
Rodney Patton
SISYPHUS*, THE BOULDER, AND THE CHOICE-OF-LAW
HILL: THE ANALYTICAL FRAMEWORK FOR
RESOLVING THE UNUSUAL AND COMPLEX
CHOICE-OF-LAW ISSUES THAT CAN ARISE WHEN
THE UNITED STATES IS A PARTY IN AN AVIATION CASE

RODNEY PATTON**

I. INTRODUCTION

DEAN PROSSER famously observed that the law of conflicts was a “dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.”1 Indeed, perhaps more so than any other subject in the law, the law of conflicts is the province of the law professor. But it must be our province too. If law professors inhabit the dismal swamp of conflicts-of-law, then we trial attorneys are fighting in the sucking mud of the trenches in that swamp. Without the

* Sisyphus is the “legendary figure doomed in the underworld to rolling a boulder up an incline and forever failing to surmount its crest.” HOMER, THE ODYSSEY 539 (Robert Fagles trans., Penguin Books Deluxe ed. 1996). He appears in the Kingdom of the Dead in The Odyssey thus:

And I saw Sisyphus too, bound to his own torture
grappling his monstrous boulder with both arms working,
heaving, hands struggling, legs driving, he kept on
thrusting the rock uphill toward the brink, but just
as it teetered, set to topple over—
time and again
the immense weight of the thing would wheel it back and
the ruthless boulder would bound and tumble down to the plain
again—
so once again he would heave, would struggle to thrust it up,
sweat drenching his body, dust swirling above his head.

Id. at 269.

** Rodney Patton is a trial attorney with the United States Department of Justice, representing the United States in aviation and admiralty litigation. The views expressed in this article are his alone and do not necessarily represent the views of the United States Department of Justice.

luxury of time (or indeed the inclination) to pontificate on issues such as whether to maintain methodological purity, we must persuade courts (within the bounds of ethics) to choose the substantive law that favors our clients. To succeed, we need both a journeyman’s practical understanding of this most complex subject matter, along with perhaps a dash of academic insight.

This article seeks to achieve the elusive blending of practical instruction and academic discourse in the limited context of how the United States’ presence as a party in an aviation case can create some unusual and complex choice-of-law issues. Indeed, the issues can become so complex and the analysis so convoluted that counsel may feel like Sisyphus, doomed to his own torture of pushing the analytical boulder up the choice-of-law hill forever. But this need not be your fate. This article provides you with the analytical framework to resolve these choice-of-law issues, giving you the strength to finally topple the boulder over the summit. After Part II of this article outlines the various choice-of-law approaches applied across this country, Parts III and IV will consider how a choice-of-law analysis can differ from the norm when the United States is a party in both a garden-variety aviation case and in a more complex aviation case. In each of these Parts, the article will explore examples, demonstrating to the practitioner how such choice-of-law analyses can significantly affect the ultimate issue of who will be left holding the proverbial baby when it comes time to enter judgment in the case. But first, a few words on the confusing cacophony of choice-of-law approaches an aviation trial attorney is likely to encounter.


"Once upon a time, there existed in the United States a choice-of-law system," a fairy-tale time when choice-of-law rules were rules and their application was uniform. Now there is chaos. Although the “wicked witch” of rigid, territorial-based rules is not dead yet but lives on in a handful of jurisdictions, the uniformity of the old-rules system has given way to a patchwork quilt of various choice-of-law approaches. Dean Symeon C. Symeonides, a leading conflicts scholar, annually classifies each American jurisdiction’s choice-of-law approach and identifies them with one of seven methodological camps, including traditional, interest analysis, Second Restatement, most significant contacts, lex fori, better law, and combined modern. Although such a classification system is “not an exact science,” his classifications should be a point of departure for every aviation attorney assigned the thankless task of researching the choice-of-law approach of an unfamiliar jurisdiction. We turn now to these classifications.

4 Symeonides, The American Choice-of-Law Revolution, supra note 2, at 34.
10 These annual surveys have been labeled “invaluable.” Louise Weinberg, Theory Wars in the Conflict of Laws, 103 Mich. L. Rev. 1631, 1632 (2005).
A. Traditional Choice-of-Law Rules

There are ten states currently classified as “traditional,” meaning those jurisdictions that still cling (with varying degrees of enthusiasm) to the First Restatement of Conflict of Laws. In tort cases, these traditional choice-of-law rules generally seek to apply the substantive law of one jurisdiction based on a single connecting factor—the place of the wrong (the lex loci delicti), which is usually the place where the injury occurred because that is the last element necessary to make the tortfeasor liable. This system was one “of rigid, territorially based, multilateral, jurisdiction-selecting, choice-of-law rules intended to provide legal certainty, attain conflicts justice, and promote interstate uniformity of result regardless of forum.” These “rules get cases settled quickly and cheaply.” Nevertheless, their rigidity has led some “traditional” courts to create and stretch exceptions to avoid what are perceived to be unjust results. For example, in Mills v. Quality Supplier Trucking, Inc., the West Virginia Supreme Court stretched its public policy exception and refused to apply the contributory negligence rule of the lex loci delicti and instead applied the forum state’s comparative fault rule. With such an apparently expansive public policy exception in a nation of “balkanized” tort law, counsel should be prepared to

---

1 These states are Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming. See Symeonides, 2004 Annual Survey, supra note 7, at 943-44.
5 See generally, e.g., Mills v. Quality Supplier Trucking, Inc., 510 S.E.2d 280 (W. Va. 1998). Of course, the more expansive the exceptions to these rules, the less predictability the rules provide as counsel and courts struggle to define the parameters of these exceptions.
6 Mills, 510 S.E.2d at 282.
7 Id. at 282-83.
argue that the law of the *lex loci* violates the forum’s public policy any time the forum law is more favorable.\(^\text{18}\)

**B. Modern Choice-of-Law Approaches**

Over the last four or five decades, the First Restatement’s choice-of-law system has eroded, with a total of forty-two jurisdictions (including the District of Columbia and Puerto Rico) abandoning the traditional rule and embracing a plethora of modern choice-of-law approaches, each vying for territory on the methodological map.\(^\text{19}\)

1. **Government Interest Analysis**

Brainerd Currie fathered the “government interest” analysis and is responsible for so much of what is right\(^\text{20}\) and what is wrong\(^\text{21}\) with today’s modern conflicts law. Contrary to the First Restatement’s content-neutral approach to choosing what law to apply, Currie introduced the content-specific concept of state or governmental interests to the field of American conflicts law, postulating that courts should “ascertain whether each of the involved states would wish to apply their respective laws” by “examining the content of the conflicting laws” and determining “whether the involved states have an interest in applying their law.”\(^\text{22}\)

Currie believed state interests controlled the choice-of-law analyses and that the interests of private litigants and the federal system were irrelevant.\(^\text{23}\) Like the spice, many jurisdictions have found that too much Currie analysis can ruin the dish of a choice-of-law approach, and so many states have adopted Currie’s central thesis that state interests matter, but have declined to make this the sole criterion in their choice-of-law approaches.\(^\text{24}\) For example, Currie’s “state interest” analysis can be seen in the Second Restatement and in the “combined modern” approaches, although the “interest analyses” of California,

\(^{18}\) See id.


\(^{20}\) According to Dean Symeonides, Currie was “fundamentally correct” in making state interests the basis for resolving conflict of laws. Symeonides, *The American Choice-of-Law Revolution*, supra note 2, at 50.

\(^{21}\) Judge Posner of the Seventh Circuit has complained that the choice-of-law approach involving interest balancing is “maddeningly indefinite.” Carter v. United States, 333 F.3d 791, 794 (7th Cir. 2003).


\(^{23}\) Id. at 40-43, 382.

\(^{24}\) Id. at 98, 361, 383.
New Jersey, and the District of Columbia come closest to the central thesis of his approach.  

The District of Columbia's rules are a "constructive blending" of the Second Restatement and the "governmental interests" approaches. Under this approach, courts identify the governmental policies underlying the laws in conflict and determine which state's policy would be most advanced by having its law applied. To evaluate the state with the stronger interest, a court considers the four contact-factors from section 145 of the Second Restatement. Additionally, New Jersey "applies a flexible 'governmental-interest' standard, which requires application of the law of the state with the greatest interest in resolving the particular issue that is raised in the underlying litigation." The New Jersey courts determine which state has a greater interest by identifying the governmental policies underlying the applicable law of each state and deciding how these "'policies are affected by each state's contacts to the litigation and to the parties.'" Finally, California's choice-of-law approach is borrowed from Professor William F. Baxter's "comparative impairment" theory, which "weighs the loss that would result from subordinating the interests of one state to those of another state" and applies the law of the state whose interest would be more impaired if its laws were not applied to the particular issue.

2. Second Restatement

The Second Restatement, known as the "most significant relationship" test, dominates conflicts law with twenty-two jurisdictions following this approach in tort cases. But this statistic tells only half the tale. The Second Restatement is not uni-

25 Unlike the approaches he inspired, Currie believed that judges should not attempt to weigh the interests of the states involved and should instead apply the law of the forum when a true conflict existed. Id. at 45.
28 Id.
30 See id. at 485 (quoting Veazey v. Doremus, 510 A.2d 1187, 1189 (N.J. 1986)).
formally applied from jurisdiction to jurisdiction or even within a single jurisdiction. This is because there are gradations of commitment to this approach, and some courts are unwilling or unable to apply the Second Restatement as the drafters intended. Thus, counsel should carefully review the leading choice-of-law cases in the applicable Second Restatement jurisdiction before resorting to a generic “most significant relationship” analysis.

The “most significant relationship” test “works through three related functions.” First, section six—the “cornerstone of the Restatement Second” contains a “dispositive priority to the forum’s statutory choice-of-law rules” and a list of non-exclusive policies intended to identify the state with the most significant relationship if there is no dispositive statutory rule. These “policies are broader and qualitatively different” from those advocated by Brainerd Currie. Moreover, in the Second Restatement analysis, state interests are only a factor to be balanced against other policies, while in government interest jurisdictions, state interests “drive the analysis.” Therefore, counsel should be wary of assuming that the Second Restatement and an “interest” analysis are functionally the same or would produce the same result in each instance.

---


36 Symeonides, *The American Choice-of-Law Revolution*, supra note 2, at 96 (“[S]ome states prefer to use only the general, open-ended, and flexible sections of the Restatement (such as §§ 145, 187 and especially § 6) and avoid using the specific sections that contain mildly confining presumptive rules.”); Gottesman, *Draining the Dismal Swamp*, supra note 5, at 9-10 (“[T]here is widespread divergence in the way that various states apply the second Restatement.”); George, *supra* note 34, at 526 (“[S]tates using the Second Restatement do not necessarily employ the same methods, some using it for contacts counting, some for territorial preferences, and some for interest balancing.”).

37 George, *supra* note 34, at 519.


39 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); George, *supra* note 34, at 519.


41 George, *supra* note 34, at 493.

42 *Id.*

43 See *id.*
Second, in tort cases, there are four contacts (familiar to most counsel) that must be "taken into account in applying the principles of [Section] 6." Significantly, "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue," which demonstrate that the Second Restatement (like most but not all modern approaches) embraces an issue-by-issue choice-of-law analysis. This issue-by-issue approach is considered a major breakthrough in modern choice-of-law analysis and is "widely practiced by American courts." The approach can lead to the laws of different states applying to different issues within the same cause of action, a result known as the French term "depecage." Finally, the Second Restatement contains numerous sections applying to specific torts such as personal injury and to specific issues such as the standard of care. Counsel should search these sections to determine if any are applicable to the specific

---

44 Restatement (Second) of Conflict of Laws § 145 (1971). These four contacts are (1) the place where the injury occurred, (2) the place where the conduct occurred, (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties, and (4) the place where the relationship between the parties is centered. Id.

45 Id.

46 For example, although Indiana is designated a modern approach state because it applies a "most significant contacts" approach when the lex loci delicti bears little connection to the action, its supreme court recently refused to incorporate an issue-by-issue approach into its choice-of-law methodology. Simon v. United States, 805 N.E.2d 798, 801-03 (Ind. 2004). For a critique of Indiana's rejection of "one of the breakthroughs of modern choice-of-law analysis," see Symeonides, 2004 Annual Survey, supra note 7, at 944-48.

47 Symeonides, 2004 Annual Survey, supra, note 7, at 947.

48 Symeonides, The American Choice-of-Law Revolution, supra note 2, at 132; see, e.g., In re Air Crash Disaster, 644 F.2d 594, 611 (7th Cir. 1981) (approving of an issue-by-issue approach and of the resulting depecage).

49 Symeonides, 2004 Annual Survey, supra note 7, at 946.

50 According to Dean Symeonides, "Depecage is the application . . . of the laws of different states to different issues in the same cause of action . . . ." Symeonides, 2004 Annual Survey, supra note 7, at 946; see also Symeonides, The American Choice-of-Law Revolution, supra note 2, at 132-33. Depecage is "a natural consequence, and an appropriate recognition, of the fact that the states involved in the case may be interested in different aspects of it or interested in varying degrees." Symeonides, The American Choice-of-Law Revolution, supra note 2, at 153. Although an issue-by-issue analysis can lead to depecage, this is not always the result because the court may determine that the same state's laws apply to the entire cause of action even after an issue-by-issue analysis.

51 Restatement (Second) of Conflict of Laws § 146 (1971); see also George, supra note 34, at 520.

52 Restatement (Second) of Conflict of Laws § 157 (1971); see also George, supra note 34, at 520.
issue under consideration before relying on the general tort principles in conjunction with evaluating the policies under section 6.

The Second Restatement has certainly complicated the court's basic task of determining what law to apply in each case, resulting in unpredictability, delay, and administrative inefficiency. Moreover, Second Restatement courts must struggle with the same problems as "government interest" jurisdictions in trying to determine the policies underlying the laws of potentially interested states, which has been aptly compared to "skeet shooting with a bow and arrow." Such an ethereal task is fraught with more intellectual danger when the underlying law's purposes are obscure. New York's Judge Breitel once observed the following in dissent: "Intramural speculation on the policies of other States has obvious limitations because of restricted information and wisdom. It is difficult enough to interpret the statutes and decisional rules of one's own State." A court's ability to consciously or unconsciously manipulate such policies, when combined with the Second Restatement's almost infinite flexibility, can lead to the perception that too often the approach simply provides a curtain of legitimacy behind which the court—like the Wizard of Oz—pulls unseen levers to achieve the desired result.

Perhaps because the Second Restatement sought to cherry-pick from the conflicting choice-of-law theories of multilateralism and unilateralism and blend them into one approach, the Second Restatement has been harshly and roundly criticized as

58 Michael H. Gottesman, Adrift on the Sea of Indeterminacy, 75 Ind. L.J. 527, 528-29 (2000) (hereinafter Gottesman, Adrift); see also Gottesman, Draining the Dismal Swamp, supra note 5, at 8.
55 George, supra note 34, at 515.
56 Tooker v. Lopez, 249 N.E.2d 394, 411 (N.Y. 1969) (Breitel, J., dissenting); see also George, supra note 34, at 515.
57 Friedrich K. Juenger, A Third Conflicts Restatement?, 75 Ind. L.J. 403, 405-06 (2000) (stating that the Second Restatement "furnished courts with any number of plausible reasons to support whatever results they wished to reach").
58 Symeonides, The American Choice-of-Law Revolution, supra note 2, at 61 ("[T]he Restatement's approach is a blend of multilateralism and unilateralism."); Gottesman, Draining the Dismal Swamp, supra note 5, at 8 ("The second Restatement . . . was a hodgepodge of all theories."); Juenger, supra note 57, at 405-06 (The Second Restatement mixed "together all manner of doctrinal currents"); George, supra note 34, at 519 ("The Second Restatement is eclectic, combining what its drafters believed to be the best of several choice-of-law methodologies.").
“mishmash,”59 “gibberish,”60 and “a cacophonous formula of formulae, a blend of indeterminate indeterminacy.”61 In the final analysis, the kindest thing that can be said about this approach is that it is the worst choice-of-law approach, except for all those other approaches that have been tried.62

3. Most Significant Contacts

Three jurisdictions follow the “most significant contacts” approach when deciding tort choice-of-law issues.63 Most practitioners could be forgiven for confusing the “most significant contacts” approach with the Second Restatement’s “most significant relationship” approach.64 However, the two are different. Although both approaches tend to rely on the same factors, the significant contacts approach considers the factual contacts alone, without reference to any set of policies or state interests, whereas the Second Restatement test considers and evaluates similar contacts in light of the policies set forth in section 6.65 This means that the most significant contacts approach can come perilously close to simple contact counting despite protestations to the contrary.66 For example, Indiana is classified as a “most significant contacts” approach jurisdiction,67 and that state has recently confirmed the correctness of this classification by eschewing the policy-balancing of the Second Restatement, as it instead prefers to count contacts and evaluate them with refer-

---

59 Juenger, supra note 57, at 405.
60 Id. at 403. As one seasoned practitioner observed, courts are required under the Second Restatement approach “to compare apples, oranges, umbrellas, and pandas, and determine which state’s law to apply by the relative importance assigned to these factors.” Gottesman, Draining the Dismal Swamp, supra note 5, at 8.
61 Gottesman, Adrift, supra note 53, at 527.
62 This is a paraphrase of Sir Winston Churchill’s famous remark that “democracy is the worst form of government except all the others that have been tried.” Winston Churchill, http://www/quotationspage.com/quotes/SirWinston_Churchill/Il (last visited Sept. 3, 2006).
63 These jurisdictions are Indiana, North Dakota, and Puerto Rico. Symeonides, The American Choice-of-Law Revolution, supra note 2, at 130.
64 See, e.g., id. at 395 (“Some courts engage in contact-counting even when applying the Second Restatement, which contemplates a content-oriented selection.”).
65 Symeonides, Judicial Acceptance, supra note 5, at 1283 n.159; see also Symeonides, The American Choice-of-Law Revolution, supra note 2, at 129-30.
67 See Simon v. United States, 805 N.E.2d 798, 805-07 (Ind. 2004) (reiterating that Indiana’s choice-of-law rule follows the lex loci delicti unless the tort bears little connection to the action, in which case the law of the state with the most significant contacts will apply).
ence to how the contacts relate to each cause of action, not with reference to the policies of each interested state.\(^8\)

4. \textit{Lex Fori} Approach

Kentucky, Michigan, and Nevada follow the \textit{lex fori} approach and apply the law of the forum in the majority of cases, enshirning the forum court’s natural tendency to apply its own law.\(^9\) For example, Kentucky will apply its own law in a case so long as there are significant—not necessarily the \textit{most} significant—contacts with Kentucky.\(^7\) Similarly, in Nevada, the law of the \textit{lex fori} governs “unless another state has an overwhelming interest,”\(^7\) determined not by Currie-like interest analysis, but by the other state having at least two of four geographical contacts that Nevada borrowed and modified from section 145 of the Second Restatement.\(^7\) Finally, Michigan courts will apply their own law presumptively unless there is a “rational reason” for applying another state’s law, determined by considering whether the other state has an interest in having its law applied and whether Michigan’s interests mandate that its law be applied anyway.\(^7\) Although the \textit{lex fori} approach is methodologically dissimilar to Brainerd Currie’s “interest analysis” approach, it usually

\(^{68}\) See id. at 803. For criticism of this approach as turning “the clock back to the time of the first Restatement,” see Symeonides, 2004 Annual Survey, supra note 7, at 944-48.


\(^{70}\) Foster v. Leggett, 484 S.W.2d 827, 829 (Ky. 1972). As the Sixth Circuit has observed, “Kentucky courts have apparently applied Kentucky substantive law \textit{whenever possible}.” Harris Corp. v. COMAIR, Inc., 712 F.2d 1069, 1071 (6th Cir. 1983); see also Wallace Hardware Co. v. Abrams, 223 F.3d 382, 391 (6th Cir. 2000) (noting the “egocentric” and “provincial tendency in Kentucky choice-of-law rules”).

\(^{71}\) Motenko v. MGM Dist., Inc., 921 P.2d 933, 935 (Nev. 1996).

\(^{72}\) Id.; see also Nw. Pipe Co. v. Eighth Jud. Dist. Ct., 42 P.3d 244, 245 (Nev. 2002). According to one observer, “[t]he four factors that the majority listed [in Motenko] . . . are detached from any of the policies supporting the laws of the involved non-forum states.” Ralph U. Whitten, U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited), 37 Tex. Int’l L.J. 559, 572-73 (2002); see also Nw. Pipe Co., 42 P.3d at 247 (Agosti, J., dissenting) (noting that Nevada “borrowed and modified section 145 of the Restatement” but did not permit “a court to consider the important policy questions” in choice-of-law issues because the “Motenko test does not incorporate the specific reference in sections 146 and 175 to the policy considerations of section 6(2)”).

\(^{73}\) Sutherland v. Kennington Truck Serv., Ltd., 562 N.W.2d 466, 471 (Mich. 1997).
achieves his preferred result—the application of the forum’s law.74

5. Professor Leflar’s “Better Law” Approach

To greater or lesser degrees, five states continue to follow the so-called “better law” approach to choice-of-law issues.75 Professor Leflar proposed five “choice-influencing considerations” to guide a court when facing choice-of-law problems: “(1) predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum’s governmental interest, and (5) the application of the ‘better rule of law.’”76 Although only one of five considerations, the “better law” criterion became associated with this approach, probably because it was the “decisive criterion in all the close cases” and because the other considerations differ little from those set forth in the Second Restatement’s section 6.77 By allowing judges to choose what each believes to be the “better law,” this approach necessarily legitimizes “judicial subjectivism” and promotes “pro-forum law” bias, “pro-plaintiff/pro-recovery” bias, and “pro-forum litigant” bias.78 Such biases are now “less pronounced” because “most of the states that initially adopted Leflar’s approach have already begun to combine it with other approaches, and to de-emphasize the better-law factor.”79 As a result, counsel would be well advised to cite the appropriate state’s most recent pronouncement on choice-of-law to ensure the proper emphasis on the “better law” criterion specifically and generally on the set of choice-influencing factors.80

75 These five states are Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin. See id. at 91, 109-10; see also Symeonides, 2004 Annual Survey, supra note 7, at 944.
77 Id. at 53.
78 Id. at 54, 110-12.
79 Id. at 114. Rhode Island and Minnesota have the most eclectic approaches. Id.
6. "Combined Modern" Approach

Dean Symeonides classifies Hawaii, Louisiana, Massachusetts, New York, Oregon, and Pennsylvania (the six re-

81 Peters v. Peters, 634 P.2d 586, 593 (Haw. 1981) ("The preferred analysis, in our opinion, would be an assessment of the interests and policy factors involved with a purpose of arriving at a desirable result in each situation."); see also Mikel-

son v. United Servs. Auto. Ass'n, 111 P.3d 601, 608 n.6 (Haw. 2005) (noting that Peters referenced the Second Restatement, the governmental interests approach, and Professor Leflar's approach, but that Hawaii's choice-of-law approach assesses the interests and policies of the states involved rather than follows any one particular methodological approach).

82 Louisiana is an odd duck regarding choice-of-law issues. The Louisiana Civil Code provides that state's choice-of-law approach, not case law. See, e.g., La. Civ. CODE ANN. art. 3515 (1994) (setting forth the residual rule for choice-of-law is-

stances in Louisiana):

[A]n issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue. That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of up-

holding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state. .

Dean Symeonides drafted the choice-of-law approach for Louisiana.

83 Cosme v. Whitin Mach. Works, Inc., 632 N.E.2d 832, 834 (Mass. 1994) (noting that Massachusetts "takes a functional approach" and uses "established conflicts criteria and considerations" but does not follow any particular doctrine, preferring instead to decide choice-of-law issues by assessing choice-influencing considerations, including those from the Second Restatement and various scholars).

84 See, e.g., Padula v. Lilarn Prop. Corp., 644 N.E.2d 1001, 1002 (N.Y. 1994): New York utilizes interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation. The greater interest is determined by an evaluation of the 'facts or contacts which . . . relate to the purpose of the particular law in conflict.' Two separate inquiries are thereby required to determine the greater interest: (1) what are the significant contacts and in which jurisdiction are they located; and, (2) whether the purpose of the law is to regulate conduct or allocate loss.


85 Tower v. Schwabe, 585 P.2d 662, 663 (Or. 1978) (noting that Oregon had adopted the Second Restatement test but that it engaged in a false conflict analysis first, based exclusively on an interests and policy analysis); Erwin v. Thomas, 506 P.2d 494, 494-98 (Or. 1973) (establishing that Oregon will not look to the contacts set forth in the Second Restatement unless two states' policies and interests are involved and conflict); Dabbs v. Silver Eagle Mfg. Co., 779 P.2d 1104, 1105-06 (Or. Ct. App. 1989) (noting that Oregon's threshold analysis is to com-
maining jurisdictions) as following a “combined modern” approach to choice-of-law issues in tort cases. Although more than these six jurisdictions could be classified as eclectic, in that many courts from time to time have judicially mixed choice-of-law methodologies, this classification is reserved only for those jurisdictions where more than one modern methodology is “overtly, knowingly, and repeatedly” combined. Broad descriptions of these “combined modern” approaches are perilous because, by their very nature, each state’s approach constitutes that particular state’s blend of choice-of-law methodologies. Pennsylvania is a good example. Almost twenty years ago, Gregory Smith described Pennsylvania’s choice-of-law approach in a law review article as being “convoluted” and “eclectic,” having applied at various times “the First and Second Restatements, the center of gravity approach, interest analysis and Professor Cavers’ ‘principles of preference.’” Currently, Pennsylvania applies a “flexible conflicts methodology” that is a hybrid of the Second Restatement and “interest analysis.”

Pennsylvania begins its choice-of-law approach with an analysis of the policies of the interested states to determine if there is a false conflict, a true conflict, or whether the case falls into Brainerd Currie’s “unprovided-for” category. A false conflict exists when only one of the relevant jurisdiction’s governmental interests would be impaired by the application of another state’s law. Under these circumstances, that state will provide the law applicable to the particular issue. If none of the jurisdiction’s

---

87 Symeonides, The American Choice-of-Law Revolution, supra note 2, at 91-92, 94; see also Symeonides, 2004 Annual Survey, supra note 7, at 944.
91 Garcia, 421 F.3d at 220; Kirschbaum v. WRGSB Assocs., 243 F.3d 145, 151 (3d Cir. 2001).
92 Garcia, 421 F.3d at 220.
93 Id.
94 Id.
interests would be impaired, then this is an unprovided-for case, and the law of the place where the tort occurred will control the case. Finally, if there is a true conflict, then the applicable law is that of the place having the most significant contacts or relationship with the issue.

For the remaining five states, the practitioner should consult the law set forth in the footnotes as a starting point for research into those states' particular choice-of-law approaches, bearing in mind that the most recent case law also should be consulted since these approaches tend to morph over time.

C. Conclusion

Courts have made these classifications hazardous by often using distinct doctrines interchangeably, producing a choice-of-law phenomenon known as “judicial eclecticism.” Nevertheless, practitioners should still become students of these various methodologies because the distinctions between them sometimes have a significant impact on the outcome of litigation. At the very least, because choice-of-law motions often “will have a drastic effect on settlement potential,” these methodological classifications should provide a valuable starting point for a practitioner before taking the plunge into the unfamiliar waters of a choice-of-law approach.

III. WHEN UNCLE SAM IS THE ONLY DEFENDANT IN A GARDEN-VARIETY AVIATION CASE

A Federal Tort Claims Act ("FTCA") claim against the United States can produce a choice-of-law surprise for the unwary practitioner because the choice-of-law rules chosen may differ from the rules that would otherwise apply in a case against a private defendant. When a plaintiff files a diversity action against an aircraft manufacturer arising out of an airplane crash, the

---

95 Id.
96 Id.
97 Juenger, supra note 57, at 411; see also Symeonides, The American Choice-of-Law Revolution, supra note 2, at 94.
99 Harrington, supra note 3, at 10.
100 George, supra note 34, at 501 (“Attorneys wishing to challenge a court’s choice-of-law approach would do well to begin at the beginning and to learn the lineage of these various choice-of-law methodologies.”).
choice-of-law approach of the forum is automatically applied pursuant to long-standing Supreme Court precedent.\textsuperscript{101} This is not true in FTCA actions. Under the FTCA, the government is liable for the negligent acts and omissions of its employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."\textsuperscript{102} On its face, this statutory language appears to be a clear choice-of-law provision in which Congress decided the substantive law of the place where the negligent acts or omissions occurred would apply in an FTCA case, but this simple reading is not how the United States Supreme Court has interpreted the language. Instead, the Supreme Court has interpreted this language to mean that the "whole law" of the state where the alleged negligent act or omission occurred applies—including its choice-of-law rules.\textsuperscript{103} As a result, the court will analyze that jurisdiction's choice-of-law rules to determine the applicable substantive law, so that the law which ultimately applies in an FTCA case is not necessarily the law of the place where the negligent acts or omissions occurred because that jurisdiction's choice-of-law rules could point the court to the forum's law or the law of any other interested jurisdiction.

One example will demonstrate the importance of the difference between the rule applicable in diversity cases and the rule applicable in FTCA cases. A pilot receives allegedly negligent weather information from a flight service station in Indiana before taking off in instrument meteorological conditions. En route to his home state of Pennsylvania, the pilot crashes while still in Indiana. The pilot was earning a high income and was divorced with adult children. After submitting its administrative claim and receiving a denial from the Federal Aviation Administration, the pilot's estate files suit against the United States in the Eastern District of Pennsylvania. Venue is proper in that dis-


\textsuperscript{103} Richards v. United States, 369 U.S. 1, 11 (1962). For an excellent article on why Richards' quasi-renvoi approach was ill-advised, see generally James A. Shapiro, Choice of Law Under the Federal Tort Claims Act: Richards and Renvoi Revisited, 70 N.C. L. Rev. 641 (1992). At least the Court did not torture the language any further, finding that the "place where the act or omission occurred" meant just that and did not mean the place where the act or omission had its operative effect. Richards, 369 U.S. at 9-10.
trict because the plaintiff resides there. If the case were a diversity action against a private defendant, the forum court would apply Pennsylvania choice-of-law rules, probably resulting in the application of that state's compensatory damages law because the pilot resides there. Under Pennsylvania law, the plaintiff could recover damages arising from the decedent's pre-death pain and suffering and for his lost gross earnings.

However, Plaintiff could not recover any of these damages under this hypothetical. Here is why. Under the FTCA, Indiana's choice-of-law rules, not those of the forum, would apply because the government's alleged negligence occurred in that state. Under Indiana's choice-of-law approach, the substantive law of the place of injury applies to the entire cause of action unless that jurisdiction "bears little connection" to the action. In this hypothetical, Indiana is both the place of the injury (where the crash occurred) and the place where the actionable negligence occurred, ensuring that Indiana bears more than a little connection with the cause of action. As a result, Indiana choice-of-law rules would select that state's own substantive law to apply to all issues—liability and damages—because Indiana does not apply an issue-by-issue approach and does not consider the interest Pennsylvania may have in compensating its...
resident decedent. Under Indiana law, the plaintiff could not recover any economic loss for the death of a divorced adult with no dependents. Also, like anyone else whose wrongful death and survival actions are governed by Indiana law, the pilot’s conscious pain and suffering is not compensable because he died from the same negligence that caused his personal injuries.

Although this is an extreme example, a similar but more complex aviation case was recently litigated against the United States. Counsel for plaintiffs should be aware of the possibility of similar, though perhaps less dramatic, differences in expected economic recovery anytime the government’s negligence occurs outside of the forum and the jurisdiction where the negligence occurs applies the lex loci delicti approach (any one of ten states) or any other approach such as Indiana’s method that eschews an issue-by-issue approach or refuses to recognize the validity of state or governmental interests in the choice-of-law mix.

IV. WHEN UNCLE SAM IS A CO-DEFENDANT IN A COMPLEX AVIATION CASE

Choice-of-law issues can become increasingly complex when the United States is a co-defendant in an aviation case and when multiple acts of government negligence occur in different jurisdictions. First, the claims against the United States may need to be analyzed completely separately from the claims against the private co-defendant. Second, when the government negligence occurs in more than one jurisdiction, the court must determine which jurisdiction’s choice-of-law rules apply to the claims against the United States. Finally, when those choice-of-

112 Simon, 805 N.E.2d at 798; see also Judge, 205 F.3d at 337; Judge v. Pilot Oil Corp., 17 F. Supp. 2d 832, 835-36 (N.D. Ind. 1998).

113 Ind. Code § 34-23-1-2 (2000). Although such an outcome sounds draconian, the legislation was enacted in 1999, apparently “[a]fter years of debate in the legislature.” Tammy J. Meyer & Kyle A. Lansberry, Recent Developments in Indiana Tort Law, 34 Ind. L. Rev. 1075, 1077-78 (2001). Under this statute, the decedent’s loved ones can recover for loss of his love and affection, but the total award for such damages is capped at $300,000. § 34-23-1-2.


116 These states are Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming. See Symeonides, 2004 Annual Survey, supra note 7, at 943-44.
law rules are applied to the claims against the United States, one state’s law may apply to the claims against the government, and another state’s law may apply to the claims against the co-defendant, even on a “common issue” such as apportionment of fault. All of these issues will be addressed below.

A. Separate Choice-of-Law Analysis for Claims Against the United States

When a plaintiff files an action against the United States and a co-defendant in a jurisdiction other than the place where one of the government’s allegedly negligent acts or omissions occurred, a court must analyze separately the choice-of-law issues for the FTCA claims in cases where the forum’s choice-of-law approach differs from that of the place where the government acts or omissions occurred. This situation can occur with some degree of frequency, given that this country is a patchwork quilt of choice-of-law approaches, and courts ostensibly applying the same approach do so in a markedly different manner. Does this separate choice-of-law analysis mean that one state’s substantive law will apply to issues involving the United States and different substantive law will apply to issues involving the private-party defendant? Not necessarily. The answer will depend on the facts of the case and the types of choice-of-law approaches involved.

For example, when the law of the place where the acts or omissions occurred follows the lex loci delicti approach in tort choice-of-law decisions, and the forum applies a modern approach, the law of the place where the injury occurred is applicable to the United States regardless of what choice-of-law rules

---

117 For venue to be proper against the United States, this jurisdiction must be the place where the plaintiff resides. 28 U.S.C. § 1402(b) (2000).

118 See, e.g., Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (forum’s choice-of-law rules apply in a diversity case); see generally Raflo v. United States, 157 F. Supp. 2d 1, 4-10 (D.D.C. 2001) (separately analyzing the FTCA claims and the non-FTCA claims for purposes of the choice-of-law analysis when the choice-of-law rules of different jurisdictions applied to those two sets of claims); Clawans v. United States, 75 F. Supp. 2d 368, 371-75 (D.N.J. 1999) (analyzing separately the choice-of-law issues when one state’s choice-of-law rules applied to the pilot and passengers’ FTCA claims and another state’s choice-of-law rules applied to the passengers’ state-law claims asserted against the pilot and owner of the aircraft).


120 Id. at 96; George, supra note 34, at 490-91.
or substantive law applies to the private co-defendant. Under these circumstances, the contacts solely related to the claims against the government should be irrelevant, or at least given less weight, in the separate choice-of-law analysis performed for the claims against the co-defendant.

The analysis becomes less definitive when both jurisdictions apply modern, though different, choice-of-law approaches. Because of the factual variations of each case, and the distinctions between the numerous modern approaches, no definitive statement can be made regarding the outcome of the two separate choice-of-law analyses under modern but dissimilar choice-of-law approaches; however, the court will always need to decide whose contacts to consider in each of the separate choice-of-law analyses. A court should probably decide whose contacts to consider based on whether that party has a claim involved in the particular choice-of-law analysis. For example, a corporation hires a pilot to fly its executives from one business meeting to another. During one of those flights in which the pilot and two executives are flying from State A (their home state) to State B, the plane crashes in State B as a result of pilot error, an avionics malfunction, and air traffic control negligence in State B. The crash kills all onboard. In a consolidated action, the estates of the pilot and passengers sue the United States and the avionics manufacturer in State A, while the avionics manufacturer and the government sue each other for contribution. The estates of the passengers cannot sue the corporation that employed the pilot because of a workers' compensation bar. State A and State B use dissimilar modern choice-of-law approaches. Under these circumstances, the pilot, passengers, and the avionics manufacturer all have claims against the United States so that their contacts should be considered in the choice-of-law analysis applicable to the government, while the pilot, passengers, and United States all have claims against the avionics manufacturer so that their contacts should be considered in the non-FTCA choice-of-law analysis. This result is proper even though the

---

121 See generally Raflo, 157 F. Supp. 2d at 4-11; Clawans, 75 F. Supp. 2d at 372, 374.

122 See, e.g., Clawans, 75 F. Supp. 2d at 374 (noting that, in the separate choice-of-law analysis for the plaintiffs' claims against the private co-defendants, the residency of the United States "is entitled to little, if any, weight since the claims against [the government] will be determined" under another state's law).
CHOICE OF LAW

FTCA claims will be tried to a different finder of fact than the state-law claims.123

B. SELECTING THE CHOICE-OF-LAW RULES WHEN THE
GOVERNMENT’S NEGLIGENCE OCCURS IN MORE THAN
ONE JURISDICTION

Choice-of-law analyses in diversity cases can become protracted and complex, but at least counsel and the court know what choice-of-law rules to apply.124 This is not true in FTCA cases when a plaintiff alleges a death or injury was caused by government negligence occurring in more than one jurisdiction. Neither the text of the FTCA125 nor the Act’s legislative history126 shed any light on how to choose the choice-of-law rules applicable in such cases.127 The Supreme Court’s seminal decision in Richards v. United States128 is also silent on this issue.129 The Third Circuit stepped into this vacuum, setting forth a workable three-step process when making choice-of-law decisions under these circumstances.130 “When a case involves multiple alleged acts or omissions occurring in more than one state, the FTCA, as construed by Richards, requires the District Court to engage in a complex conflict of laws analysis to determine which state law governs the jurisdictional inquiry.”131 The court

124 As noted previously, the court should apply the forum’s choice-of-law approach in diversity cases. See, e.g., Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). If the case was transferred from another district, the transferee court should apply the transferor court’s choice-of-law rules when the action was transferred pursuant to 28 U.S.C. § 1404 and the transferee court’s choice-of-law rules when the action was transferred pursuant to 28 U.S.C. § 1406. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 244 n.8 (1981) (applying choice-of-law rules of transferor court); Doering v. Copper Mountain, Inc., 259 F.3d 1202, 1209 (10th Cir. 2001) (stating that choice-of-law rules of transferee court apply after § 1406 transfer).
127 Id.
129 See, e.g., Bowen v. United States, 570 F.2d 1311, 1317 (7th Cir. 1978); Raflo v. United States, 157 F. Supp. 2d 1 (D.D.C. 2001); see also Shapiro, supra note 103, at 669.
130 Gould Elecs., Inc., 220 F.3d at 179-80; see also Schalliol v. Fare, 206 F. Supp. 2d 689, 693-94 (E.D. Pa. 2002) (applying the Third Circuit’s approach); Raflo, 157 F. Supp. 2d at 8-11 (also applying the Third Circuit’s three-step approach).
131 Gould Elecs., Inc., 220 F.3d at 179.
must first ensure that there is not a "false conflict" between the potentially applicable substantive laws or the respective choice-of-law approaches.\textsuperscript{132} Second, assuming that a conflict exists, the court must "select between the states’ respective choice of law rules."\textsuperscript{133} Finally, the court must apply the chosen jurisdiction’s choice-of-law approach to “determine which state’s substantive tort law applies."\textsuperscript{134} When a co-defendant is thrown into the mix, these choice-of-law issues must be separately analyzed\textsuperscript{135} so that the analysis can begin to take on epic proportions,\textsuperscript{136} placing counsel in the ship with Odysseus to wander aimlessly for years on a protracted choice-of-law journey or on the hillside with Sisyphus, seemingly eternally condemned to roll the boulder of analysis up the choice-of-law hill only for it to roll back down again.\textsuperscript{137}

\textsuperscript{132} \textit{Id.} at 180. Although the Third Circuit may have been the first court to delineate a three-step process in a search to root out "false conflicts," other courts have recognized the importance of false conflicts in avoiding the quagmire of trying to determine which jurisdiction’s choice-of-law approach to apply when government negligence occurred in more than one jurisdiction. \textit{See, e.g.,} Suchomajcz v. United States, 465 F. Supp. 474, 477 (E.D. Pa. 1979) (finding no reason to determine which state’s choice-of-law rules to apply when government negligence could have occurred in either New York or Pennsylvania because both states had “identical choice of law rules” and would apply Pennsylvania substantive law); \textit{In re Silver Bridge Disaster Litig.}, 381 F. Supp. 931, 941-46 (S.D. W. Va. 1974) (finding, in a case involving multiple acts of government negligence in multiple jurisdictions, that a false conflict existed even though the choice-of-law rules differed because the applicable substantive laws did not differ).

\textsuperscript{133} \textit{Gould Elecs., Inc.}, 220 F.3d at 180.

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{See generally Raflo}, 157 F. Supp. 2d at 4-11.

\textsuperscript{136} \textit{See id.} at 7-8 (“The process of determining which state’s choice of law provision to apply may become as or more complex than determining which state’s substantive law to apply.”).

\textsuperscript{137} My own journey with these issues took several years and involved extensive briefing before a district court, a federal court of appeals, and a state supreme court. \textit{See generally} Simon v. United States, 341 F.3d 193 (3d Cir. 2003); Schalliol v. Fare, 206 F. Supp. 2d 689 (E.D. Pa. 2002); Simon v. United States, 805 N.E.2d 798 (Ind. 2004). Like Odysseus beseeching the lustrous goddess Calypso, I beseeched the choice-of-law gods:

\begin{quote}
Nevertheless, I long—I pine, all my days—
To travel home and see the dawn of my return.
And if a god will wreck me yet again on the wine-dark sea,
I can bear that too, with a spirit tempered to endure.
Much have I suffered, labored long and hard by now
in the waves and wars. Add this to the total—
bring the trial on!
\end{quote}

1. Determining Whether a False Conflict Exists

The first step exists to ensure that the last two steps are necessary, by determining whether there is a "false conflict" between the various choice-of-law approaches and among the potentially applicable underlying substantive law. The problem is that there is no consensus among academics or states on what constitutes a false conflict. Some courts believe that false conflicts are limited to situations where the laws of two or more states are the same or would produce the same result. Other courts and many scholars believe that false conflicts also exist when the laws of more than one jurisdiction are different but when only one state has a legitimate interest in the application of its law, demonstrated by an examination of the governmental interests underlying the law of each state. The latter view can be traced back to our old friend, Brainerd Currie. He classified fact patterns into "true conflicts," "apparent conflicts,"

---

139 See, e.g., 16 AM. JUR. 2D Conflict of Laws § 135 (2005); 63B AM. JUR. 2D Products Liability § 1521 (2005); 19A N.Y. JUR. 2D Conflict of Laws § 3 (2005); CHARLES KRAUSE & KENT KRAUSE, AVIATION TORT & REG. LAW § 2:1 (2005).
140 See, e.g., 16 AM. JUR. 2D Conflict of Laws § 135 (2005); 19A N.Y. JUR. 2D Conflict of Laws § 3 (2005); Krause & Krause, supra note 139, § 2:1.
141 See, e.g., Lacey v. Cessna Aircraft Co., 932 F.2d 170, 187 (3d Cir. 1991) (applying Pennsylvania's choice-of-law approach and finding that "[a] false conflict exists if only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's law."); Raflo, 157 F. Supp. 2d at 5 (applying the District of Columbia's choice-of-law rules and holding that "[w]hen the policy of 'State A' would be advanced by application of its own State A law, and the policy of the other state, 'State B,' would not be advanced by application of State B's law, a so-called 'false conflict' appears and the law of the interested state, State A, prevails."); Tucci v. Club Mediterranee, S.A., 107 Cal. Rptr. 2d 401, 407 (Cal. Ct. App. 2001); 63B AM. JUR. 2D Products Liability § 1521 (2005); 15A C.J.S. Conflict of Laws § 28 (2005); 10 FLA. JUR. 2D Conflict of Laws § 2 (2005); 19A N.Y. JUR. 2D Conflict of Laws § 3 (2005); Krause & Krause, supra note 139; see also Weinberg, supra note 10, at 1670 n.32 (finding "[t]he mistaken belief persists that the technical term 'false conflict' is intended to describe cases in which there is no conflict because the laws of both concerned states are the same") See generally Joel S. Perwin, Damage Choice of Law 2 ANN. 2001 ATLA-CLE 1699 (discussing this type of false conflict).
142 This is when more than one state is interested in the particular issue. Symeonides, The American Choice-of-Law Revolution, supra note 2, at 44.
143 This occurs when a moderate or restrained definition of policy or interest would lead to a finding that only one state is truly interested in the issue, even though more than one state would be constitutionally justified in asserting an interest. Id. at 44 & n.85.
“false conflicts,” and “un-provided for” cases. Under his approach, state interests are paramount and "a false conflict occurs when the court determines that only one state has a true interest in the dispute."

Currie’s approach to false conflicts does not mean there is no "conflict of laws" problem; instead, it means only that there is no conflict of governmental interests. Obviously, this more expansive definition of false conflicts works well if the pertinent choice-of-law approach is one that worships exclusively at the altar of Currie’s governmental interests; however, this type of false conflict would clash with the traditional choice-of-law approach, which does not consider state interests and instead applies the substantive law of the lex loci delicti. Similarly, this type of false conflict would clash with any modern choice-of-law approach that eschews consideration of state interests as part of its analysis. More significantly, one scholar recently noted that Currie’s approach to false conflicts differs from that of the Second Restatement, which provides that such state interests are only one consideration and not a dispositive factor and fails to use the term “false conflict” at all in its black letter sections or in the comments, its only allusion to false conflicts being the term’s more traditional meaning, “where the laws of all pertinent states are the same or would reach the same result.” As a result, “Currie’s false conflict [approach] cannot be grafted onto a Second Restatement analysis without defeating the latter’s essential function.” Therefore, practitioners in all aviation cases should be wary any time opposing counsel tries to graft Currie’s

---

144 This occurs when only one of the relevant states is actually interested in applying its law to the issue. Id. at 44.
145 This occurs when none of the relevant states are interested in the particular issue. Id.
146 George, supra note 34, at 493.
147 Luther L. McDougal, III et al., American Conflicts Law 341 (5th ed. 2001).
148 Krause & Krause, supra note 139, § 2:1 (noting that the more expansive definition of false conflicts "may well be limited to jurisdictions that have adopted a flexible interest analysis approach to aviation tort choice-of-law situations as distinguished from a jurisdiction that adheres to the old, traditional theory of the lex loci delicti").
149 See, e.g., Simon v. United States, 805 N.E.2d 798, 803-07 (Ind. 2004) (declining to include an evaluation of states’ policies in its choice-of-law mix).
150 George, supra note 34, at 493-94.
151 Id. at 494.
152 Id. at 494, 541 & n.276.
153 Id. at 494.
“governmental interests” version of “false conflicts” onto the choice-of-law approach of the relevant jurisdiction, unless that jurisdiction has specifically adopted that particular definition of false conflict or follows an approach that focuses exclusively on a state interest analysis.\footnote{For example, “it is somewhat questionable . . . whether it is appropriate for a federal court, sitting in diversity, to adopt such an approach when confronted with this species of ‘false conflict’ cases (unless, of course, the forum state’s courts would do likewise).” Fioretti v. Mass. Gen. Life Ins. Co., 53 F.3d 1228, 1234 n.21 (11th Cir. 1995); see also In re Air Crash Disaster at Boston, 399 F. Supp. 1106, 1122 n.13, 14 (D. Mass. 1975) (noting that use of the more expansive view of false conflicts would be inappropriate in a diversity action unless that was also the law of the forum state).}

For our purposes here, the proper definition of false conflict is important because it will delineate the parameters of step one of the three-step analysis. Federal common law—not state law—should determine what constitutes a false conflict when the issue is which jurisdiction’s choice-of-law approach to apply in an FTCA case involving multiple governmental acts or omissions in multiple jurisdictions.\footnote{When an FTCA case involves only acts or omissions in one jurisdiction, that jurisdiction’s definition of a false conflict should control because the FTCA provides that the government is liable for the negligent acts and omissions of its employees “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1) (2000); Richards v. United States, 369 U.S. 1, 11 (1962) (interpreting the statutory language to mean the “whole law” of the place, including its choice-of-law rules).} Because the federal common law follows the Second Restatement approach to choice-of-law issues,\footnote{See, e.g., Flores v. Am. Seafoods Co., 335 F.3d 904, 916 (9th Cir. 2003) (quoting Chan v. Soc’y Expeditions, Inc., 124 F.3d 1287, 1297 (9th Cir. 1997)) (noting that federal common law applies to choice-of-law determinations in admiralty cases and that federal common law follows the Second Restatement); Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1296 n.19 (11th Cir. 1999) (noting that federal common law conflicts rules were those of the Second Restatement); Certain Underwriters at Lloyd’s, London v. Inlet Fisheries, Inc., 370 F. Supp. 2d 974, 976 (D. Ala. 2004) (holding that federal common law applies to admiralty choice-of-law decisions and that federal common law mirrors the Second Restatement); Nat’l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 62 (D.D.C. 2002) (noting that federal common law follows the Second Restatement approach for conflicts issues); Hamilton v. Cunningham, 880 F. Supp. 1407, 1413 (D. Colo. 1995) (finding that federal common law follows the Second Restatement regarding conflicts issues). But see Barkanic v. Gen. Admin. of Civil Aviation of the P.R.C., 923 F.2d 957, 959-60 (2d Cir. 1991) (applying the forum state’s choice-of-law approach in a Foreign Sovereign Immunities Act case).} federal courts should apply the Second Restatement’s concept of false conflicts when deciding whether it is necessary
to proceed to steps two and three. Without any specific reference in the black letter sections of the Second Restatement, or in its comments to the more expansive view of false conflicts espoused by Currie, federal courts would be on safe ground applying only the more traditional notion of false conflicts and determining simply whether the pertinent choice-of-law approaches conflict and whether the underlying substantive law that could apply also conflict. This is exactly what the Third Circuit and the district court in the District of Columbia recently did when addressing the issue of determining which jurisdiction's choice-of-law approach to apply when the government's negligence occurs in more than one jurisdiction, though it is doubtful whether either court gave any thought to how defining the notion of false conflict would have changed their analyses.

Having made the decision as to what constitutes a false conflict, the court must proceed to determine whether there is a false conflict as to the choice-of-law approaches or the underlying substantive law. A hypothetical will demonstrate how this analysis progresses. We return to our luckless (but wealthy) divorcee with adult children, now taking off in instrument meteorological conditions from an airport in Ohio after receiving an incomplete weather briefing from a flight service station there. During his flight in Ohio and Indiana airspace, the air traffic controllers in both states fail to provide him with critical pilot reports of icing conditions. He encounters problems with the maneuverability of his aircraft, declares an emergency, and tries to land at an uncontrolled airport just across the state line in Kentucky. Because of icing on his aircraft and improper vectors provided to him by controllers in Indiana, the plane crashes and the pilot dies. Unknown to the pilot, his de-icing equipment was malfunctioning, even though he had just had the equipment serviced by a company in Ohio, just across the state line from his home in Pennsylvania. The estate of the pilot sues the United States and the company that serviced the de-icing equipment in federal court in Ohio, venue being proper as to both parties there. Plaintiff alleges that the United States was neg-

---

157 Simon v. United States, 341 F.3d 193, 200-02 (3d Cir. 2003); Gould Elecs., Inc. v. United States, 220 F.3d 169, 179-81 (3d Cir. 2000); Raflo v. United States, 157 F. Supp. 2d 1, 8 (D.D.C. 2001) (applying the more traditional view of false conflicts after applying the District of Columbia's expansive concept of false conflicts to the claims against the private defendant earlier in its analysis).

158 28 U.S.C. § 1391 (2000) (maintaining that venue is proper in a diversity action where a substantial part of the events giving rise to the claim occurred); 28
ligent for failing to provide adequate weather information in its initial weather briefing in Ohio, in its failure to provide pilot reports of icing in Ohio and Indiana, and in its provision of improper vectors in Indiana.

The court must decide whether a false conflict exists as to the relevant choice-of-law approaches applicable to the United States and as to the potentially applicable substantive law. There is a true conflict between the choice-of-law approach of Ohio (where one portion of the government's negligence allegedly occurred) and Indiana (where the remainder of the government's negligence occurred). Ohio follows the Second Restatement on choice-of-law issues in tort cases, whereas Indiana has rejected the Second Restatement and applies either a modified lex loci delicti approach or a most significant contacts approach, depending on the importance of the place where the injury occurred. Although theoretically a court could apply these two different choice-of-law approaches at this stage of the analysis to determine if a different outcome would result under either approach, courts addressing these issues usually have been satisfied that there is a true conflict as to choice-of-law rules when different methodologies would apply. If the approaches truly would lead to the same result, then a court's decision to proceed through the remaining steps of this analysis should not change the ultimate result in the case.

U.S.C. § 1402(b) (2000) (noting that venue is proper in the United States where the plaintiff resides or where the act or omission occurred).


160 Simon v. United States, 805 N.E.2d 798, 804 (Ind. 2004) (noting that the court could have adopted the Second Restatement in 1987 when it modified its previous adherence to the traditional rule but that it seemed like just as unattractive a course then as now).


163 Simon v. United States, 341 F.3d 193, 200-02 (3d Cir. 2003); Gould Elecs., Inc. v. United States, 220 F.3d 169, 180-81 (3d Cir. 2000); Bowen v. United States, 570 F.2d 1311, 1317-18 (7th Cir. 1978); Raflo v. United States, 157 F. Supp. 2d 1, 8 (D.D.C. 2001). But see In re Silver Bridge Disaster Litig., 381 F. Supp. 931, 944-46 (S.D. W. Va. 1974) (applying different choice-of-law approaches to show that they nevertheless would lead to the application of the same substantive law on a particular set of issues); Kantelehner v. United States, 279 F. Supp. 122, 125-28 (E.D.N.Y. 1967) (finding that the end result would be the same on a particular issue under the various choice-of-law approaches).
Based on these two choice-of-law approaches, several states’ substantive law could apply: Kentucky (where the crash occurred), Indiana (where part of the government’s negligence occurred), Ohio (where the remaining government negligence occurred and where the private defendant’s negligence occurred), and Pennsylvania (where the pilot lived). As to the potentially applicable substantive law, the laws of Pennsylvania, Ohio, Indiana, and Kentucky conflict on a number of critical issues. For example, Kentucky law applies a pure comparative fault system, allowing a plaintiff to recover regardless of the degree of negligence attributable to the plaintiff,\(^{164}\) whereas Indiana,\(^{165}\) Ohio,\(^{166}\) and Pennsylvania\(^{167}\) all apply a modified comparative fault system in which a plaintiff will not recover if his negligence is greater than the combined total of all defendants’ negligence. Also, Indiana law makes defendants severally liable,\(^{168}\) as does Kentucky,\(^{169}\) whereas Pennsylvania holds defendants jointly and severally liable,\(^{170}\) and Ohio applies different rules regarding when and for what type of damages joint tortfeasors are severally liable and jointly and severally liable.\(^{171}\)


\(^{168}\) Ind. Code Ann. §§ 34-51-2-8, 34-51-2-9 (LexisNexis1999); Control Techs., Inc. v. Johnson, 762 N.E.2d 104, 109 (Ind. 2002) (noting that under the Indiana comparative fault scheme liability is apportioned among those persons whose fault caused or contributed to causing the loss in proportion to their percentages of fault).


\(^{170}\) Baker v. AC&S, Inc., 729 A.2d 1140, 1146-47 (Pa. Super. 1999). In 2002, the Pennsylvania legislature enacted tort reform that ensured defendants would be severally liable only, except in cases of intentional misrepresentation, intentional torts, or where a defendant is 60% or more at fault. 42 Pa. Cons. Stat. Ann. § 7102 (West 2002). But the Pennsylvania Supreme Court recently affirmed a Commonwealth Court’s decision that had struck down this law as unconstitutional and void. DeWeese v. Cortes, 906 A.2d 1193 (Pa. 2006). Efforts to re-enact the legislation in a constitutional manner have suffered at the hand of the governor’s veto. See Senator Corman’s Statement on Governor Rendell’s Veto of ‘Fair Share Act,’ available at http://www.politicalspa.com/pressreleasdetail.asp?id=2067 (visited Oct. 6, 2006). Consequently, Pennsylvania has reverted back to the doctrine of joint and several liability, at least for now.

\(^{171}\) Ohio Rev. Code Ann. §§ 2307.22, 2307.23, 2307.36 (Baldwin 2004). If one defendant is greater than 50% at fault, then that defendant is jointly and severally liable for economic losses and severally liable for non-economic losses. Ohio
Additionally, as you may recall, our hapless pilot would not receive any damages for pain and suffering under Indiana law, nor would his estate receive any damages for his economic losses. In contrast, the pilot’s estate and his beneficiaries would be eligible to recover for the decedent’s pain and suffering under Kentucky, Ohio, and Pennsylvania law, as well as for varying degrees of economic losses. As a result, under the facts of this hypothetical, the court would need to perform steps two and three of the analysis to determine which state’s choice-of-law approach to apply and what substantive law will ultimately apply to the United States after an application of those rules.

2. Selecting Between the States’ Choice-of-Law Approaches

Courts have applied at least seven different approaches throughout the years when struggling with the issue of how to select which choice-of-law approach to apply when the government’s alleged negligence occurred in more than one jurisdiction. The acts and omissions a court considers must be those that are alleged to be actionable, rather than those that are ultimately determined to be actionable, otherwise a court could not make a choice-of-law decision in such cases until the fact finder had rendered a decision on the merits. The various approaches, their merits, and their shortcomings are set forth below, along with their application to the facts of our hypothetical.

a. Applying the Statutory Language Literally

The FTCA provides that the law applicable to claims against the United States is to be determined by the “law of the place

Rev. Code Ann. § 2307.22. [For those defendants that or less at fault, then they are severally liable as to all damages. Id.].


175 Ohio Rev. Code Ann. § 2125.02 (West 2004); Giuliani v. Guiler, 951 S.W.2d 318, 322 (Ky. 1997); Estate of Coleman, 772 A.2d at 1027.

176 Bowen v. United States, 570 F.2d 1311, 1318 (7th Cir. 1978).

177 S. Pac. Transp. Co. v. United States, 462 F. Supp. 1227, 1228-29 (E.D. Cal. 1978) (noting that when governmental acts or omissions occurred in more than one jurisdiction, the court could not decide until after the close of plaintiff’s case-in-chief which of the relevant jurisdictions’ choice-of-law approaches to apply). The problem with this delay should be self-evident.
where the act or omission occurred.”

When acts or omissions have occurred in more than one jurisdiction, one court has applied the language literally. In *Kohn v. United States*, the family of a serviceman sued the United States for emotional distress following the Army’s performance of an unauthorized autopsy, failure to return certain organs removed during the autopsy, embalming of the body, and the cremation of certain organs, all of which were in violation of the family’s deeply held religious beliefs. Because these acts and omissions occurred in both New York and Kentucky, the court decided to apply New York’s choice-of-law approach to the acts or omissions that occurred there and Kentucky’s choice-of-law approach to the acts or omissions which occurred in that state. This literal ap-

---


179 Other courts have looked at each act or omission separately but found it unnecessary to decide which jurisdiction’s choice-of-law rules to apply because they all resulted in the application of the same state’s substantive law. See *Spring v. United States*, 833 F. Supp. 575, 575-77 (E.D. Va. 1993) (finding it unnecessary to choose between the choice-of-law approaches of the two states where acts or omissions occurred because they both applied the same approach and thus led to the application of the same substantive law); *Springer v. United States*, 641 F. Supp. 913, 934-35 (D.S.C. 1986) (negligent acts in Maryland and North Carolina would lead to the application of the same substantive law because both states apply the same choice-of-law rules); *Ins. Co. of N. Am. v. United States*, 527 F. Supp. 962, 966-67 (E.D. Ark. 1981) (unnecessary to choose between Arkansas and Tennessee where acts and omissions occurred because both states’ choice-of-law rules would apply Tennessee substantive law); *In re Silver Bridge Disaster Litig.*, 381 F. Supp. 931, 944-46 (S.D. W. Va. 1974) (refraining from deciding among the three jurisdictions where acts or omissions occurred because the choice-of-law rules of the District of Columbia, Ohio, and West Virginia would lead to the application of the same substantive law); *Kandler v. United States*, 279 F. Supp. 122, 124-28 (E.D.N.Y. 1967) (finding that although the nine jurisdictions’ choice-of-law rules conflicted and the potentially applicable substantive law conflicted on some issues, there was no conflict regarding the particular issue before the court). Interestingly, in *Insurance Company of North America*, the court did not consider the choice-of-law rules of Missouri, where other government acts or omissions occurred because superseding acts had occurred elsewhere and neither party had urged the application of that jurisdiction’s substantive law. *Ins. Co. of N. Am.*, 527 F. Supp. at 966 n.3. Discounting the substantive law of a jurisdiction with contacts to an action seems appropriate when the parties do not urge its application; however, not considering the choice-of-law rules from that jurisdiction simply because the parties did not urge the application of its substantive law seems dubious, unless the acts or omissions that occurred later actually intervened and superseded the earlier acts in Missouri so as to cut off the causal chain. If the court simply discounted the earlier acts in one jurisdiction because later ones occurred in another jurisdiction, then this action would be improper.


181 *Id.* at 571.

182 *Id.* at 572.
proach worked in the *Kohn* case because each separate act was a distinct tort and a fact finder could attribute different amounts of damages to each separate act causing emotional distress, thereby allowing the different claims to be analyzed under different choice-of-law approaches and potentially different substantive law. Such a literal approach does not work in wrongful death or personal injury cases that typically arise from airplane crashes because separate acts of negligence combine to cause a single, indivisible harm—death or physical injury.\textsuperscript{183}

Counsel should be aware that the Ninth Circuit has also flirted with this approach in a wrongful death action. In *Grunnet v. United States*,\textsuperscript{184} the mother of a member of Jim Jones' cult sued the United States for failing to prevent the death of her daughter by suicide or other violent means in Jonestown, Guyana.\textsuperscript{185} The alleged acts or omissions occurred in both Guyana and the United States.\textsuperscript{186} Instead of searching for the one place where the acts or omissions occurred, the Ninth Circuit considered the acts in the United States and the acts in the foreign country separately.\textsuperscript{187} After finding that the omissions that occurred in Guyana were barred by the FTCA's foreign country exception,\textsuperscript{188} the Ninth Circuit looked to the other acts or omissions that occurred in the United States.\textsuperscript{189} The court found that the cloak of the discretionary function exception covered most of these acts or omissions, while the remaining acts or omissions occurred exclusively in California.\textsuperscript{190} As a result, the court did not have to confront the issue of how to apply two or

\textsuperscript{183} Gould Elecs., Inc. v. United States, 220 F.3d 169, 181-82 (3d Cir. 2000) (discussing the limitations of the literal language approach); see also Beattie v. United States, 756 F.2d 91, 104-05 (D.C. Cir. 1985), overruled on other grounds, Smith v. United States, 507 U.S. 197 (1993) (endorsing the fragmentation of a unitary claim for choice-of-law purposes under the FTCA); Beattie, 756 F.2d at 130-42, 141 (Wald, J., concurring) (believing that courts should apply either the law of each place where the separate acts occurred or “by some formula choose one place such as the place where the most significant act or omission occurred”); id. at 106-30, 122 (Scalia, J., dissenting) (noting that it was “inconceivable” that Congress intended to apply different choice-of-law rules for each act or omission, and proposing instead that the choice-of-law rules of the place where the “operative non-compliance occurs—regardless of whether any specific ‘blame’ can be attributed to any particular federal employee at that point”).

\textsuperscript{184} Grunnet v. United States, 730 F.2d 573 (9th Cir. 1984).

\textsuperscript{185} Id. at 574.

\textsuperscript{186} Id. at 574-76.

\textsuperscript{187} Id. at 575-76.

\textsuperscript{188} Id. at 575.

\textsuperscript{189} Id.

\textsuperscript{190} Id. at 575-76.
more sets of choice-of-law rules to a single wrongful death action. If the court had been faced with such an issue, would this just be another example of our old French ami, depecage, at work? It would not. With the application of different choice-of-law approaches to the same wrongful death claim, there is the potential for different substantive law to apply to the same issue as to the same defendant so that the United States could be jointly and severally liable according to the laws of one jurisdiction and severally liable according to the laws of another. Choice-of-law issues are complex enough without introducing unnecessary, intractable problems. 191

This approach is unworkable in the context of our hypothetical because it involves a single, indivisible injury.

b. Place of the Last Act or Omission Having Causal Effect

A more workable solution to the problem of how to choose the pertinent choice-of-law rules involves the application of the rules of the place where the last act or omission having causal effect occurred. 192 In Bowen v. United States, 193 a pilot brought an FTCA action based on the alleged failure of air traffic controllers in a number of states to warn him of icing conditions during a flight from Texas to Indiana that ultimately resulted in his aircraft crashing as he attempted to land in Indiana. 194 Confronted with multiple government acts or omissions occurring in different jurisdictions, the Seventh Circuit found that the text of the FTCA supported only two possibilities, that of the place where the “last act or omission” occurred or the place where the acts with “the most significant causal effect” occurred. 195 The first approach is considered here, the latter in the next section.

The “last act or omission” test has the distinct advantage of certainty, a greatly underrated word in the choice-of-law lexicon. Even in the early stages of litigation before any depositions have been taken, when decisions regarding what law will apply in the

191 Perhaps Grunnet can be limited to its facts so that Ninth Circuit courts will consider acts and omissions separately only when some of those acts or omissions occurred in a foreign country, thus triggering the application of the foreign country exception to the claims of negligence based on acts or omissions occurring there. For the cases involving acts or omissions exclusively in this country, courts in the Ninth Circuit should follow Ducey v. United States, 713 F.2d 504 (9th Cir. 1983).

192 See Bowen v. United States, 570 F.2d 1311 (7th Cir. 1978).
193 Id.
194 Id. at 1313.
195 Id. at 1318.
case usually should be made, both counsel and the court should be able to determine where the last act of governmental negligence occurred. Application of the test to our hypothetical demonstrates its appeal. Although the estate of the deceased pilot alleged the government was negligent in Ohio and Indiana, the last acts with any causal effect clearly were the improper vectors that the Indiana controllers provided to the pilot after he declared an emergency. This approach would lead to the application of Indiana's choice-of-law rules in our hypothetical. The problem with the test is that the last act with any causative effect may not be the most significant act or even one of any significance, resulting in the arbitrary application of one jurisdiction's choice-of-law rules, even though that jurisdiction may have little relation to the entire litigation.  

c. Place of the Act or Omission Having the Most Significant Causal Effect

The Seventh Circuit in Bowen found that selecting the choice-of-law rules of "the place of the act or omission having the most significant causal effect...seems to us to be more consistent with the statutory language and Congress' intent." Although this test is less arbitrary than the other approach considered by the Seventh Circuit because it focuses on the acts or omissions that are most important to the litigation, its strength is also its weakness. If a party requests that a court decide the choice-of-law issue early in the litigation to avoid committing resources to develop facts that might be ultimately irrelevant depending on which jurisdiction's law applies, then how is a court to decide which acts or omissions will ultimately be those found to have the most significant causal effect? Courts that rely exclusively on the allegations set forth in the plaintiff's complaint will be reduced to counting the number of allegations in each jurisdiction without the benefit of knowing the significance of any of

---

196 Shapiro, supra note 103, at 672 ("The simplicity of the 'last negligent cause' analysis, however, is countermanded by the possibility that the last negligent act or omission is an insubstantial cause of the injury, at least relative to other causes.") (citing Hitchcock v. United States, 665 F.2d 354 (D.D.C. 1981)).

197 Bowen, 570 F.2d at 1318. Nevertheless, the Seventh Circuit found it unnecessary to decide between the two proposed approaches because they both led to the application of Indiana's choice-of-law rules under the facts of the case. Id. Similarly, the Eastern District of Virginia found it unnecessary to decide between the two approaches outlined in Bowen because they both led to the application of the same substantive law. Spring v. United States, 833 F. Supp. 575, 577 (E.D. Va. 1993).
these acts or omissions. Clever (and prescient) plaintiff's counsel can always increase the number of specific allegations in one jurisdiction over another to tip the scale in favor of the jurisdiction with the more favorable choice-of-law approach. To avoid a decision in favor of one jurisdiction over another based merely on numerical advantage, the parties will have to conduct discovery—including probably expert depositions—before an accurate choice-of-law decision can be made regarding the acts or omissions with the most significant causal effect, a result that increases litigation costs and diminishes the likelihood of an early settlement.198 Indeed, even after expert depositions have been taken, the parties may still not agree on (and the court may not be able to determine) which acts have the most significant causal effect.199 By the time expert reports and depositions have been taken, counsel may be in the uncomfortable position of having to highlight some acts as most important for liability issues and other acts as most important for purposes of choice-of-law determinations.200

Applying this test to the facts of the hypothetical is not easy. We need much more information to be certain whether the acts and omissions in Ohio or in Indiana had the most significant causal effect. Nevertheless, if Ohio's choice-of-law approach was more favorable to the plaintiff, then the estate of the pilot could argue that the omissions in Ohio had the most significant causal effect because the pilot would never have taken off had he received a full weather briefing. In contrast, if Indiana's choice-of-law approach favored the government, the United States could argue that “[t]he relative importance of the Indiana events becomes apparent when it is recalled that flight control personnel

198 See Shapiro, supra note 103, at 672 (observing that the most significant causal approach is “often difficult to apply in practice” and that “[t]his is especially true in the early stages of litigation, when factual questions such as significant causation have yet to be resolved, but when courts often need to decide the applicable law for purposes of motions”).

199 Simon v. United States, 341 F.3d 193, 196, 203 (3d Cir. 2003) (noting that “this case was fully ready for a four-week trial when the District Court” decided the choice-of-law issues, and yet the Third Circuit, even after the experts were deposed and the pre-trial briefs had been filed, still found that “reasonable minds could disagree on which cause (if any) was most significant”).

200 Compare Schalliol v. Fare, 206 F. Supp. 2d 689, 692 n.12 (E.D. Pa. 2002) (finding that the “parties’ pretrial memoranda clearly emphasize the conduct of the Indiana controllers over the publications” in the District of Columbia), with Simon, 341 F.3d at 203 (noting that the plaintiffs in the same case were arguing that “producing a defective product” in the District of Columbia constituted the “major sin of commission” for purposes of the choice-of-law determination).
in that state were responsible for giving [the pilot] the information he would need to complete his journey..."\textsuperscript{201} At the very least, because controllers in both Ohio and Indiana failed to provide pertinent pilot reports of icing, the events in Ohio "had no more causal significance than those [events] that occurred in Indiana..."\textsuperscript{202} On balance, this approach seems to favor Indiana over Ohio.

d. The Place Where a Physical Act Necessary to Avoid Negligence Should Have Occurred

The Ninth Circuit chooses which jurisdiction’s choice-of-law rules to apply when government acts or omissions occurred in more than one jurisdiction by applying the law of the place where “physical acts” could have prevented the injury.\textsuperscript{203} In Ducey v. United States,\textsuperscript{204} three persons were killed by a flash flood in a recreation area, allegedly because the park service failed to close the facility or to post signs.\textsuperscript{205} Although the court recognized that park service decisions in California informed the acts and omissions of park service employees in Nevada, the court found that the “failure to close down the facility” and the “failure to post signs” were omissions that “could have been prevented only by the doing of such physical acts as the posting of signs, the erection of barbed wire, and the tearing up of boat slips and trailer spaces in Nevada.”\textsuperscript{206} The Ninth Circuit’s approach to this problem was therefore to apply the choice-of-law rules of the jurisdiction where “physical acts” could have prevented the injury.\textsuperscript{207}

The Ninth Circuit’s method is a most unsatisfactory approach because its utility (if it has any at all) seems limited to cases involving policy decisions and a chain of sequential and depen-

\textsuperscript{201} Bowen, 570 F.2d at 1318.

\textsuperscript{202} Id.

\textsuperscript{203} See Ducey v. United States, 713 F.2d 504, 509 n.2 (9th Cir. 1983).

\textsuperscript{204} Ducey v. United States, 713 F.2d 504 (9th Cir. 1983).

\textsuperscript{205} Id. at 507, 509 n.2.

\textsuperscript{206} Id.

\textsuperscript{207} See id.; see also Beattie v. United States, 756 F.2d 91, 122 (D.C. Cir. 1985) (Scalia, J., dissenting), overruled on other grounds, Smith v. United States, 507 U.S. 197 (1993) (proposing a somewhat similar rule to that of the Ninth Circuit by applying the choice-of-law approach of the place where the “operative non-compliance occurs – regardless of whether any specific ‘blame’ can be attributed to any particular federal employee at that point”). Applying then-Judge Scalia’s approach to the facts of Ducey leads to the same result that the Ninth Circuit reached.
dent causality, where the latter omissions were based, at least in part, on acts or omissions taken elsewhere. In our hypothetical, physical acts in both Ohio and Indiana could have prevented the accident because all of the acts were independently operative negligent acts or omissions. For example, the plaintiff could allege that if only the flight service station employee in Ohio had spoken (instead of failing to speak) about the icing conditions, the pilot never would have taken off. If only the controller in Ohio had provided timely and pertinent pilot reports, the pilot would have aborted his flight and landed short of his destination. If only the controller in Indiana had done likewise, his life would have been spared. If only the controller in Indiana had given proper vectors, the pilot could have landed the aircraft before the icing caused the aircraft to fall from the sky. The Ninth Circuit’s approach set forth in Ducey provides no answer for our hypothetical facts.

e. Place Where the Relevant Act or Omission Occurred

In Hitchcock v. United States, the District of Columbia Circuit followed an approach that selects the choice-of-law rules based on where the “relevant act or omission” occurred. In that case, a nurse in Virginia administered a vaccine, the protocol for which was developed by officials in the District of Columbia. The court applied the District of Columbia’s choice-of-law rules rather than those of Virginia, because it was the development of the protocol for giving the vaccine that was “relevant” rather than its actual administration in Virginia. Indeed, the court recognized that “[a]ny negligence arising from these facts certainly cannot be attributed to the nurse.” The choice was clear in Hitchcock, but trying to apply the Hitchcock approach to the facts of our hypothetical demonstrates its limitations. The approach only works when the case involves a choice between dependent acts occurring in more than one jurisdiction. The air traffic controllers in the hypothetical engaged in indepen-

---

209 Id. at 359.
210 Id.
211 Id.
212 Id. This is the opposite result from that which would occur under then-Judge Scalia’s proposed approach in his dissent in Beattie v. United States, 756 F.2d 91 (D.C. Cir. 1985), overruled on other grounds, Smith v. United States, 507 U.S. 197 (1993). According to his approach, the applicable choice-of-law rules would be those of the place where the nurse administered the vaccine.
dent negligent acts and omissions that combined to cause the aircraft to crash and thus are not the aeronautical equivalent of the staff nurse properly administering policies negligently developed elsewhere. As a result, this approach is inapplicable to our hypothetical.

f. Place Where Most Substantial Portion of Acts or Omissions Occurred

The District of Columbia is also the source of another approach in which the court applied the choice-of-law rules of the place where the most substantial portion of the acts or omissions occurred. In *Raflo v. United States*, a governmental and non-governmental defendant allegedly failed to diagnose and treat the medical condition of the plaintiff’s wife. Numerous government acts or omissions occurred in both Virginia and the District of Columbia, although more occurred in Virginia. While the district court acknowledged that, as mandatory precedent, *Hitchcock* “clearly controls the analysis in this Court,” the district court was still unable to apply that approach because *Hitchcock* failed to give “clear guidance . . . regarding the proper standard to follow when relevant acts or omissions occur in more than one jurisdiction . . .” The problem implicit in the district court’s conundrum was that not all of the acts or omissions in one jurisdiction were dependent on acts or omissions in the other jurisdiction. If the acts or omissions in one jurisdiction were dependent on the acts or omissions in another jurisdiction, then there would be only one jurisdiction with “relevant” acts or omissions, regardless of the number of acts or omissions involved. Facing an issue not present in *Hitchcock*, the *Raflo* court decided that it would be “prudent to elect the choice of law provision belonging to the place where the most substantial portion of the acts or omissions occurred.” Applying the choice-of-law approach of the place where the most negligent acts or omissions occurred certainly has the advantage of sim-

---

213 See Schalliol v. Fare, 206 F. Supp. 2d 689, 697-98 (E.D. Pa. 2002) (noting that this approach was “indeterminate” when “two independent actors [are] each alleged to be negligent in their own right”).
215 *Id.* at 4.
216 *Id.* at 9-10.
217 *Id.* at 9.
218 *Id.* at 10.
219 *Id.*
plicity and would probably lead to the proper result in most cases; however, this approach is open to abuse by a skillful pleader or expert who can turn a single event into a series of alleged acts or omissions sufficient to tip the scale in favor of a jurisdiction with a more favorable choice-of-law approach.

The limitations of this approach are evident when it is applied to the facts of our hypothetical. In Ohio, the flight service station failed to inform the pilot of the icing conditions and controllers in that state also failed to pass along pertinent pilot reports of icing. In Indiana, the controller failed to pass along other pertinent pilot reports and provided improper vectors. Therefore, two acts and omissions occurred in both jurisdictions. Without more detailed information regarding these allegations, perhaps arising from an expert deposition, it would be impossible for a court to determine the pertinent choice-of-law rules. As a result, this approach is indeterminate when applied to our hypothetical.

g. Place Where the Last Significant Act or Omission Occurred

The Third Circuit has recently articulated a new test that applies the choice-of-law rules of the jurisdiction where the last significant act or omission occurred when government negligence occurs in more than one jurisdiction. In *Simon v. United States*, an aircraft crashed in Kentucky, allegedly resulting from the negligence of controllers in Indiana who cleared the pilot for an approach whose navigational aid had been inoperative for years and from allegedly negligent policymaking occurring in the District of Columbia that had allowed the instrument approach procedure to continue to be published all those years while the navigational aid was not working. The Third Circuit recognized that the acts and omissions of the controllers in Indiana were independent of the allegedly defective instrument approach procedure. Declining to follow a previous panel decision of the Third Circuit that had considered five approaches from other courts without choosing one single approach, the

---

221 See id. at 194, 203.
222 See id. at 203.
223 Gould Elecs., Inc. v. United States, 220 F.3d 169, 183 (3d Cir. 2003) (declining to choose which approach to apply because all workable approaches led to the application of the same state’s choice-of-law rules). For some reason, the Third Circuit in *Simon* thought that the five approaches articulated in *Gould Elec-
court in *Simon* chose to articulate a new “last significant act or omission” approach because “clarity is the most important virtue in crafting a rule by which we choose” the correct jurisdiction’s choice-of-law rules.

This test enjoys the certainty of the “last act or omission having causal effect” approach without saddling itself with that approach’s potential for arbitrary results that can occur when the last act is only incidental to the accident; similarly, the test takes the positive aspects of the “most significant causal effect” approach that ensures that the jurisdiction whose choice-of-law rules are chosen will be significantly related to the government’s negligence, while “avoiding the conjecture that ‘most significant act’ inquiries often entail.” Although courts may struggle with what constitutes “a significant act,” the burden is much less on both the parties and the court compared with trying to determine the place where the most significant act occurred. The strengths of this approach were recently recognized by Justice Ginsburg in a concurrence in the context of the FTCA’s “foreign country” exception, and her endorsement of the approach bodes well for its adoption by other courts in the context of choosing which choice-of-law rules to apply when government negligence occurs in more than one jurisdiction. Applying this approach to the facts of our hypothetical points to the application of Indiana’s choice-of-law rules because the last government acts and omissions occurred there, and these acts and omissions were “significant” in that the plaintiff alleged the controller’s failure to provide proper vectors so delayed the aircraft’s approach that it ensured the aircraft crashed rather than landed safely.

h. My Two Cents

After reviewing numerous approaches articulated by various courts, it is clear that any given case should fit into one of three

---

*tronics, Inc. were combined into some sort of test that failed to provide “any guidance as to which approach should be given the most weight.” *Simon*, 341 F.3d at 204. There is no basis for such a conclusion. The *Gould* court simply considered five possible approaches, determining that one was unworkable and the remaining four all pointed to the same state’s choice-of-law rules, precluding any need to choose one approach over another. See *Gould Elecs., Inc.*, 220 F.2d at 183.

*224 Simon*, 341 F.3d at 204.

*225 Id.*

categories. First, there are cases that do not involve a single, indivisible injury. In those cases, it would seem unnecessary to choose a singular act or omission because applying the choice-of-law rules for each act or omission works well. Second, there are cases that involve acts or omissions in which the latter acts are wholly dependent on the acts or omissions that occurred earlier. In those cases, usually involving a government employee simply following instructions or a protocol developed elsewhere, the choice-of-law rules of the place where the instructions or protocol was developed should apply. In all other cases, where the latter acts or omissions are only partially dependent on earlier acts or omissions, or where all acts or omissions are independent of each other, the best approach is that articulated recently by the Third Circuit applying the choice-of-law rules of the place where the last significant act or omission occurred.

3. Applying the Chosen Jurisdiction’s Choice-of-Law Approach

Applying these approaches to the facts of the hypothetical demonstrates that one approach was unworkable, three were indeterminate, and three pointed to the application of Indiana’s choice-of-law rules. Applying Indiana’s choice-of-law approach to the facts of our hypothetical also leads to the application of Indiana’s substantive law to all aspects of the claims against the United States. Indiana applies a two-step choice-of-law approach, beginning with the presumption that the traditional lex loci delicti will apply, a presumption that “is not conclusive” and can be “overcome if the court is persuaded that the ‘place of the tort “bears little connection” to this legal action.’” In our hypothetical, the place of the tort is Kentucky because that is the place where the death occurred, the “last event necessary to make the United States liable[.]” Although “[i]n a large number of cases, the place of the tort will be significant and the place with the most contacts,” this is not true in our hypothetical because Kentucky’s only connection with the action is that the death occurred there. Under Indiana’s choice-of-law approach, this means that Kentucky bears little connection to the action, so that the presumption in favor of the lex loci delicti is overcome.

228 Id.
230 See Simon, 805 N.E.2d at 806.
Under the second step of the approach, the court considers factors that might be relevant to determining which jurisdiction has the most significant relationship or contacts to the case, such as the place or places where the conduct causing the injury occurred, the residence or place of business of the parties, and the place where the relationship is centered. Although these factors are to be considered “according to their relative importance to the litigation at hand,” Indiana applies a claim-by-claim approach, rather than an issue-by-issue approach, and eschews consideration of state interests or policies. This means that Indiana will choose only one state’s substantive law to apply to the entire wrongful death claim—liability, apportionment of fault, and compensatory damages—based on an examination of at least these three factors. Even though government acts and omissions occurred in both Indiana and Ohio, the “conduct” factor points to the application of Indiana substantive law because the “conduct in Indiana was more proximate to the harm” and more directly affected the aircraft and its attempts to land. The conduct in Indiana was thus more important. Under Indiana’s approach to wrongful death cases, “[t]he residence or place of business of a party . . . is not a particularly

---

232 Simon, 805 N.E.2d at 806.
233 See id. at 801-04.
234 See id. at 806-07; Hubbard Mfg. Co., 515 N.E.2d at 1074; see also Judge v. Pilot Oil Corp., 205 F.3d 335, 337 (7th Cir. 2000); Judge v. Pilot Oil Corp., 17 F. Supp. 2d 832, 835-36 (N.D. Ind. 1998). As a result, Indiana’s choice-of-law analysis and its results can be at odds with other modern choice-of-law approaches such as that of the Second Restatement.
235 Only one Indiana court appears to have considered factors other than the three first enunciated in Hubbard Manufacturing Co. See In re Estate of Bruck, 632 N.E.2d 745, 747-49 (Ind. Ct. App. 1994).
236 Under this choice-of-law analysis, it is the government’s conduct that is at issue, not that of the plaintiff or the co-defendant, the company that negligently repaired the de-icing equipment. See Simon, 805 N.E.2d at 807 (“[I]t is the conduct of the FAA and the air traffic controllers that is at issue, not the conduct of the plaintiffs.”); Hubbard Mfg. Co., 515 N.E.2d at 1074 (dismissing as irrelevant contacts unrelated to the action against the defendant).
237 Simon, 805 N.E.2d at 807. When an injury is caused by conduct in more than one jurisdiction, Indiana courts have found that the conduct factor favors the state where the most significant conduct occurred. See Ram Prods. Co. v. Chauncey, 967 F. Supp. 1071, 1081 (N.D. Ind. 1997); Hoffman v. Roberto, 578 N.E.2d 701, 705 (Ind. Ct. App. 1991). If the hypothetical facts ultimately showed that the controller’s communications with the pilot during the latter’s attempt to land constituted the most significant of all the government conduct, then this would be another reason why this factor would favor Indiana.
relevant contact," so the court will not give much weight to the plaintiff's residence in Pennsylvania, the co-defendant's residence in Ohio, the government's places of business in both Ohio and Indiana, or its residence in neither or both states. Finally, when "the contact between the allegedly negligent party and the injured party is fleeting," as is often the case between pilots and controllers, Indiana will not consider this sufficient enough to constitute a "relationship," so there can be no place where this non-existent relationship is centered. Of these three factors, Indiana considers "the most important relevant factor" to be "where the conduct causing the injury occurred because an individual's actions and the recovery available to others as a result of those actions should be governed by the law of the state in which he acts." Although it is a close case, Indi-

---

238 Simon, 805 N.E.2d at 807; see also id. ("People do not take the laws of their home state with them when they travel . . . ."); Judge v. Pilot Oil Corp., 205 F.3d 335, 337 (7th Cir. 2000) (finding a plaintiff's residency to be "irrelevant to the outcome of this [wrongful death] case" because "the tragic events of this case would still have transpired if [the decedents] had been from any other state in the nation . . . ."); Judge v. Pilot Oil Corp., 17 F. Supp. 2d 832, 835, 836 (N.D. Ind. 1998) (noting that the decedent "having resided in [a particular state] does not bear much on whether Defendants negligently caused his death in another state" and rejecting plaintiffs' "suggestion that [the law of the decedent's domicile] should apply here because of that state's interest in full compensation for its residents under its own laws").

239 The government's place of business would be where its flight service station was located and where its air traffic controllers were located. See Schalliol v. Fare, 206 F. Supp. 2d 689, 700 (E.D. Pa. 2002).

240 Compare Clavans v. United States, 75 F. Supp. 2d 368, 374 (D.N.J. 1999) (maintaining that the United States is a resident of no particular state), with United States v. Whitcomb, 314 F.2d 415, 417-18 (4th Cir. 1963) (finding that the United States is a resident of every state).

241 Simon, 805 N.E.2d at 807 (refusing to recognize a relationship between controllers and a pilot and his passengers). But see Zabala Clemente v. United States, 567 F.2d 1140, 1148 (1st Cir. 1977) (recognizing a relationship between air traffic controllers and the pilot and passengers in an aircraft); Yates v. United States, 497 F.2d 878, 882-83 (10th Cir. 1974) (finding a pilot and controller relationship); Carney v. United States, 634 F. Supp. 648, 651 (S.D. Miss. 1986) (recognizing a relationship between an air traffic controller in Mississippi and a pilot in Alabama that was centered where the controller was located); Roland v. United States, 463 F. Supp. 852, 854 (S.D. Ind. 1978) (finding a pilot and controller relationship).

242 Simon, 805 N.E.2d at 806-07. The Indiana Supreme Court does not seem unduly bothered by its analytical decision to substitute one controlling factor (the place where the tort occurred) for another (the place where the conduct occurred). Indeed, this emphasis on the conduct factor holds true even when the pertinent conflicts between the potentially applicable substantive laws revolve around apportionment of fault and compensatory damages. See id. at 806 ("The gravamen of this case is the allegedly negligent conduct."); see also Simon v.
ana’s choice-of-law approach would probably apply its own substantive law to the entire FTCA claim filed against the United States in our hypothetical.

C. WHEN ONE STATE’S LAW APPLIES TO THE UNITED STATES AND ANOTHER STATE’S LAW APPLIES TO THE PRIVATE CO-DEFENDANT

Both counsel for plaintiffs and counsel for defendants should care what law applies to the claims against the United States in a multi-party action because either of their clients could be left holding the proverbial baby when it comes time to enter judgment, as the plaintiff may recover less than expected or the co-defendant may have to pick up part of the tab for Uncle Sam. Here are the preconditions that can allow this to happen.

First, the choice-of-law rules applicable to the United States must differ from those applicable to the co-defendant, as can occur anytime the forum state is not the place where the government’s acts or omissions occurred. Second, the choice-of-law rules applicable to the United States must require that one state’s substantive law applies regardless of any considerations of uniformity of result or ease of administration, an outcome sure to occur when applying the lex loci delicti approach and some modern choice-of-law approaches such as that followed in Indiana. Finally, the two sets of choice-of-law rules (one for the United States and one for the co-defendant) must lead to the application of different state laws that conflict, an outcome that is increasingly likely as states continue to apply divergent choice-of-law approaches and have disparate substantive law in the wake of tort reform, especially on allocation of fault and compensatory damages.

\[\text{United States, 341 F.3d 193, 204, 205 (3d Cir. 2003) (certifying choice-of-law issues to the Indiana Supreme Court, noting that "[t]his case is essentially about damages, for liability does not seem difficult . . ." and setting forth the areas of substantive law that were in conflict—apportionment of fault and compensatory damages).}\]

\[\text{243 Of course, any time plaintiff’s counsel mistakenly believes the choice-of-law rules of the forum will automatically apply to claims against the United States, counsel’s recovery for the client may be different than anticipated. This can lead to unexpectedly limited damages as set forth in the hypothetical in Section III. The shortfalls discussed here in Section IV are those that can occur in multi-party actions.}\]

\[\text{244 Although there may be other paths to the same result, the three prerequisites set forth in the text are those that are most likely to occur.}\]
These criteria are present under the facts of our hypothetical, so that different state law would apply to the United States than would apply to the claims against the co-defendant. As set forth above, Indiana law applies to all issues against the United States. In contrast, because the decedent resided in Pennsylvania, that state’s compensatory damages law would probably apply to the claims against the co-defendant under Ohio’s Second Restatement approach. As a result, the United States would not have to pay damages to the plaintiff under Indiana law\(^\text{245}\) for any of the decedent’s lost income because he was divorced with adult and non-dependent children, whereas the co-defendant would have to pay such damages in accordance with Pennsylvania law\(^\text{246}\). Similarly, Indiana law precludes an award for the pain and suffering of the decedent under the facts of our hypothetical so the United States would not be required to pay any such award;\(^\text{247}\) in contrast, Pennsylvania law allows such an award, so the co-defendant would have to pay these damages in accordance with Pennsylvania law\(^\text{248}\).

The key question then becomes the “common issue” of apportionment of fault. Given that the FTCA and Supreme Court precedent require the district court to select the choice-of-law approach of the place where the acts or omissions occurred, and the jurisdiction in our hypothetical selects the substantive law of one state for the entire claim (just as the *lex loci delicti* approach does), the court cannot then set aside such precedent and parse the claims into distinct issues, common or otherwise, without either grafting an exception onto the FTCA choice-of-law provision or by doing violence to the state’s choice-of-law approach.\(^\text{249}\) Thus, with Indiana law applying to all aspects of


\(^{248}\) Estate of Coleman, 772 A.2d at 1027 (stating that decedent’s pain and suffering was compensable under Pennsylvania law).

\(^{249}\) The possibility that two different states’ laws could apply to a common issue such as apportionment of fault is much less likely to occur in aviation cases involving only private parties simply because the choice-of-law rules that would apply are usually the same either in state court or in a diversity case in federal court. Only a transfer of venue involving some but not all of the parties seems like it could open the possibility for conflicting substantive law to apply on the issue of apportionment of fault. Suppose claims are filed between several plaintiffs and several defendants in one district court. The choice-of-law rules of that forum apply under Supreme Court precedent. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). If another set of claims involving another set of plaintiffs
the claims against the United States, the court must decide whether to apply the law of Indiana, Ohio, or Pennsylvania on the issue of apportionment of fault to the claims against the private co-defendant. Although Indiana law follows the principles of several liability, Ohio and Pennsylvania apply different rules. In Ohio, if one defendant is greater than 50% at fault, then that defendant is jointly and severally liable for economic losses and severally liable for non-economic losses. For the remaining defendants that are less than 50% at fault, they are only severally liable for all damages. If all defendants are 50% or less at fault, then all defendants are severally liable as to all damages. In contrast, Pennsylvania law makes defendants jointly and severally liable. The court is faced with either applying Indiana’s law on the issue of apportionment of fault so as to achieve harmony and ease of application, or to apply the laws of two different states on that common issue based on the competing interests of the resident states of the pilot and the co-defendant. If the court chooses the former approach, the plaintiff may obtain less than his expected damages; if the court chooses the latter, the co-defendant may have to pay more than its fair share.

The District of New Jersey has addressed this exact issue. In Clawans v. United States, an aircraft crash resulted in the deaths of the pilot and two passengers. One passenger filed suit against the United States and the pilot. The pilot filed a third-party complaint against the owner of the aircraft and a cross-claim against the United States. The United States filed a cross-claim for contribution against the pilot, and the owner filed cross-claims against the United States and the pilot for con-
The second passenger sued the United States, the pilot, and the owner of the aircraft. The pilot filed a cross-claim for contribution against the United States and the aircraft’s owner in the second passenger’s action. The United States filed a cross-claim for contribution against the pilot in the second passenger’s action, and the owner of the aircraft filed cross-claims against all defendants. Finally, the pilot filed a lawsuit against the United States and the owner of the aircraft, and the owner asserted cross-claims for contribution.

The United States sought a determination of the applicable law to all FTCA claims, including those against the United States for contribution. Although the court did not explain why it was doing so, it analyzed the choice-of-law issues involving the United States separately from those involving the private defendants because different choice-of-law approaches applied to those two sets of claims. The court found that the choice-of-law rules of Virginia applied to the claims against the United States because the government’s acts or omissions occurred there, and New Jersey’s choice-of-law approach applied to the state-law claims against the private defendants as New Jersey was the forum state. Because Virginia’s choice-of-law rules are lex loci delicti, the court decided that all claims against the United States—including claims for contribution—would be governed by the law of Maryland. When the court turned its attention specifically to the issue of apportionment of fault between all co-defendants, the court noted that “all cross-claims for contribution asserted against the United States, i.e., those asserted by the [pilot] and by [the owner], are governed by the FTCA.... No party disputes that Maryland law applies to those claims.”

---

259 Id.
260 Id.
261 Id.
262 Id.
263 Id.
264 Id. at 370.
265 Id. at 371-75.
266 Id. at 371, 372.
267 Id. at 372.
268 Id. at 374. There seems to be a typographical error in the opinion that could confuse the reader. After the court noted that Maryland law applies to “all cross-claims for contribution asserted against the United States [by the pilot and the owner],” the court went on to state that the “issue to be decided is whether the remaining cross-claims for contribution—against the United States by [the pilot and the owner], and between [the pilot and the owner]—should be decided by Maryland law or New Jersey law.” Id. (emphasis added). The only way for this
ther Maryland law or New Jersey law could apply to the apportionment of fault issues in the non-FTCA claims. The court observed that, although both Maryland law and New Jersey law adhere to the principles of joint and several liability, "Maryland allocates fault on a pro rata basis, while New Jersey apportions [fault] based on actual degree of fault." After again noting that "the cross-claims against the United States must be governed by Maryland law under the FTCA," the court chose Maryland law to govern the issue of apportionment of fault, largely because this result conformed with several of the policies enumerated in section six of the Second Restatement, those involving "certainty, predictability and uniformity of result," along with "ease of determination and application of the law to be applied."

And now back to our hypothetical. If the court in our hypothetical followed the District of New Jersey's lead, then Indiana law would apply to all apportionment of fault issues, so the co-defendant would have to pay the plaintiff's economic losses and pain and suffering damages only in accordance with its percentage of fault. Because neither of these types of damages is recoverable from the government based on Indiana law, the plaintiff would simply not recover the remaining economic and non-economic losses. If the court allowed the state interests of Pennsylvania and Ohio to trump the policies of uniformity and ease of application, then the co-defendant could pay more than its share under either of those state's allocation of fault rules, depending on how the court ultimately attributes fault. For example, if the court applied Ohio law on apportionment of fault and the private co-defendant was at least 50% responsible, it would have to pay 100% of the economic losses, regardless of its own degree of fault, though it would be severally liable for non-economic damages such as pain and suffering. Alternatively, if the court chose to apply Pennsylvania law to the issue of apportionment of fault in the claims against the private co-defendant, then the co-defendant would be jointly and severally liable for

text and the subsequent analysis to make sense is for the choice-of-law issue to involve the contribution claims by the United States against the pilot and owner and between the two private party defendants. Consequently, this is how the practitioner should read this case.

269 Id. at 374-75.
270 Id. at 375 (emphasis added).
271 Id. (emphasis added).
272 Id. at 373, 375; Restatement (Second) of Conflict of Laws § 6 (1971).
all damages. Of course, when the co-defendant has sufficient insurance, then the problem is one for the insurance company and not for the plaintiff. But when the private co-defendant has an insurance policy limit and insufficient assets, these potential outcomes become the plaintiff's problem. Either way, the deepest pocket of all is off-limits. 273

V. CONCLUSION

The inclusion of the United States as a defendant in an aviation case can greatly complicate the choice-of-law issues. These issues will be straightforward, or at least no more complex than with private defendants, when the forum is also the place where the government's negligence is alleged to have occurred. When the government's negligence occurred outside the forum, counsel for plaintiff should be aware that the choice-of-law rules applicable to the United States are those of the state where the negligence took place, not those of the forum state. In a multi-party action involving allegations of government negligence outside the forum, there is the potential for a different choice-of-law approach to apply to the claims against the United States than the approach that applies to the claims against the private defendants, a more likely occurrence these days as states increasingly create their own approaches by blending various methodologies. Another layer of complexity is added when the governmental negligence occurred in more than one jurisdiction. If the pertinent jurisdictions' choice-of-law rules do not conflict, then the court need not select between competing choice-of-law rules as to the claims against the United States. If the potentially applicable substantive laws do not conflict, then the court need not even apply those choice-of-law rules. But if the choice-of-law rules and the substantive laws conflict, then a court could follow any one of the numerous approaches that have been tried to resolve the problem of which jurisdiction's choice-of-law rules to select and apply to the claims against the United States. There is no consensus yet. Nevertheless, for

273 Practitioners should be aware that the opposite results can occur when the law applicable to the United States renders the government jointly and severally liable and the law applicable to the private co-defendant renders that defendant severally liable. Although the United States would still only be liable for whatever damages were recoverable under the applicable substantive law, plaintiffs are markedly less fearful of this reverse scenario because there is little chance of a damages short-fall when a defendant that prints its own money is jointly and severally liable.
those courts not bound by mandatory precedent to apply a certain approach, the Third Circuit's test of selecting the choice-of-law rules of the place where the last significant act occurred will likely carry the day.

All of this analysis becomes interesting as a practical matter (rather than simply as an academic exercise) when the methodology applicable to the United States selects different substantive law than the approach applicable to the private defendant. Such an outcome is most dramatic, and more likely to occur, when one jurisdiction's choice-of-law rules do not follow an issue-by-issue approach but mandate the application of one state's law to the entire cause of action against either the United States or the co-defendant, as occurs under the traditional choice-of-law rules that are still alive and well in ten jurisdictions. Depending on the apportionment-of-fault law applicable to each defendant, one of the parties—the plaintiff, the United States, or the private co-defendant—could be left shouldering another party's economic burden. This potential outcome should be sufficient to spur counsel to begin pushing the "monstrous boulder" up the choice-of-law hill early in the case. By applying the framework for analysis set forth in this article, counsel can push the boulder uphill and topple it over the summit, thereby avoiding the legal equivalent of Sisyphus' eternal fate.