff Bushkin Associates was incorporated in New York. Bushkin Assocs., Inc. v. Raytheon Co., 473 N.E.2d 662, 664 (Mass. 1985).

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| | domiciliary.[294] PPs and D entered into an alleged oral agreement by phone call in Massachusetts.[295] | | State rather than in the other."[296] | |
| *Jimenez v. Am. Airlines, Inc.*, 579 F. Supp. 631 (D.P.R. 1983) | PPs (passengers) were Puerto Rico domiciliaries; D (airline) was a Texas domiciliary.[297] PPs were flying from Illinois to California; the plane crashed in Illinois, killing PPs. | Puerto Rico law. | "[T]he place of the injury is an entirely fortuitous factor, and the fortune of the parties, in a rational system of law, should not be left at the mercy of such a whimsical factor."[298] | Yes. |
| *Halstead v. United States*, 535 F. Supp. 782 (D. Conn. 1982), *aff'd sub nom. Saloomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983) | PPs (decedents) were Connecticut domiciliaries; D (manufacturer of navigational chart) was domiciled in Colorado.[299] PPs were flying in West Virginia when they crashed owing to an allegedly defective navigational chart. The navigational chart was manufactured in Colorado; the | Colorado law. | "In the absence of any meaningful contact between the litigation and the state of West Virginia other than, by pure fortuity, the site of the crash, it would be offensive to traditional notions of justice and normal expectations to apply West Virginia law . . . ."[300] | Yes. |

294. Defendant Raytheon Company was incorporated in Massachusetts. *Id.*

295. The agreement was entered into over the phone: the offer was made in New York and accepted in Massachusetts. *Id.*

296. *Id.* at 668.

297. The court does not mention the domicile of Defendant American Airlines, Inc. American Airlines was headquartered in Texas.

298. Jimenez v. Am. Airlines, Inc., 579 F. Supp. 631, 633 (D.P.R. 1983) (quoting Fornaris v. Am. Sur. Co. of N.Y., 93 D.P.R. 29, 46 (P.R. 1966)).

299. Defendant Jeppesen & Co. was incorporated in Colorado and had its principal place of business there. Halstead v. United States, 535 F. Supp. 782, 785 (D. Conn. 1982), *aff'd sub nom.* Saloomey v. Jeppesen & Co., 707 F.2d 671 (2d Cir. 1983).

300. *Id.* at 787.

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| | place of the allegedly tortious conduct was therefore in Colorado. The navigational chart was purchased in Colorado. | | | |
| *Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290 (Fla. Dist. Ct. App. 1983) | PPs (passengers and decedents) were Florida residents;[301] DDs (owners of the plane) were Florida residents.[302] PPs flew from Florida to New York for the holidays. On return, PPs were flying from Delaware to Florida; PPs crashed in North Carolina. The plane was hangared in Florida and was negligently maintained in Florida; therefore, the allegedly wrongful conduct occurred in Florida. The relationship between the | Florida law. | "The dissent suggests that *lex loci delicti* is appropriate even when the location of the accident is a mere fortuity. Review of the cases upon which it relies discloses the error in that proposition."[303] | Yes. |

301. Plaintiffs were only temporary residents of Florida. *See* Proprietors Ins. Co. v. Valsecchi, 435 So. 2d 290, 295 (Fla. Dist. Ct. App. 1983) ("Although the plaintiffs in this case . . . are not permanent Florida residents, neither are they North Carolina residents.").

302. Defendant DeLand Aviation, Inc. was incorporated in Florida. *Id.* at 292. Defendant DeLand Aviation leased the plane from Dean West and O.R. Hunt, who were Florida residents. *Id.*

303. *Id.* at 296.

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| | parties arose in Florida. | | | |
| *DeMeyer v. Maxwell*, 647 P.2d 783 (Idaho Ct. App. 1982) | P (passenger) and D (driver) were both Idaho residents. P and D took a trip to Washtington. During their return trip to Idaho, P and D passed through Oregon. While in Oregon, P was killed in an automobile accident. | Idaho law. | "[O]nly through fortuitous circumstances were [the parties] passing through Oregon at the time of the accident . . . ."[304] | Yes. |
| *Schulze v. Ill. Highway Transp. Co.*, 423 N.E.2d 278 (Ill. App. Ct. 1981) | PPs (passengers) were Illinois residents; DDs (driver and company) were Illinois domiciliaries.[305] PPs were driving from Illinois to Michigan; PPs crashed in Michigan. D's wrongful conduct occurred in Illinois. | Illinois law. | "We are compelled to say that here, too, the place of injury was fortuitous. The same type of accident and the same injuries could just as easily have occurred on an Illinois or Indiana highway."[306] | Yes. |
| *Pittway Corp. v. Lockheed Aircraft Corp.*, 641 F.2d 524 (7th | P (owner) was incorporated in Pennsylvania and had its principal place of business in Illinois;[307] D | Illinois law. | "In view of the fortuity of the contact, Wisconsin, whether characterized as the place of injury or not, has little, if any, | Yes. |

304. DeMeyer v. Maxwell, 647 P.2d 783, 786 (Idaho Ct. App. 1982).

305. Defendant Illinois Highway Transportation Company was incorporated in Illinois and had its principal place of business in Illinois; Defendant Doreen Foster was an Illinois resident. Schulze v. Ill. Highway Transp. Co., 423 N.E.2d 278, 279 (Ill. App. Ct. 1981).

306. *Id.* at 280.

307. Plaintiff Pittway Corp. had facilities in Illinois, New York, Ohio, Connecticut, and Wisconsin. Pittway Corp. v. Lockheed Aircraft Corp., 641 F.2d 524, 525 (7th Cir. 1981). The facility in Wisconsin had no connection to the dispute. *Id.*

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| Cir. 1981) | (designer and manufacturer) was a California domiciliary;[308] D's division that had designed and manufactured the plane at issue had its principal place of business in Georgia. D manufactured a plane in Georgia; therefore, the conduct causing the injury occurred in Georgia. P took delivery of a plane manufactured by D in Delaware and flew it to Illinois, where the plane was hangared. The injury to P occurred in Illinois.[309] The party's relationship was centered in Illinois. The defect in the plane was discovered in Wisconsin. | | legitimate interest in the outcome of the litigation."[310] | |

308. Defendant Lockheed Aircraft Corp. was headquartered in California. *Id.*

309. There was debate as to which state was the place of injury, but the court found that "a more plausible argument can be made for deeming Illinois rather than Wisconsin the place of injury." *Id.* at 528. Because the harm sustained by Pittway was "purely economic," the court reasoned that the injury would be sustained where Pittway had its principal place of business—Illinois—rather than where the injury was discovered—Wisconsin. *Id.*

310. *Id.* at 528.

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| *Cousins v. Instrument Flyers, Inc.*, 376 N.E.2d 914 (N.Y. 1978) | P (pilot) was a New York domiciliary; D (owner) was a New Jersey domiciliary.[311] D's president lived and worked in New York. P rented a plane from D in New Jersey and flew the plane from New Jersey to New York. After several stops in New York, P flew towards Michigan and planned an intermediate stop in Ohio. P crashed in Pennsylvania. The plane was manufactured in Florida. The plane was kept in a hangar and maintained in New Jersey. | New York law. | "[I]n airplane crash cases, the place of the wrong, if it can even be ascertained, is most often fortuitous . . . ."[312] | Yes. |
| *In re Air Crash Disaster at Bos., Mass. on July 31, 1973*, 399 F. Supp. 1106 (D. Mass. 1975) | PPs (decedents) were Vermont domiciliaries; D (airline) was incorporated in Delaware and had its principal place of business in Georgia. PPs were flying from Vermont to Massachusetts, | Vermont law. | "The other advantage of the traditional approach to choice of law, predictability of result, is not a strong consideration in tort cases which have their origin in purely fortuitous occurrences."[313] "Massachusetts' sole contact with this | Yes. |

311. Defendant Instrument Flyers, Inc., is incorporated in New Jersey. Cousins v. Instrument Flyers, Inc., 376 N.E.2d 914, 914 (N.Y. 1978).

312. *Id.* at 915 (citing Long v. Pan Am. World Airways, Inc., 213 N.E.2d 796, 798 (N.Y. 1965)).

313. *In re* Air Crash Disaster at Bos., Mass. on July 31, 1973, 399 F. Supp. 1106, 1111 (D. Mass. 1975).

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| | and were planning on returning to Vermont. PPs crashed in Massachusetts. PPs purchased their plane tickets in Vermont. PPs' estates were being probated in Vermont. PPs' beneficiaries were Vermont residents. | | litigation is the happenstance that the accident occurred there."[314] | |
| *First Nat'l Bank in Fort Collins v. Rostek*, 514 P.2d 314 (Colo. 1973) | PPs (passengers) and D (pilot) were all Colorado residents.[315] PPs took a short business trip to South Dakota and stayed for less than a day. The plane crashed in South Dakota and PPs died in the accident. | Colorado law. | "South Dakota's only interest in this controversy is the fortuitous occurrence of the accident within its borders."[316] | Yes. |

314. *Id.* at 1112.

315. The decedents were husband and wife. First Nat'l Bank in Fort Collins v. Rostek, 514 P.2d 314, 315 (Colo. 1973). Plaintiff, First National Bank in Fort Collins, was the guardian of the decedent wife's natural children. *Id.* Plaintiff brought suit against the estate of the decedent husband. *Id.* Therefore, the Plaintiffs and Defendant overlap in this case.

316. *Id.* at 318.

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| *Issendorf v. Olson*, 194 N.W.2d 750 (N.D. 1972) | P (passenger) and D (driver) were both North Dakota residents. The vehicle was owned by a North Dakota resident (D) and was registered, garaged, and insured in North Dakota. P and D set out from North Dakota and intended to return to North Dakota. P and D passed briefly onto the Minnesota highway.[317] P was injured in an automobile accident while in Minnesota. | North Dakota law. | "The locus of the accident was fortutious [sic], having resulted from a brief journey into Minnesota for food, beverage, and entertainment."[318] | Yes. |
| *Woodward v. Stewart*, 243 A.2d 917 (R.I. 1968) | P (passenger and decedent) and DDs (driver and owner) were all Rhode Island residents. P and D (driver) took a trip that was to start and end in Rhode Island. For convenience, P and D passed briefly into Massachusetts. While in Massachusetts, P and D collided with another vehicle driven by a Rhode Island | Rhode Island law. | "All the interest factors, other than the fortuitous locus of the accident, point to the application of Rhode Island law."[319] | Yes. |

317. The court also emphasizes that, although the defendant chose to use a Minnesota highway, "he could have used North Dakota highways almost exclusively . . . ." Issendorf v. Olson, 194 N.W.2d 750, 755 (N.D. 1972).

318. *Id.*

319. Woodward v. Stewart, 243 A.2d 917, 923 (R.I. 1968).

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| | resident and owned by a different Rhode Island resident. P was killed in the resulting automobile accident. | | | |
| *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968) | P (decedent) and D (driver) were both Iowa residents. P and D took a trip that was to start and end in Iowa to visit the decedent's children. On their return, P and D passed briefly into Wisconsin. While in Wisconsin, P died in an automobile accident. | Iowa law. | "The presence of the parties in Wisconsin at the time of the accident was entirely fortuitous."[320] | Yes. |
| *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967) | P (passenger) and D (driver) were both Kentucky residents. While crossing a bridge from Kentucky into Indiana, P was injured in an automobile | Kentucky law. | "By fortuitous circumstances the accident happened on the other side of the Ohio River instead of on this side."[321] "All of the interests involved (other than the fortuitous place of the | Yes. |

320. Fuerste v. Bemis, 156 N.W.2d 831, 833 (Iowa 1968).
321. Wessling v. Paris, 417 S.W.2d 259, 260 (Ky. 1967).

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| | accident. The injury occurred on the Indiana side of the bridge. | | accident) are Kentucky interests."[322] | |
| *Kuchinic v. McCrory*, 222 A.2d 897 (Pa. 1966) | PPs (passengers) were Pennsylvania residents; D (pilot) was a Pennsylvania resident. PPs were flying from Pennsylvania to Florida for a short trip; PPs' plane crashed in Georgia. The relationship between PPs and D was formed in Pennsylvania. | Pennsylvania law. | "Georgia's only contact with the present case, as the situs of the accident, is wholly fortuitous . . . ."[323] | Yes. |
| *Long v. Pan Am. World Airways, Inc.*, 213 N.E.2d 796 (N.Y. 1965) | PPs (passengers) were Pennsylvania residents; D (airline) was a New York domiciliary.[324] PPs were flying from Puerto Rico to Pennsylvania; PPs' plane broke down in flight near the Delaware-Maryland border and crashed in Maryland. PPs had purchased their flight tickets in Pennsylvania. PPs' survivors and | Pennsylvania law. | "If . . . it could be shown that a Maryland policy would be furthered by shielding this defendant from liability, then, perhaps, even though it is only fortuitously the situs of the accident, a stronger showing could be made for application of its law. But there is no [such] contention here . . . ."[325] | Yes. |

322. *Id.* at 261.
323. Kuchinic v. McCrory, 222 A.2d 897, 900 (Pa. 1966).
324. Defendant Pan American World Airways was incorporated in New York and had its principal place of business in New York. Long v. Pan Am. World Airways, Inc., 213 N.E.2d 796, 797 (N.Y. 1965).
325. *Id.* at 798.

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| | executors and administrators were Pennsylvania residents. | | | |
| *Wilcox v. Wilcox*, 133 N.W.2d 408 (Wis. 1965) | P (passenger) and DD (driver and insurer) were all Wisconsin domiciliaries.[326] The automobile was licensed and usually garaged and operated in Wisconsin. P and D (driver) went on a vacation that was to start and end in Wisconsin. While returning to Wisconsin, P and D passed through several states, including Nebraska. While in Nebraska, P was injured in an automobile accident. | Wisconsin law. | "That [the accident] occurred outside [Wisconsin] was merely fortuitous, and should not now inure as a windfall to any of the defendants."[327] | Yes. |

326. The defendant insurer, American Family Mutual Insurance Company, was incorporated in Wisconsin. *See* Wilcox v. Wilcox, 133 N.W.2d 408, 415 (Wis. 1965). The insurer was also organized and licensed in Wisconsin. *Id.*

327. *Id.* at 416.

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| *Griffith v. United Air Lines, Inc.*, 203 A.2d 796 (Pa. 1964) | P (passenger) was a Pennsylvania domiciliary; D (airline) was incorporated in Delaware and had its principal place of business in Illinois. P was flying from Pennsylvania to Arizona; P's plane crashed while making a stop in Colorado. P's will was probated in Pennsylvania. D regularly conducted business in Pennsylvania. The relationship between P and D was formed in Pennsylvania. P's dependents were domiciled in Pennsylvania. | Pennsylvania law. | "The state in which injury occurred, as such, has relatively little interest in the measure of damages to be recovered unless it can be said with reasonable certainty that defendant acted in reliance on that state's rule. . . . [T]he site of the accident was purely fortuitous."[328] | Yes. |
| *Kilberg v. Ne. Airlines, Inc.*, 172 N.E.2d 526 (N.Y. 1961) | P (decedent) was a New York resident. P planned to fly from New York to Massachusetts. New York was the place of contracting for the plane ticket. The plane crashed in Massachusetts and P was killed. | New York law.[329] | "[Plaintiff's] plane may meet with disaster in [a] State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another. The place of injury becomes entirely fortuitous."[330] | Yes. |

328. Griffith v. United Air Lines, Inc., 203 A.2d 796, 806 (Pa. 1964).

329. New York law was applied to the limitation of damages on the basis that New York recognized a public policy against limiting damages. Kilberg v. Ne. Airlines, Inc., 172 N.E.2d 526, 528 (N.Y. 1961).

330. *Id.* at 527.

| **"Transitory"** | | | | |
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| *Bruce v. Martin-Marietta Corp.*, 418 F. Supp. 829 (W.D. Okla. 1975), *aff'd*, 544 F.2d 442 (10th Cir. 1976) | PPs (passengers and decedents) were primarily Kansas domiciliaries;[331] D (manufacturer) was a Maryland domiciliary.[332] PPs were flying from Kansas to Utah. The plane crashed in Colorado, killing most passengers. The plane was designed and manufactured in Maryland; Maryland was therefore the place of the alleged wrongdoing. | Maryland law. | "The place the injuries and deaths occurred is Colorado which carries relatively minor importance as to the issues herein between Plaintiffs and the manufacturer of the aircraft for the reason that the crash occurred while a transient aircraft was passing through said state."[333] | Yes. |
| *Bruce v. Martin-Marietta Corp.*, 418 F. Supp. 837 (W.D. Okla. 1975), *aff'd*, 544 F.2d 442 (10th Cir. 1976)[334] | PPs (passengers and decedents) were primarily Kansas domiciliaries; D (owner) was a Missouri domiciliary. PPs were flying from Kansas to Utah. The plane crashed | Missouri law. | "The place the injuries and deaths occurred is Colorado but this factor is not of significant importance as said state was merely the place where a transient aircraft crashed while passing through said state."[335] | Yes. |

331. Some crew members were Oklahoma domiciliaries. Bruce v. Martin-Marietta Corp., 418 F. Supp. 829, 833 (W.D. Okla. 1975), *aff'd*, 544 F.2d 442 (10th Cir. 1976).

332. Defendant Martin-Marietta was incorporated in Maryland and had its principal palace of business in Maryland. *Id.*

333. *Id.* at 832–33.

334. This is the sister case to *Bruce*, 418 F. Supp. 829, analyzed immediately above. District Judge Daugherty decided both cases and handed down the decisions one month apart.

335. *Id.* at 839.

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| | in Colorado, killing most passengers. The plane was based in and operated from in Missouri; Missouri was therefore the place of the alleged wrongdoing. | | | |
| *Bruce v. Martin-Marietta Corp.*, 544 F.2d 442 (10th Cir. 1976) | See the district court decisions (discussed immediately above). | Maryland law and Missouri law.[336] | "The only connection of Colorado is that a transient airplane, flying interstate, crashed there."[337] | Yes. |
| *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968) | P (passenger) and D (driver) were both Alaska domiciliaries. P and D left Alaska for a short trip to Washington. On their return trip, P and D briefly passed through Canada. While in Canada, P was injured in an automobile accident. | Alaska law. | "[The parties'] only contacts with the situs of the tort are transitory in nature."[338] "[Applying the lex loci delicti] would give unwarranted precedence to the laws of a jurisdiction with which the parties' contacts were merely fortuitous, transitory, and insubstantial."[339] | Yes. |

336. Maryland law controlled the liability of the airline manufacturer (Martin-Marietta Corporation); Missouri law controlled the liability of the airline owner (Ozark Airlines, Inc.). Bruce v. Martin-Marietta Corp., 544 F.2d 442, 445 (10th Cir. 1976).

337. *Id.*

338. Armstrong v. Armstrong, 441 P.2d 699, 700 (Alaska 1968).

339. *Id.* at 703.

| **"Happenstance"** | | | | |
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| *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163 (Tex. Ct. App. 2002) | P (contractor) was an Oklahoma domiciliary;[340] D (Nabors Drilling USA, Inc.) was a Texas domiciliary.[341] P contracted with D to drill an oil well in Louisiana; workers sustained injuries at the site and claimed against D; D sought an indemnity against P. The contract was negotiated and entered into in each party's respective home state. | Texas law.[342] | "Given that happenstance will govern the outcome, it is difficult to characterize this means of determining place of performance as anything but 'purely fortuitous.'"[343] | Yes. |
| *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980) | PPs (passengers) and DDs (pilot and plane lessee) were all Florida residents. PPs and DDs planned a holiday trip to North Carolina. The plane crashed in South Carolina. | Florida law. | "The relationship of South Carolina to the personal injury action is limited to the happenstance of the plane coming into contact with South Carolina soil after developing engine trouble in unidentified airspace."[344] | Yes. |

340. Plaintiff Chesapeake Operating, Inc. was incorporated in Oklahoma. Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc., 94 S.W.3d 163, 166 (Tex. Ct. App. 2002).
341. Defendant Nabors Drilling USA, Inc. was incorporated in Texas. *Id.*
342. Justice Kem Thompson Frost, dissenting, argued that Louisiana law should govern. *Id.* at 188 (Frost, J., dissenting).
343. *Id.* at 191.
344. Bishop v. Fla. Specialty Paint Co., 389 So. 2d 999, 1000 (Fla. 1980).

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| **"Insignificant"** | | | | |
| *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987) | P (decedent) and D (manufacturer) were both Indiana residents. P was working in Illinois using a lift manufactured by D in Indiana. P died owing to an alleged defect in the lift. | Indiana law. | "A court should be allowed to evaluate other factors when the place of the tort is an insignificant contact."[345] | Yes. |
| **"Adventitious"** | | | | |
| *Gordon v. E. Air Lines, Inc.*, 391 F. Supp. 31 (S.D.N.Y. 1975) | P (decedent) was a New York domiciliary; D (airline) was incorporated in Delaware and had its principal place of business in Florida.[346] P was flying from New York to Florida. The plane crashed in Florida and P was killed. P's estate was administered in New York. The plane ticket was purchased in New York. | New York. | "The only 'contacts' with Florida are that the accident occurred there—a 'purely adventitious circumstance'—and defendant's principal place of business is there—an equally insignificant circumstance."[347] | No.[348] |

345. Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071, 1073 (Ind. 1987).

346. The court emphasized that, although Defendant Eastern Air Lines, Inc., had its principal place of business in Florida, it conducted extensive business outside of Florida as well. Gordon v. E. Air Lines, Inc., 391 F. Supp. 31, 32 (S.D.N.Y. 1975).

347. *Id.* at 33.

348. Besides the place of the accident, the only other connection to Florida was the place of the defendant's principal place of business—which the court treats as "equally insignificant." *Id.* at 33.

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| *Vick v. Cochran*, 316 So. 2d 242 (Miss. 1975) | P (passenger) was an Alabama resident; D (driver and owner) were also Alabama residents. P and D (driver) were taking a trip that was to start and end in Alabama. P was injured in Mississippi when the vehicle was overturned by D's (driver's) negligence. The relationship between the parties was established in Alabama. Nine of the ten witnesses were from Alabama.[349] | Alabama law.[350] | "[T]he place of the accident was purely fortuitous and Mississippi's sole relation to the occurrence was, as was said in *Mitchell*, 'purely adventitious.'"[351] | Yes. |
| *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972) | P (passenger and decedent) was an Ontario domiciliary; D (driver) was a New York domiciliary. P's administratrix was domiciled in Ontario.[352] The automobile was insured in New | Ontario law. | "[P]laintiff has failed by her allegations to establish that the relationship to this State was sufficient to displace the normal rule that the Lex loci delictus should be applied, the accident being | No. |

349. Although the court cites this fact in support of its conclusion that Alabama law applies, the court does not explain why it is assigning weight to the residences of the witnesses. *See* Vick v. Cochran, 316 So. 2d 242, 246 (Miss. 1975) ("[A]ll of the parties, plaintiffs and defendant, and nine of the ten witnesses, reside at Hamilton, Alabama . . . .").

350. The Court applied Alabama tort law but held that Mississippi's statute of limitations and rules of the road applied. *Id.*

351. *Id.*

352. It is unclear what weight the court attaches to this fact. *See* Neumeier v. Kuehner, 286 N.E.2d 454, 455–59 (N.Y. 1972).

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| | York. | | associated with Ontario, from inception to tragic termination, except for adventitious facts [i.e., the defendant was a New York resident and the automobile was insured in New York] and where the lawsuit was brought."[353] | |
| *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968) | P (driver and decedent) and D (driver and decedent) were both Mississippi residents. Both parties used Mississippi administratrices. P was killed in an automobile accident with D in Louisiana two miles from the Mississippi border. Both P and D were returning to Mississippi. | Mississippi law. | "Louisiana's sole relationship with the occurrence is the purely adventitious circumstance that the collision happened there."[354] | Yes. |
| *Scott v. E. Air Lines, Inc.*, 399 F.2d 14 (3d Cir. 1967) | P (passenger and decedent) was a Pennsylvania resident; D (airline) was a Delaware domiciliary.[355] P was flying from Massachusetts to | Pennsylvania law. | "[W]e think the facts of the instant case exemplify a situation where the place of the wrong was quite adventitious . . . ."[357] | Yes. |

353. *Id.* at 460 (Breitel, J., concurring).
354. Mitchell v. Craft, 211 So. 2d 509, 513 (Miss. 1968).
355. Defendant Eastern Air Lines, Inc., was incorporated in Delaware; the court does not specify Eastern's principal place of business but instead merely states that Eastern's "principal place of business is neither in Pennsylvania nor in Massachusetts." Scott v. E. Air Lines, Inc., 399 F.2d 14, 19 (3d Cir. 1967).
357. *Id.* at 28.

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| | Pennsylvania;[356] P's plane crashed in Massachusetts. The relationship between the parties arose in Pennsylvania. | | | |
| *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963) | P (passenger) and D (driver) were both New York residents. D's automobile was garaged, licensed, and insured in New York. P and D left New York for a weekend trip in Canada. P was injured in an automobile accident in Ontario. | New York law. | "Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there."[358] | Yes. |
| *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959) | P (sailor) was a Spanish citizen; DDs (husbanding agent and contractors) were domiciled in New York and Delaware.[359] P was injured in U.S. territorial waters while working on a Spanish ship; P's ship was sailing under a Spanish flag and was owned by a Spanish company. | Spanish law. | "The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury."[360] | Yes. |

356. The ultimate destination of the flight was Georgia; however, the first scheduled flight stop was in Philadelphia. *Id.* at 16.

358. Babcock v. Jackson, 191 N.E.2d 279, 284 (N.Y. 1963).

359. Defendant Compania Trasatlantica and Garcia & Diaz, Inc. was incorporated in New York; International Terminal Operating Co. was incorporated in Delaware; Quin Lumber Co. was incorporated in New York. Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 356–57 (1959).

360. *Id.* at 384.

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| | P's hiring agreement was entered into in Spain. | | | |
| **"Insubstantial"** | | | | |
| *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968) | P (passenger) and D (driver) were both Alaska domiciliaries. P and D left Alaska for a short trip to Washington. On their return trip, P and D briefly passed through Canada. While in Canada, P was injured in an automobile accident. | Alaska law. | "[The parties'] only contacts with the situs of the tort are transitory in nature."[361] "[Applying the lex loci delicti] would give unwarranted precedence to the laws of a jurisdiction with which the parties' contacts were merely fortuitous, transitory, and insubstantial."[362] | Yes. |
| **"Attenuated"** | | | | |
| *Forty-Eight Insulations, Inc. v. Johns-Manville Prods. Corp.*, 472 F. Supp. 385 (N.D. Ill. 1979) | P (drug manufacturer) was an Illinois domiciliary;[363] DDs (asbestos providers) were Canadian and Colorado domiciliaries.[364] P sought indemnity from DDs after being named as defendant in many personal injury lawsuits. P suffered injury wherever a | Illinois law. | "When, however, a nonresident defendant causes injury in a state to a nonresident plaintiff, the place of injury is fortuitous and its importance in the choice of law analysis is attenuated. . . . This is especially true here because the injury occurred in a | Yes. |

361. Armstrong v. Armstrong, 441 P.2d 699, 700 (Alaska 1968).

362. *Id.* at 703.

363. Plaintiff Forty-Eight Insulations, Inc. was incorporated in Illinois and had its principal place of business in Illinois. Forty-Eight Insulations, Inc. v. Johns-Manville Prods. Corp., 472 F. Supp. 385, 393 (N.D. Ill. 1979).

364. Defendant Asbestos Corporation is incorporated in Canada. *Id.* at 389. The court does not discuss the domicile of Johns-Manville Products Corp. or Johns-Manville Sales Corp.; Johns-Manville Corp. is headquartered in Colorado.

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| | personal injury claim against P established a right to recover (potentially many states). The conduct causing P's injury occurred in Illinois (where P took delivery of asbestos from DDs). The parties' relationship was also centered in Illinois. | | particular state only because the last event necessary to make Forty-Eight liable occurred there . . . ."[365] | |
| *Grosskopf v. Chrysler Grp. LLC*, No. A-14-CA-801-SS, 2015 WL 6021851 (W.D. Tex. Oct. 14, 2015) | P (driver) was a Texas resident; D (manufacturer) was incorporated in Delaware and had its principal place of business in Michigan. While driving in Texas P collided with another vehicle; owing to an alleged defect in P's vehicle caused by D, P sustained serious injuries. The vehicle was manufactured in Illinois and entered the stream of commerce in Missouri. | Texas law. | "Michigan has an attenuated interest in applying its law to protect out-of-state residents against the mostly out-of-state activities of a Delaware corporation headquartered in Michigan."[366] | Yes. |

365. *Id.* at 392.

366. Grosskopf v. Chrysler Grp. LLC, No. A-14-CA-801-SS, 2015 WL 6021851, at *8 (W.D. Tex. Oct. 14, 2015).

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| **"Anomalous"** | | | | |
| *Ingersoll v. Klein*, 262 N.E.2d 593 (Ill. 1970) | P (passenger) and DDs (driver and owner) were all Illinois residents and were driving on the Mississippi river on the border between Iowa and Illinois. The ice on the river broke while on the Iowa side of the river and P drowned. | Illinois law. | "The arbitrary nature of the [lex loci delicti] doctrine is quite evident in this case where determination of the applicable law is based upon what spot in the Mississippi River the decedent met his death."[367] "[U]njust and anomalous results . . . may ensue from an application of *lex loci delicti* . . . ."[368] | Yes. |
| **"Random"** | | | | |
| *Burlington N. & Santa Fe Ry. Co. v. ABC-NACO*, 906 N.E.2d 83 (Ill. App. Ct. 2009) | P (railroad) was incorporated in Delaware and had its principal place of business in Texas; D (railcar transom designer) had its principal place of business in Illinois. P claimed against D for damages caused by a derailment. The derailment occurred in Arizona; therefore, Arizona was the place of injury. | Arizona law. | "The derailment site itself was clearly random; a train could derail at any location along the rail system of this country."[369] | Yes. |

367. Ingersoll v. Klein, 262 N.E.2d 593, 596 (Ill. 1970).
368. *Id.*
369. Burlington N. & Santa Fe Ry. Co. v. ABC-NACO, 906 N.E.2d 83, 92 (Ill. App. Ct. 2009).

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| *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183 (S.D. Cal. 2007). | P (insured) was domiciled in Washington; D (insurer) was domiciled in Massachusetts. P argued that D breached the agreed insurance policy. The insurance policy insured another company domiciled in Connecticut. The insurance policy was entered into in Connecticut. | Connecticut law. | "[T]he meaning of the Policy would hinge on the random happenstance of where Kuo (or any other CDS employee similarly situated) happens to trip and fall."[370] | Yes. |
| **"Coincidental"** | | | | |
| *Jaiguay v. Vasquez*, 948 A.2d 955 (Conn. 2008) | P (passenger and decedent) was a New York domiciliary; DDs (driver, owner, and employer) were also New York domiciliaries.[371] P was killed in an accident in Connecticut allegedly owing to DDs' negligence. | New York law. | "Choice of law must not be rendered a matter of happenstance, in which the respective interests of the parties and the concerned jurisdictions receive only coincidental consideration."[372] | Yes. |

370. Costco Wholesale Corp. v. Liberty Mut. Ins. Co., 472 F. Supp. 2d 1183, 1205 (S.D. Cal. 2007).

371. Defendant Joel Vasquez was a New York resident; Defendant Percy Montes was a New York resident; Defendant Primo's Landscaping, Inc., was incorporated in New York. Jaiguay v. Vasquez, 948 A.2d 955, 958–59 (Conn. 2008).

372. *Id.* at 972 (citing O'Connor v. O'Connor, 519 A.2d 13, 20 (Conn. 1986)).

### 2. *Cases Where the Fact Pattern Was Deemed Not to Be "Arbitrary," "Fortuitous," Etc.*

| CASE | FACT PATTERN | LAW APPLIED | TERMINOLOGY | STAND-ALONE TRIGGER?[373] |
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| **"Arbitrary"** | | | | |
| *Surovy v. Peterson*, No. DBDCV196031147S, 2020 WL 6121715 (Conn. Super. Ct. Sept. 17, 2020) | PPs (passengers) were Connecticut domiciliaries but part-time New York residents;[374] D was a New York domiciliary. PPs and D drove from Connecticut to New York and planned to stay there for a short period. While in New York, PPs were injured in an automobile accident. | Connecticut Law. | "Lex loci delicti for the reasons cited below, does not call for the choice of New York law, as the application of New York law would lead to 'an arbitrary, irrational result.'"[375] | No. |
| *Family Wireless #1, LLC v. Auto. Techs., Inc.*, No. 15-CV-1310 (JCH), 2016 WL 183475 (D. | PPs (franchisees) were Pennsylvania, Ohio, New York, Virginia, and Michigan domiciliaries;[376] D (franchisor) was a Connecticut | Pennsylvania, Ohio, New York, Virginia, and Michigan law.[378] | "Application of the [lex loci decliti rule] does not result in an arbitrary or irrational outcome . . . ."[379] | No. |

373. Of course, not all cases are equally thorough in identifying all potentially relevant factors. For example, while some cases involving automobile accidents mention only the place of the accident and the residences/domiciles of the parties, others will also mention where the automobile was licensed, insured, or garaged. For purposes of this analysis, we treat a case as raising a stand-alone trigger issue where one and only one mentioned factor points towards the law selected by the relevant choice of law rule.

374. Plaintiffs were minors and lived primarily with their mother in Connecticut; Defendant was Plaintiffs' father and lived in New York. Surovy v. Peterson, No. DBDCV196031147S, 2020 WL 6121715, at *1 (Conn. Super. Ct. Sept. 17, 2020).

375. *Id.* at *9.

376. Plaintiffs were incorporated under the laws of and had their principal place of business in each of these states. Family Wireless #1, LLC v. Auto. Techs., Inc., No. 15-CV-1310 (JCH), 2016 WL 183475, at *1 (D. Conn. Jan. 14, 2016).

378. The eleven different Plaintiffs were citizens of these five states. *Id.* at *9.

379. *Id.*

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| Conn. Jan. 14, 2016) | domiciliary.[377] PPs argued, among other things, that D breached its franchise contract. The alleged injuries to PPs occurred in PPs' home states. | | | |
| *Norton v. Michonski*, 368 F. Supp. 2d 175 (D. Conn. 2005) | P (passenger) was a Connecticut resident; DDs (driver and owner) were Massachusetts residents. While P and D (driver) were driving in Massachusetts, P was injured in an automobile accident. | Massachusetts law. | "[T]he facts present no reason to depart from the doctrine of *lex loci deliciti* as the application of Massachusetts law will not produce an arbitrary or irrational result, or frustrate the legitimate expectations of the parties."[380] | No. |
| *CLT Telecomms. Corp. v. Colonial Data Techs. Corp.*, No. 3:96CV2490 (AHN), 1999 WL 200700 (D. Conn. Mar. 21, 1999) | P (minority investor) is a Taiwan domiciliary; D (majority investor) is incorporated in Delaware and has its principal place of business in Connecticut. P alleges that it was induced to make a poor investment based on D's representations. The investment that caused P's loss was incorporated in Delaware and operated in California. Connecticut was the | Connecticut law. | "This is not a case where the application of the lex loci doctrine results in either an arbitrary or irrational outcome."[381] | No. |

377. Defendant Automotive Technologies, Inc. was incorporated in Connecticut. *Id.*

380. Norton v. Michonski, 368 F. Supp. 2d 175, 178–79 (D. Conn. 2005).

381. CLT Telecomms. Corp. v. Colonial Techs. Corp., No. 3:96CV2490 (AHN), 1999 WL 200700, at *8 (D. Conn. Mar. 21, 1999).

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| | place of the injury, as the place where the alleged breach of D's fiduciary's duty occurred. | | | |
| *N. Tankers (Cyprus) Ltd. v. Backstrom*, 934 F. Supp. 33 (D. Conn. 1996) | P (charterer) was a Cyprus domiciliary.[382] DDs (sub-charterer and related entities) were domiciled in various states.[383] P had earlier initiated a breach of contract claim against DDs in New York. New York was the place of injury: The relevant damages (increased legal fees and protracted litigation) were incurred in New York; the protracted litigation was also incurred in New York. All relevant earlier litigation and arbitration had also occurred in New York. | New York law. | "While it may be irrational or arbitrary to apply New York law when such application would frustrate the legitimate expectation of the parties or undermine an important policy of Connecticut . . . we find the application of New York law here would be neither irrational nor arbitrary."[384] | No. |
| *Flavorchem Corp. v. Mission Flavors & Fragrances, Inc.*, 939 F. Supp. 593 (N.D. Ill. 1996) | P (former employer) was an Illinois domiciliary;[385] DDs (former employee and employee's company) were California domiciliaries. P suffered alleged injury stemming from | Illinois law. | "A clear reading of *Ingersoll* demonstrates that the Illinois Supreme Court rejected the 'wooden application' of the 'arbitrary' *Lex loci delicti* doctrine, also known as the | No. |

382. Plaintiff Northern Tankers was organized under the laws of Cyprus and has its principal place of business in Cyprus. N. Tankers (Cyprus) Ltd. v. Backstrom, 967 F. Supp. 1391, 1393 (D. Conn. 1997). This fact is not mentioned or discussed by the district court in 1996 but is mentioned in related proceedings.

383. Plaintiff Northern Tankers claimed against fifty-three defendants while seeking to unravel a "corporate Gordian Knot." *Id.* at 1394.

384. N. Tankers (Cyprus) Ltd. v. Backstrom, 934 F. Supp. 33, 38–39 (D. Conn. 1996).

385. Plaintiff Flavorchem was incorporated in Illinois. Flavorchem Corp. v. Mission Flavors & Fragrances, Inc., 939 F. Supp. 593, 595 (N.D. Ill. 1996).

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| | misappropriation of trade secrets in Illinois. The relevant misappropriation took place in California. The parties' relationship was formed and centered in Illinois. | | 'place of the injury rule,' in favor of the 'most significant contacts' test . . . ."[386] | |
| *Feldt v. Sturm, Ruger & Co.*, 721 F. Supp. 403 (D. Conn. 1989) | PPs (purchasers) were Georgia residents; D (manufacturer) was incorporated in Delaware and had its principal place of business in Connecticut. PPs were injured by a handgun that was manufactured by D and was allegedly faulty. D manufactured the handgun in Connecticut. P's father bought the handgun from a distributor in Illinois and gifted it to P; P brought the handgun to Georgia, where it was kept. PPs were injured by the handgun in Georgia. | Georgia law. | "The contacts with Georgia in this case are not 'merely fortuitous,' as they arguably are in aviation accidents, where a few moments of flight may determine whether an accident occurs in one state or another. . . . Likewis e, the application of Georgia law here will not produce an irrational or arbitrary result."[387] | No. |
| *Choate, Hall & Stewart v. SCA Servs.,* | P (law partnership) and was a Massachusetts domiciliary[388]; D | Massachusetts law. | "[T]he law of the place of making [the contract] can produce awkward or | No. |

386. *Id.* at 596. The court did not describe the law of the place of injury in this case as "arbitrary." *See id.*

387. Feldt v. Sturm, Ruger & Co., 721 F. Supp. 403, 405 (D. Conn. 1989).

388. The plaintiff partnership was formed in Massachusetts. Choate, Hall & Stewart v. SCA Servs., Inc., 392 N.E.2d 1045, 1049 (Mass. 1979).

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| *Inc.*, 392 N.E.2d 1045 (Mass. 1979) | (waste disposal service) was incorporated in Delaware and had its principal place of business in Massachusetts. The contract between P and D was entered into in Massachusetts. All early negotiations took place in Massachusetts. | | arbitrary results where that place had no or little other connection with the contract or the parties . . . . The facts of the present case deprive us of an opportunity to elect among the extant doctrines, for [the case has several connections to Massachusetts.]"[389] | |
| **"Fortuitous"** | | | | |
| *In re Tylenol (Acetaminophen) Mktg., Sales Pracs. & Prods. Liab. Litig.*, MDL Nos. 2436, 24362:13-md-02436, No. 2:12-cv-07263, 2015 WL 2417411 (E.D. Pa. May 20, 2015) | P (decedent) was an Alabama resident; DDs (drug manufacturers) were domiciled in New Jersey.[390] P purchased the allegedly harmful drug in Alabama; P was treated for the drug's effects in Alabama; and P died in Alabama. The allegedly harmful conduct occurred in New Jersey (where marketing decisions were made) and in Alabama (where the drug was marketed to P). The parties' relationship was centered in Alabama. | Alabama law. | "To be sure, there is nothing 'fortuitous' about the decedent's experience with Tylenol or liver failure in Alabama. Nor is it fortuitous that McNeil chose to market its product in Alabama. The defendants marketed Tylenol in Alabama to consumers, including the plaintiff, and sold Tylenol there. The plaintiff lived in Alabama. The fact that her death occurred there is not 'fortuitous.'"[391] | No. |

389. *Id.* at 1048–49.

390. Defendant Johnson & Johnson, Inc. was headquartered in New Jersey and had its principal place of business in New Jersey; Defendant McNeil–PPC, Inc. was headquartered in Pennsylvania but had its principal place of business in New Jersey. *In re* Tylenol (Acetaminophen) Mktg., Sales Pracs. & Prods. Liab. Litig., MDL Nos. 2436, 24362:13-md-02436, No. 2:12-cv-07263, 2015 WL 2417411, at *1 (E.D. Pa. May 20, 2015).

391. *Id.* at *7 n.41.

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| *Malik v. Cooper Tire & Rubber Co.*, 59 F. Supp. 3d 686 (D.N.J. 2014) | P (passenger) was a New Jersey domiciliary;[392] D (tire manufacturer) was domiciled in Delaware.[393] P was a passenger in a car driving from Illinois to New Jersey; P's car crashed in Illinois. At the time, P had been studying in Illinois for a semester; P had therefore been in Illinois on a regular basis for several months.[394] The alleged wrongful conduct occurred in New Jersey (design and manufacture of tires). | New Jersey.[395] | "His contacts with the situs of the accident were too significant for his presence on an Illinois highway to be considered fortuitous. The location was not fortuitous simply because the tire could have blown out somewhere else."[396] | No. |

392. Plaintiff Malik disputed the claim that he was domiciled in New Jersey but did not defend an alternative domicile. Malik v. Cooper Tire & Rubber Co., 59 F. Supp. 3d 686, 692–93 (D.N.J. 2014).

393. Defendant Cooper Tire and Rubber Co. was incorporated in Delaware. *Id*. at 689. Cooper Tire argued that its principal place of business was in Ohio; however, since Cooper Tire presented no evidence in support, the court rejected this claim. *Id.* at 695 n.4.

394. The court emphasized that Plaintiff intended to be in Illinois. *Id.* at 694.

395. Although the court found that the place of the accident in Illinois was not fortuitous, it nevertheless found that "it was nonetheless incidental: the suit does not arise out of any legal, physical or policy attribute of Illinois." *Id.* at 696. The court concluded that "New Jersey's interest in the litigation is much stronger" than Illinois's interest. *Id.*

396. *Id.* at 693.

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| *Galeotti v. Cianbro Corp.*, No. 5:12-cv-00900 (MAD/ TWD), 2013 WL 3207312 (N.D.N.Y. June 24, 2013) | P (employee) was a New York resident; D (employer[397]) was a Maine domiciliary.[398] P worked for D's subcontractor in Vermont for thirty-nine days. P was injured working in Vermont. The wrongful conduct (D's allegedly negligent behavior) also occurred in Vermont. D indirectly employed P as part of its work on a construction project funded by a Vermont company. | Vermont law. | "The *Gilbert* plaintiff's contact with the state of New York consisted of his participation in a single rugby game, yet the brevity of this contact did not give rise to it being considered 'fortuitous.' . . . [T]he reasoning used by the Second Circuit in refusing to invoke the law of the plaintiff's domicile in *Gilbert* would apply *a fortiori* to Plaintiff's case."[399] | No. |
| *In re NuvaRing Prods. Liab. Litig.*, 957 F. Supp. 2d 1110 (E.D. Mo. 2013) | P (purchaser) was a Missouri resident; D (manufacturer) was domiciled in New Jersey.[400] P purchased D's product in Missouri after it was prescribed to P. D had also marketed the product in Missouri. P suffered personal injury in Missouri owing to an alleged defect in D's | Missouri law. | "This is not a case where a plaintiff purchased a product and then travelled [sic] into a new, unforeseen jurisdiction when calamity struck. . . . The place of injury is not fortuitous as that term is used in the choice-of-law analysis."[401] | No. |

397. Plaintiff Michael Galeotti was directly employed by Air2, LLC, a subcontractor hired by Defendant Cianbro Corporation. Galeotti v. Cianbro Corp., No. 5:12-cv-00900 (MAD/TWD), 2013 WL 3207312, at *1 (N.D.N.Y. June 24, 2013). Air2, LLC was a Maryland company. *Id.* at *2.

398. Defendant Cianbro Corporation was incorporated in Maine and had its principal place of business in Maine. *Id.* at *1.

399. *Id.* at *13.

400. Defendant Organon USA, Inc. had its principal place of business in New Jersey. *In re* NuvaRing Prods. Liab. Litig., 957 F. Supp. 2d 1110, 1111 (E.D. Mo. 2013).

401. *Id.* at 1115.

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| | product. Missouri was also the place of the alleged wrongful conduct (D employed sales representatives to promote the product in Missouri). The parties' relationship is centered in Missouri. | | | |
| *Pounders v. Enserch E & C, Inc.*, 276 P.3d 502 (Ariz. Ct. App. 2012), *aff'd in part*, *vacated in part*, 306 P.3d 9 (Ariz. 2013) | P (employee and decedent) was an Arizona resident; DDs (manufacturers, construction manager) were domiciled in several states.[402] P was exposed to asbestos while living and working in New Mexico; therefore, New Mexico was the place of injury.[403] P developed mesothelioma while living in Arizona; P | New Mexico law. | "[The place of injury] is particularly meaningful as the injury took place in a fixed location and was therefore predictable rather than fortuitous."[405] | No. |

402. Defendant Enserch E&C, Inc. was headquartered in Massachusetts. Pounders v. Enserch E & C, Inc., 306 P.3d 9, 15 (Ariz. 2013). The court does not discuss the domicile of Enserch in reaching its choice of law conclusion. *See* Pounders v. Enserch E & C, Inc., 276 P.3d 502, 509 (Ariz. Ct. App. 2012), *aff'd in part*, *vacated in part*, 306 P.3d 9 (Ariz. 2013).

403. Decedent Dudley W. Pounders did not develop mesothelioma as a result of his asbestos exposure until after he moved to Arizona. *See Pounders*, 276 P.3d at 508. Nevertheless, the court found that, owing to the "the immediate effects of asbestos inhalation," New Mexico was the place of the injury. *Id.*

405. *Id.* at 509 (citing Garcia v. Gen. Motors Corp., 990 P.2d 1069, 1076 (Ariz. Ct. App. 1999)).

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| | was treated and died in Arizona. P's surviving beneficiary[404] resides in Arizona. New Mexico (as the place where P was employed and where DDs engaged in allegedly defective construction) was also the place of the allegedly wrongful conduct. | | | |
| *Kammerer v. Wyeth*, No. 8:04CV196, 2011 WL 5237754 (D. Neb. Nov. 1, 2011) | P (patient) was a Nebraska domiciliary;<br>D (drug manufacturer) was incorporated in Delaware and had its principal place of business in Pennsylvania. P allegedly suffered breast cancer as a result of D's medication. P's prescription was filled in Nebraska;<br>P purchased the medication in Nebraska;<br>P used the medication in Nebraska; and P developed breast cancer in Nebraska. The place of injury was therefore in Nebraska. D's | Nebraska law. | "The place where th[e] injury occurred was hardly fortuitous."[406] | No. |

404. The decedent was survived by his wife, Vicki L. Pounders, who was also the plaintiff in this case. *Id.* at 504.

406. Kammerer v. Wyeth, No. 8:04CV196, 2011 WL 5237754, at *5 (D. Neb. Nov. 1, 2011).

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| | allegedly wrongful conduct took place in Pennsylvania (where D's corporate headquarters were located) and in Nebraska (where D marketed its drug). | | | |
| *Hill-Jackson v. FAF, Inc.*, 808 F. Supp. 2d 1083 (S.D. Ind. 2011) | P (decedent) was an Indiana domiciliary;[407] DDs (driver, employer of driver, and automobile lessor) were Wisconsin and Tennessee | Indiana law. | "[I]t is only important that [the decedent] had some connection to the state and that his presence on the Indiana roadways was not merely | No. |

407. Plaintiff Rolanda Hill-Jackson, the decedent's mother and the representative of the decedent's estate, filed a motion to establish that the decedent was domiciled in Illinois rather than in Indiana. Hill-Jackson v. FAF, Inc., 808 F. Supp. 2d 1083, 1087 (S.D. Ind. 2011). Plaintiff argued that the decedent was only residing in Indiana to study there and had no intention to remain indefinitely. *Id.* The court denied Plaintiff's motion. *Id.* at 1088. The court later noted that "[e]ven if Hill's domicile is found to be Illinois, Hill still had established a connection with Indiana as resident, thus he could have been expected to be governed by Indiana's laws." *Id.* at 1090. Notably, Plaintiff was an Illinois resident. However, the court noted that, where the plaintiff is an administrator of the decedent's estate, "'the legal representative of the estate of the decedent shall be deemed to be a citizen only of the same State as the decedent.'" *Id.* at 1087 n.1 (quoting 28 U.S.C. § 1332). Therefore, "the only relevant domicile . . . is that of the decedent." *Id.*

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| | domiciliaries.[408] P had a job and apartment in Indiana, had a vehicle registered in Indiana, and was planning on starting at university in Indiana. D (driver) struck P while both were driving in Indiana. The parties' relationship was centered in Indiana, the place of their first and only encounter. | | fortuitous."[409] | |
| *Yocham v. Novartis Pharms. Corp.*, 736 F. Supp. 2d 875 (D.N.J. 2010) | P (patient) was a Texas resident; D (drug manufacturer) was incorporated in Delaware and had its principal place of business in New Jersey. P suffered personal injury in Texas after using D's medication. Texas was therefore the place of injury. The drug was marketed to P in Texas and P was prescribed the drug in Texas. Texas was therefore also the place of the allegedly wrongful conduct. The parties' | Texas law. | "Where a party is domiciled in the place of injury, purchases the allegedly defective product there, and uses it only there, the place of injury is not fortuitous. . . . [I]n this case Plaintiff's injury could not have occurred anywhere other than Texas. It was not fortuitous that Plaintiff was injured in Texas, her state of residence. . . . Defen dant's New Jersey presence [does] not outweigh all of the other connections to Texas."[410] | No. |

408. Defendant Robert Miller, the driver of the vehicle that crashed with the decedent, was a Wisconsin resident and citizen; Defendant Double J Transportation, Inc., the employer of Defendant Miller, was incorporated in Wisconsin; Defendant FAF, Inc., the lessor of Defendant Robert Miller's automobile, was incorporated in Tennessee and had its principal place of business in Ohio. *Id.* at 1086.

409. *Id.* at 1089.

410. Yocham v. Novartis Pharms. Corp., 736 F. Supp. 2d 875, 882 (D.N.J. 2010).

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| | relationship was centered in Texas. | | | |
| *Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893 (Ill. 2007) | PPs (injured party and mother) were Michigan residents; D (seller) was incorporated in New York and had its principal place of business in Illinois. P's father purchased a lawn tractor from D in Michigan; owing to an alleged defect in the tractor, P was severely injured. The place of injury was Michigan. The tractor was manufactured in South Carolina. P's (injured party's) father worked in Michigan. The allegedly wrongful conduct (design defect) occurred in Illinois. The parties' relationship was centered in Michigan. | Michigan law. | "[S]ituations exist where the place of the injury will not be an important contact, for example, where the place of the injury is fortuitous. . . . In this case, however, Michigan has a strong relationship to the occurrence and the parties."[411] | No. |

411. Townsend v. Sears, Roebuck & Co., 879 N.E.2d 893, 906 (Ill. 2007).

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| *In re SkipperLiner Indus., Inc.*, No. 00-C-0730-C, 2002 WL 32348827 (W.D. Wis. Jan. 31, 2002) | P (purchaser) was a Wisconsin domiciliary;[412] D (seller) was incorporated in Delaware and had its principal place of business in Tennessee. P purchased a boat from D. While the boat was rigged in Minnesota, several of P's employees died owing to carbon monoxide poisoning owing to an alleged defect in the boat. The place of injury was therefore Minnesota. The injured employees were all Wisconsin domiciliaries. P's base of operations was in Wisconsin. | Minnesota law. | "Because the place of the wrongful act is Minnesota and the location of the accident was non-fortuitous in nature, this factor 'assumes much more importance, and in some instances may be determinative.'"[413] | No. |
| *Fu v. Fu*, 733 A.2d 1133 (N.J. 1999) | PPs (passengers and driver) were New Jersey domiciliaries; DDs (car rental service and driver) were Pennsylvania and New Jersey domiciliaries.[414] PPs rented a car from D in New Jersey. PPs planned to drive from New Jersey to New York, and then to the midwest. PPs were injured in an | New York law. | "[W]e reject the characterization of the parties' contacts with New York as 'fortuitous.' In a broad sense, the *occurrence* of any automobile accident, and therefore its precise location, is always 'fortuitous' in that accidents by their very nature are unexpected and unpredictable. The | No. |

412. Plaintiff SkipperLiner Industries, Inc. was incorporated in Wisconsin. *In re* SkipperLiner Indus., Inc., No. 00-C-0730-C, 2002 WL 32348827, at *2 (W.D. Wis. Jan. 31, 2002).

413. *Id.* at *16.

414. Defendant Freedom River was incorporated in Delaware and had its principal place of business in Pennsylvania. Fu v. Fu, 733 A.2d 1133, 1137 (N.J. 1999).

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| | accident in New York while leaving the state. The vehicle was registered in Pennsylvania. | | *place* of an accident, however, may be considered fortuitous only when the driver did not intend or could not reasonably have anticipated being in that jurisdiction at the time of the accident."[415] | |
| *In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 926 F. Supp. 736 (N.D. Ill. 1996) | PPs (decedents) were all Indiana domiciliaries; DDs (airline and aircraft manufacturer, and various subsidiaries) were Michigan, Delaware, Texas, and French domiciliaries.[416] PPs were flying from Indiana to Illinois. The plane crashed in Indiana 10 miles from the Illinois border and PPs were killed. The aircraft's captain was an Illinois resident; the aircraft's first officer was a Wisconsin resident; the aircraft crew was | Indiana law. | "To some extent, the fact that the accident occurred in Indiana can be seen as fortuitous; however, when it is understood that the overwhelming majority of Flight 4184's air time was in Indiana skies, the force of the fortuity argument is somewhat diminished."[421] | No. |

415. *Id.* at 1149.

416. The airline defendants were incorporated in Michigan (Simmons Airlines, Inc.) and Delaware (AMR Corporation and American Airlines). *In re* Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 926 F. Supp. 736, 744 (N.D. Ill. 1996). The airline defendants had their principal places of business in Texas. *Id.* The aircraft defendants were incorporated in France (ATR), Delaware (ATR Support, Inc.) and D.C. (ATR Marketing, Inc.). *Id.* Two of the aircraft defendants had their principal place of business in Virginia (ATR Marketing, Inc. and ATR Support, Inc.). *Id.*

421. *Id.* at 743.

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| | Illinois-based.[417] PPs' estates were being administered in Indiana; the personal representatives of PPs' estates were in Indiana; almost all beneficiaries were Indiana domiciliaries. residents.[418] PPs were employed in both Indiana and Illinois.[419] PPs' plane tickets were bought in Indiana and Illinois.[420] | | | |
| *Jaurequi v. John Deere Co.*, 986 F.2d 170 (7th Cir. 1993) | P (user) was a Spanish domiciliary; D (manufacturer) was incorporated in Delaware and had its principal place of business in Illinois. P traveled to Texas to intern for a Texas company. As part of the internship, P traveled to Missouri and used a machine manufactured by D; owing to an alleged defect in the machine, P was seriously injured. D was planning on staying in Missouri for a substantial period of time. The | Missouri law. | "Jaurequi's presence can hardly be classified as a 'fortuitous . . . transversing' of Missouri soil."[422] | No. |

417. It is unclear whether this influenced the court's reasoning. *See id.* at 738.
418. One decedent had two sisters in California. *Id.* at 738 n.6.
419. More decedents seem to have been employed in Indiana. *Id.* at 738.
420. The court did not assign much weight to this factor. *See id.*
422. Jaurequi v. John Deere Co., 986 F.2d 170, 175 (7th Cir. 1993) (first citing Allison v. ITE Imperial Corp., 928 F.2d 137, 143 (5th Cir. 1991); and then citing Wert v. McDonnell Douglas Corp., 634 F. Supp. 401, 404 (E.D. Mo. 1986)).

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| | relevant product was designed and manufactured in Illinois and placed into the stream of commerce in Indiana. | | | |
| *Reale v. Herco, Inc.*, 589 N.Y.S.2d 502 (N.Y. App. Div. 1992) | PPs (injured child and mother) were New York domiciliaries; D (camp operator) was domiciled in Pennsylvania. P (child) was injured in Pennsylvania while using a slide on a camp operating by D. PPs had gone to Pennsylvania for an extended vacation. | Pennsylvania law. | "In this case, the plaintiffs have not shown that the place of the infant's injury was merely fortuitous . . . ."[423] | No. |
| *Allison v. ITE Imperial Corp.*, 928 F.2d 137 (5th Cir. 1991) | PPs (employee and employer) were Mississippi domiciliaries;[424] D (manufacturer) was a Pennsylvania domiciliary.[425] P (employee) traveled from Mississippi to Tennessee to conduct a repair; P | Tennessee law. | "Allison's presence in Tennessee was not fortuitous, because he had worked there for five consecutive days. . . . Therefore, the law of the place of the injury (Tennessee) will | No. |

423. Reale v. Herco, Inc., 589 N.Y.S.2d 502, 508 (N.Y. App. Div. 1992).

424. Plaintiff James Allison was a Mississippi resident; Plaintiff Tru–Amp Corporation was incorporated in Mississippi. *Allison*, 928 F.2d at 138.

425. Defendant ITE Imperial Corp. was incorporated in Pennsylvania; ITE was later acquired by Gould, Inc., which was incorporated in Delaware and had its principal place of business in Illinois. *Id.* at 138, 140.

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| | was seriously injured while attempting to remove an allegedly defective product manufactured by D. Pennsylvania (as the place where the allegedly defective product was manufactured) was the place where the allegedly wrongful conduct occurred. | | control . . . ."[426] | |
| *Zangiacomi v. Saunders*, 714 F. Supp. 658 (S.D.N.Y. 1989) | P (worker) was a New York resident;[427] D (employer) was a New York resident. While working for a third-party contractor, P performed renovation work on D's home. P was injured while working on D's home in Connecticut allegedly owing to D's negligence. The third-party contractor through which P worked for D was a Connecticut resident. | Connecticut law. | "This is not a case in which the place of the wrong is purely fortuitous, as in the guest statute cases. . . . Here, we have a fixed location case; the renovation work would be performed at a specifically chosen situs in Connecticut."[428] | No. |

426. *Id.* at 142–43.
427. Plaintiff Marcelo Zangiacomi was a Brazilian citizen. Zangiacomi v. Saunders, 714 F. Supp. 658, 658 (S.D.N.Y. 1989).
428. *Id.* at 662.

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| *In re Disaster at Detroit Metro. Airport on Aug. 16, 1987*, 750 F. Supp. 793 (E.D. Mich. 1989) | PPs (passengers) were Michigan domiciliaries;[429] D (airplane manufacturer) was domiciled in Missouri.[430] PPs were flying from Michigan to California. The plane crashed in Michigan; therefore, Michigan was the place of injury. The aircraft was manufactured in California; therefore, California was the place of D's alleged misconduct. | Michigan law. | "This Court rejects any suggestion that it was merely fortuitous that the Northwest aircraft crashed in Michigan . . . . The accident in question does not present the typical 'fly over' case in which a plane crashes while passing through its airspace. . . . [I]n this case, Northwest chose Michigan to serve as a regional 'hub' through which it would conduct substantial flight operations. Certainly, a crash at the 'hub' of an airline company, the destination and point of departure of substantial air traffic, is not fortuitous, in that it is foreseeable that an accident might occur there."[431] | No. |

429. The plane crash affected persons from many states; however, the court analyzed claims based on where claims were filed. *See In re* Disaster at Detroit Metro. Airport on Aug. 16, 1987, 750 F. Supp. 793, 799 (E.D. Mich. 1989).

430. Defendant McDonnell Douglas Corporation had its principal place of business in Missouri. *Id.*

431. *Id.* at 807 n.22.

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| *Kaczmarek v. Allied Chem. Corp.*, Nos. H 81-161, H 81-428, 1986 WL 5670 (N.D. Ind. Feb. 11, 1986) | P (worker) was an Illinois resident; DDs (owner of premises and owner of vehicle) were domiciled in New York, New Jersey, Delaware, and Pennsylvania.[432] P was employed as a truck driver by an Illinois company.<br>P was injured while transporting acid from Illinois to Indiana. While unloading the acid in D's facility in Indiana, P was sprayed and suffered personal injury. P received treatment in several Indiana hospitals.<br>The wrongful conduct occurred either in Indiana or Illinois.[433] | Indiana law. | "A pertinent factor favoring application of Indiana law is that the injury occurred there."[434]<br>"Since Kaczmarek was hired to deliver the acid in Indiana, it cannot be said that it was 'fortuitous' that the injury occurred there."[435] | No. |

432. Defendant Allied Chemical Corporation was incorporated in New York and had its principal place of business in New Jersey; Defendant United States Steel Corporation was incorporated in Delaware and had its principal place of business in Pennsylvania. Kaczmarek v. Allied Chem. Corp., Nos. H 81-161, H 81-428, 1986 WL 5670, at *2 (N.D. Ind. Feb. 11, 1986).

433. *See id.* at *7 ("If Kaczmarek's own conduct caused the injury, the conduct occurred in Indiana. If providing a defective 'coupler' by Allied caused the injury, the conduct occurred in Illinois. If the failure of U.S. Steel to provide a safe recepticle [sic], storage tank, and premises in general caused the injury, the conduct occurred in Indiana. Finally, if the injury was caused by the failure of Willett Transport, Inc. to properly train, instruct and supervise its employee, the conduct occurred in Indiana.").

434. *Id.* at *8.

435. *Id.* at *8 n.3.

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| *In re Air Crash Disaster at Wash., D.C. on Jan. 13, 1982*, 559 F. Supp. 333 (D.D.C. 1983) | PP (passengers and decedents) were primarily Washington D.C. domiciliaries; DDs (manufacturer and airline) were Florida and Washington domiciliaries.[436] PPs were flying from Virginia (just outside Washington D.C.)[437] to Florida. The plane crashed in Washington D.C. and most passengers were killed. Before crashing, the plane crossed over the Washington D.C.-Virginia border several times. The plane was designed, built, certified, and delivered in Washington State; Washington was therefore the place of the alleged misconduct. | Washington D.C. law. | "This interest of the District of Columbia cannot be ignored inasmuch as its connection with the Flight 90 crash is much greater than the interests of the injury sites in the more typical 'fortuitous crash' cases . . . ."[438] | No. |

436. Defendant Air Florida was headquartered in Florida; Defendant Boeing was headquartered in Washington. *In re* Air Crash Disaster at Wash., D.C. on Jan. 13, 1982, 559 F. Supp. 333, 340 (D.D.C. 1983).

437. The court treats Washington, D.C. as the place of departure. *Id.* at 344–45.

438. *Id.* at 349.

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| *Schulhof v. Ne. Cellulose, Inc.*, 545 F. Supp. 1200 (D. Mass. 1982) | P (passenger) was a New York domiciliary; DDs (owners of planes) were Massachusetts and New Hampshire domiciliaries.[439] P was flying from New Hampshire to New York. P's plane collided with another plane owned by D over Massachusetts. | Massachusetts law.[440] | "[T]hat this collision occurred over Massachusetts is no more fortuitous than, for instance, that the accident in *Pevoski* involving three cars driven by Massachusetts residents occurred in New York. . . . The Piper Navajo was, by design, flying through Massachusetts airspace en route to White Plains, New York."[441] | No. |
| *In re Air Crash Disaster Near Chi., Ill. on May 25, 1979*, 644 F.2d 594 (7th Cir. 1981) | PPs (decedents) were primarily Illinois domiciliaries;[442] DDs (airline and manufacturer) are Delaware, New York, Maryland, and Missouri domiciliaries.[443] PPs were flying from Illinois to California. | Illinois law. | "[A]ir crash disasters often present situations where the place of injury is largely fortuitous."[447] "[But] in this case Illinois is more than merely the place of injury."[448] | No. |

439. Defendant Piper Aerostar was owned by Defendant Northeast Cellulose, a company incorporated in Massachusetts and had its principal place of business in Massachusetts; Defendant Whitcomb Construction Co. was incorporated in New Hampshire and had its principal place of business in New Hampshire; Defendants Nash, Tamposi, and Stellos were New Hampshire domiciliaries. Schulhof v. Ne. Cellulose, Inc., 545 F. Supp. 1200, 1202 (D. Mass. 1982).

440. In effect, *Schulhof*, applied the "rules of the road" approach to accidents occurring mid-air above a state. *Id.* at 1205.

441. *Id.*

442. All but two decedents in the action filed in Illinois were Illinois domiciliaries. *See In re* Air Crash Disaster Near Chi., Ill. on May 25, 1979, 644 F.2d 594, 615 (7th Cir. 1981).

443. Defendant American Airlines was a Delaware corporation with its principal place of business in New York. *Id.* at 604. In 1979, American Airlines moved its principal place of business from New York to Texas. *Id.* Some plaintiffs argued that Texas was the relevant place of business for American Airlines at the time of the crash. *Id.* at 618. The court rejected plaintiffs' argument. *Id.* at 620.

447. *Id.* at 615.

448. *Id.*

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| | The plane crashed in Illinois.[444] The manufacturer's alleged wrongful conduct occurred in California and Missouri[445]; the airline's alleged wrongful conduct occurred in Oklahoma.[446] | | | |
| *Kell v. Henderson*, 263 N.Y.S.2d 647 (N.Y. Sup. Ct. 1965), *aff'd*, 270 N.Y.S.2d 552 (N.Y. App. Div. 1966) | P (passenger) was an Ontario resident; DDs (owner and driver) were also Ontario residents. P was driving for a short trip from Ontario to the United States; P crashed in New York. The relationship between the parties arose in Ontario. The vehicle was licensed and registered in Ontario. | New York law. | "[I]n communities located close to State lines or other countries, such as Canada, it is very common for people to travel in and out of both States or countries and that although the happening of an accident may be termed fortuitous, the place where the parties are when the accident happens may or may not be necessarily fortuitous."[449] | Yes. |

444. The plane crashed shortly after takeoff. *Id.* at 604.

445. Defendant manufacturer MDC had its corporate headquarters in Missouri. *Id.* The court therefore found that "Missouri has an obvious interest in deterring wrongful conduct in such design and manufacture, even if the actual work was performed in California." *Id.* at 613.

446. Oklahoma was the site of Defendant American Airlines' maintenance base. *Id.* at 607.

449. Kell v. Henderson, 263 N.Y.S.2d 647, 650 (N.Y. Sup. Ct. 1965), *aff'd*, 270 N.Y.S.2d 552 (N.Y. App. Div. 1966).

| "Happenstance" | | | | |
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| *Harlan Feeders, Inc. v. Grand Lab'ys, Inc.*, 881 F. Supp. 1400 (N.D. Iowa 1995) | P (livestock producer) was a Nebraska domiciliary;[450] D (vaccine manufacturer) was a South Dakota domiciliary.[451] D allegedly sold P a defective cattle vaccine which caused P significant property loss. D's production facility in Iowa produced the vaccine sold to P. P purchased the vaccine in Nebraska. The contract between D and P was largely negotiated in Nebraska; therefore, Nebraska was also the place of D's allegedly wrongful conduct.[452] The parties' relationship was centered in Nebraska. | Nebraska law. | "Harlan Feeders argues that the place of any injury resulting from production of a defective product is only 'happenstance' or 'fortuitous' . . . . Not with- standing these arguments, however, in the present case, the court concludes that Nebraska substantive law applies."[453] | No. |

450. Plaintiff Harland Feeders, Inc., was incorporated in Nebraska. Harlan Feeders, Inc. v. Grand Lab'ys, Inc., 881 F. Supp. 1400, 1402 (N.D. Iowa 1995).

451. Defendant Grand Laboratories, Inc., was incorporated in South Dakota. *Id.*

452. Plaintiff argued that some of the relevant communication regarding the contract for the vaccine took place in South Dakota or Iowa, rather than Nebraska. *See id.* at 1403.

453. *Id.* at 1409.

| **"Adventitious"** | | | | |
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| *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679 (N.Y. 1985) | P (boy scout) was a New Jersey domiciliary; D (Boy Scouts of America) was also a New Jersey domiciliary.[454] P was sexually abused by a scoutmaster while on a retreat in New York. P's psychological injuries, including P's eventual suicide, were suffered in New Jersey. The allegedly wrongful conduct (negligent assignment and failure to fire the scoutmaster) occurred in New York. | New Jersey law.[455] | "This is clearly not a case in which the locus can be discounted as purely fortuitous or adventitious. . . . The infant plaintiffs and the defendants' tort-feasor were not merely *in transitu* in New York. Rather, they were here for a stay, albeit a short one, and as such they deliberately submitted themselves to the protections and responsibilities of this State's laws which should now govern the consequences of the tortious conduct committed while within New York's borders."[456] | Yes.[457] |

454. Defendant Boy Scouts of America, Inc. had its headquarters in New Jersey. Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 682 (N.Y. 1985).

455. Judge Jasen, dissenting, argues that New York law should apply. *See id.* at 689–90 (Jasen, J., dissenting).

456. *Id.* at 693.

457. Judge Jasen, dissenting, emphasizes that the "visit to New York . . . was entirely deliberate, planned and not merely transitory." *Id.*

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| *Tooker v. Lopez*, 249 N.E.2d 394 (N.Y. 1969) | P (passenger) was a New York domiciliary; D (driver) was also a New York domiciliary. P was driving from one part of Michigan to another for the weekend. The automobile was owned by a New York domiciliary. The automobile was registered and insured in New York. P was temporarily residing in Michigan to study at university. | New York law. | "[E]xcept in a rather minimal way, the conduct of the parties was not affected by the place where the accident occurred. It was, therefore, adventitious. The converse occurred in this case."[458] | Yes. |

458. Tooker v. Lopez, 249 N.E.2d 394, 409 (N.Y. 1969) (Breitel, J., dissenting).