Chapter 2: Conflict of Laws

Francis J. Nicholson S.J.

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml
Part of the Conflicts of Law Commons

Recommended Citation
CHAPTER 2

Conflict of Laws

FRANCIS J. NICHOLSON, S.J.*

§ 2.1. Tort Claims — Breach of Warranty — Emotional Distress and Wrongful Death. Until recently, Massachusetts followed the traditional lex loci delicti doctrine when addressing conflict-of-law questions in tort claims.¹ This "place of the wrong" rule states that the substantive law of the place where the act occurs determines whether there is a cause of action sounding in tort and governs all substantive questions relating to the existence of a tort claim.² In 1976, the Supreme Judicial Court in Pevoski v. Pevoski³ definitively rejected the vested rights lex loci delicti rule, thereby repudiating the lex loci delicti doctrine that all issues in a tort case must be resolved by the law of the same jurisdiction. Instead, the Pevoski Court held that the disposition of a particular issue in a tort claim must depend on the law of the state which has the strongest interest in its resolution.⁴ In so doing, the Supreme Judicial Court endorsed the contacts choice-of-law analysis which a majority of states employ in the tort conflicts area.⁵

During the Survey year, in Cohen v. McDonnell Douglas Corp.,⁶ the Supreme Judicial Court considered several questions involving breach of warranty, negligent infliction of emotional distress, and wrongful death; and held that Massachusetts law governed these issues under apposite choice-of-law rules.⁷ The plaintiff's brother, a resident of Illinois, was killed in an airplane crash near Chicago during a flight from Chicago to Los Angeles.⁸ The airplane was manufactured by the McDonnell Douglas Corporation ("McDonnell Douglas"), a Maryland corporation which has its principal place of business in Missouri. The plane was operated by

---

* FRANCIS J. NICHOLSON, S.J. is a Professor of Law at Boston College Law School.


² RESTATEMENT OF CONFLICT OF LAWS §§ 377-83 (1934).


⁷ Id. at 328, 450 N.E.2d at 582.

⁸ Id. at 329, 450 N.E.2d at 583.
American Airlines Inc. ("American Airlines"), a Delaware corporation with a principal place of business in New York. The plaintiff, Cohen, a resident of California, learned of the accident while listening to a radio broadcast in that state. Some seven hours after the airplane crash, the plaintiff telephoned his mother at her home in Massachusetts to inform her of her son's death. Shortly thereafter, the mother suffered a series of angina attacks, and two days later, she died of a heart attack.

The plaintiff brought an action in the United States District Court for the District of Massachusetts seeking compensatory and punitive damages (1) on behalf of his mother's estate for the conscious pain and suffering she experienced after learning of the death of her son in the airplane crash, and (2) on his own behalf for the wrongful death of his mother. The plaintiff asserted these claims against both McDonnell Douglas and American Airlines on theories of negligence. In addition, he brought claims against McDonnell Douglas on theories of strict liability and breach of warranty. The defendants moved for summary judgment and dismissal of all claims on the grounds that Illinois law applied and that the relevant Illinois law did not permit recovery by the plaintiff.

The United States District Court judge held that Massachusetts law applied to the plaintiff's negligence and strict liability claims. The judge further determined that Massachusetts law did not permit the plaintiff to recover on his strict liability claim against McDonnell Douglas. The judge resolved no other issues but instead certified to the Supreme Judicial Court the questions: (1) which state's law applied to the plaintiff's breach of warranty claim; (2) whether the plaintiff was entitled to recover damages if Massachusetts law applied to the breach of warranty claim; and (3) whether, under Massachusetts law, the plaintiff was entitled to recover damages for his negligence claims.

The Supreme Judicial Court first addressed the question of what law should be applied to the plaintiff's claim against McDonnell Douglas for

---

9 Id. at 330, 450 N.E.2d at 583.
10 Id. at 329, 450 N.E.2d at 583.
11 Id. at 329-30, 450 N.E.2d at 583.
12 Id. at 330, 450 N.E.2d at 583.
13 Id. at 328, 450 N.E.2d at 582.
14 Id.
15 Id.
16 Id.
18 389 Mass. at 328-29, 450 N.E.2d at 582. The United States District Court judge did not certify the question whether Massachusetts law applied to the plaintiff's negligence claims. The Supreme Judicial Court agreed with the judge's conclusion that Massachusetts law controlled this issue. 389 Mass. at 339-40 n.11, 450 N.E.2d at 588 n.11.
breach of warranty. The breach of warranty claim was based on section 2-318 of the Massachusetts Uniform Commercial Code ("U.C.C."). Section 1-105 of the U.C.C., the choice-of-law provision, states that in the absence of an agreement between the parties as to governing state law, the Massachusetts U.C.C. shall apply to "transactions bearing an appropriate relation to this state." In Cohen, the parties had not agreed that a particular state law should apply to a breach of warranty claim. Therefore, according to the Court, resolution of the choice-of-law issue depended on the interpretation of the words "appropriate relation." The Court, acknowledging that it had never previously attempted to define these words when considering whether a particular transaction bore an appropriate relation to Massachusetts, decided to apply established choice-of-law principles to the question of whether Massachusetts bore an "appropriate relation" to the plaintiff's breach of warranty claim. According to the Court, the multi-state fact pattern of the case necessitated the examination of recognized conflicts rules in order to resolve the choice-of-law issue. The Court, after finding that the breach of warranty of merchantability count was essentially a tort claim, applied choice of law principles relating to tort actions.

As has already been noted, the Supreme Judicial Court endorsed the contacts approach in the Pevoski decision. The Supreme Judicial Court therefore turned to the Restatement (Second) of Conflict of Laws, which has adopted the contacts approach in tort conflicts cases. The Court cited section 146 of the Restatement (Second) which calls for the application of the local law of the state in which injury occurred to determine the legal rights of the parties, "unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties." In particular, the Court referred to Comment e to section 146, which addresses situations in which tortious conduct occurs in one state

20 G.L. c. 106, § 2-318.
21 Id. at § 1-105(1).
22 389 Mass. at 331, 450 N.E.2d at 583.
23 Id. at 331, 450 N.E.2d at 583-84. See Nevins v. Tinker, 384 Mass. 702, 429 N.E.2d 1008, 1010 (1982).
24 389 Mass. at 331-32, 450 N.E.2d at 584.
25 Id. at 332-33, 450 N.E.2d at 584 (citing Wolfe v. Ford Motor Co., 386 Mass. 95, 99, 434 N.E.2d 1008, 1010 (1982)).
26 RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).
27 Id. at § 146.
and the injury occurs in another.\textsuperscript{28} According to Comment e, local state law where the personal injury occurred should be applied "when the injured person has a settled relationship to that state, either because he is domiciled or resides there or because he does business there."\textsuperscript{29} The Supreme Judicial Court determined that under the Restatement (Second) approach, Massachusetts tort law applied in \textit{Cohen} because Mrs. Cohen was injured and died in Massachusetts, the place of her residence.\textsuperscript{30} The Court concluded its choice-of-law inquiry by stating:

\begin{quotation}
[No] other State, including Illinois, appears to have a more significant interest in the plaintiff's claim than that of Massachusetts. Although the record reveals a variety of contacts with other States, none of these contacts is sufficient to outweigh the interest of Massachusetts in determining whether conduct which causes injury in this State to a resident of this State shall result in liability.\textsuperscript{31}
\end{quotation}

The Supreme Judicial Court next considered the second question, whether the plaintiff Cohen was entitled to recover damages for his breach of warranty claim against McDonnell Douglas under Massachusetts law. It found that the plaintiff's breach of warranty claim was governed by chapter 106, section 2-318,\textsuperscript{32} which provides in relevant part that "lack of privity . . . shall be no defense in any action brought against the manufacturer . . . to recover damages for breach of warranty, express or implied . . . if the plaintiff was a person whom the manufacturer . . . must reasonably have expected to use, consume or be affected by the goods."\textsuperscript{33} The Court disagreed with the plaintiff's contention that his mother was "‘affected’" by McDonnell Douglas' aircraft in a way that allowed the imposition of liability under section 2-318.\textsuperscript{34} The Court pointed out that the plaintiff's interpretation of the language of section 2-318 would result in a greatly expanded liability for injury by emotional

\textsuperscript{28} \textit{Id.} at § 146, comment e.
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} 389 Mass. at 336, 450 N.E.2d at 586. The Supreme Judicial Court assumed for purposes of the defendants' motions for summary judgment that Mrs. Cohen's angina attacks and subsequent death were the direct result of her emotional distress after hearing of the death of her son in the airplane crash. \textit{Id.} at 330, 450 N.E.2d at 583.
\textsuperscript{31} \textit{Id.} at 336-37, 450 N.E.2d at 586. The defendant McDonnell Douglas had argued that the place of injury in \textit{Cohen} should be deemed to be Illinois where the airplane crash occurred. \textit{Id.} at 334, 450 N.E.2d at 585. McDonnell Douglas relied on cases involving claims for loss of consortium where some courts had applied the law of the place of the wrongful conduct rather than that of the marital domicile. \textit{Id. See Restatement (Second) of Conflict of Laws} § 158 (1971). The Supreme Judicial Court correctly ruled that the loss of consortium cases were inapposite.
\textsuperscript{32} 389 Mass. at 337, 450 N.E.2d at 587.
\textsuperscript{33} G.L. c. 106, § 2-318. The plaintiff's breach of warranty action on behalf of his mother's estate was an action for bodily injury to her in Massachusetts which resulted from learning of the death of her son in the airplane crash. 389 Mass. at 334-36, 450 N.E.2d at 585-86.
\textsuperscript{34} 389 Mass. at 337, 450 N.E.2d at 587.
§ 2.1 CONFLICT OF LAWS

distress. The Legislature, the Court continued, did not intend that liability under section 2-318 extend further than the scope of liability for emotional distress that was caused by negligence. The Court concluded, therefore, that the plaintiff Cohen did not state a cause of action for breach of warranty against McDonnell Douglas.

The Court in Cohen then addressed the third and final question of whether, under Massachusetts law, the plaintiff was entitled to recover damages for the conscious pain and suffering of his mother and for her wrongful death, allegedly caused by the negligence of McDonnell Douglas and American Airlines. The Court reviewed its decision in Dziokonski v. Babineau, where it outlined the criteria for recovery in actions for negligently causing emotional distress under Massachusetts law. In Dziokonski, the Court had held that a test of "reasonable foreseeability" should be applied in judging whether there is liability for a plaintiff’s emotional distress caused by the defendant’s negligence toward a third person. The Dziokonski Court further determined that the imposition of liability depended upon other factors as well, “such as where, when, and how the injury for the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship between the claimant and the third person. . . .”

The Supreme Judicial Court rejected the plaintiff’s argument that the Dziokonski principles required the imposition of liability for Mrs. Cohen’s mental distress and resulting death. The Court pointed out that Mrs. Cohen did not learn of her son’s death until seven hours after the airplane crash, did not see the accident or her son, and at all pertinent times, was at her home in Massachusetts, more than 1,000 miles from the scene of the crash. The emotional distress which Mrs. Cohen suffered, the Court continued, was akin to the anguish any person feels after being told of the death of a loved one. Her anguish did not constitute compensable distress, which requires direct observation of a defendant’s negligence or the consequences thereof. Therefore, the Court concluded, the plaintiff was not entitled to recover damages upon his claims for his mother's conscious pain or suffering or for her wrongful death.

35 Id. at 338, 450 N.E.2d at 587.
36 Id. at 338-39, 450 N.E.2d at 587.
37 Id. at 339, 450 N.E.2d at 588.
40 375 Mass. at 567, 380 N.E.2d at 301-02.
41 Id. at 568, 380 N.E.2d at 1302.
42 389 Mass. at 341, 450 N.E.2d at 589.
43 Id. at 343, 450 N.E.2d at 590.
44 Id. In its discussion of the reasons for denying liability, the court stressed the policy concern—the need to avoid an unreasonable expansion of liability in this kind of claim. Id. at 341-43, 450 N.E.2d at 589-90.
In summation, the Supreme Judicial Court, responding to the questions certified to it by the United States District Court, held that Massachusetts law applied to the plaintiff Cohen's breach of warranty and negligence claims and that, under the laws of Massachusetts, the plaintiff was not entitled to recover damages under either of these theories. In Cohen, the Court reaffirmed the contacts choice-of-law approach which it had adopted for the first time in Pevoski, for use in torts conflict cases. The Court's application of apposite sections of the Restatement (Second) of Conflict of Laws indicates that the Court favors the Restatement (Second) among the competing contacts analyses available in conflicts cases. The "most significant relationship" test of Restatement (Second) seems particularly appropriate as a means of identifying the relevant state law in a multi-state transaction. It is important to single out the different issues in a tortious action, and to apply to each issue the law of the jurisdiction which has the real concern with the occurrence and the parties in order to avoid oppressiveness to legitimate state interests.

The Supreme Judicial Court, in Cohen, has made an important interpretative decision with respect to the meaning of the choice-of-law section 1-105 of the U.C.C. By juxtaposing the "appropriate relation" criterion of section 1-105(1) with the "most significant relationship" test of Restatement (Second) of Conflict of Laws, the Court seems to equate the two standards. This conjuncture of the two criteria gives welcome specificity to section 1-105(1) of the U.C.C., and further underscores the Court's predilection for the approach of the Restatement (Second) in conflicts analysis.

§ 2.2. Assignment of Interest in Testamentary Trust by Beneficiary. During the Survey year, the Appeals Court in Boston Safe Deposit and Trust Co. v. Paris, held that Massachusetts law governed a beneficiary's right to assign his interest in a testamentary trust because the Commonwealth had the most significant relationship to the transaction. In Paris, the will of Nellie Carter, a Massachusetts domiciliary, made Stella Cheremeteff the life beneficiary of a spendthrift trust with a testamentary

45 Id. at 344, 450 N.E.2d at 590.
47 389 Mass. at 336, 450 N.E.2d at 586.
48 The following theories have also been influential in promoting the contacts approach: (1) the late Professor Branerd Currie's "governmental interest" analysis, see B. Currie, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); (2) Professor Robert Leflar's five "choice-influencing considerations" analysis, see R. LEFLAR, AMERICAN CONFLICTS LAW (3d ed. 1977).
49 G.L. c. 106, § 1-105(1).
2 Id. at 690, 447 N.E.2d at 1271.
power to appoint the corpus.\textsuperscript{3} Cheremeteff, a domiciliary of the District of Columbia, died while residing in Italy, and, by her will, appointed in favor of Paris, an Italian citizen.\textsuperscript{4} The Boston Safe Deposit and Trust Company ("Boston Safe"), a Massachusetts corporation, was the trustee under the will of Carter and executor of the will of Cheremeteff.\textsuperscript{5} Relying on his expectations under Cheremeteff's will, Paris negotiated a series of loans from Union de Banques Suisses ("UBS"), a Swiss corporation.\textsuperscript{6}

On April 7, 1972, Paris executed an assignment in English, which was delivered to both Boston Safe and UBS, acknowledging his indebtedness to UBS in the amount of $106,000, and instructing that securities registered in his name with Boston Safe be sent to UBS as security for the debt.\textsuperscript{7} The assignment further stated that these instructions could not be amended or revoked without the consent of UBS.\textsuperscript{8} Even though the document clearly indicated that Boston Safe was not free thereafter to make distributions to Paris without the consent of UBS, Boston Safe made three distributions to Paris after April 7, 1972, without permission.\textsuperscript{9} In Paris, the Appeals Court considered the relationship between these three distributions and Paris' assignment.

Boston Safe, as trustee, brought suit in a Massachusetts probate court seeking instructions concerning the distribution of the balance of the trust.\textsuperscript{10} The defendants Paris and UBS answered, each claiming this balance. In addition, UBS counter-claimed for damages against Boston Safe by reason of certain prior distributions made by Boston Safe to Paris.\textsuperscript{11} The probate judge adopted the report of the master, to whom the principal action had been referred, and found that UBS was entitled to the balance of the trust and that UBS should recover from Boston Safe, on the counter-claim, the aggregate of the three post-April 7, 1972, distributions made to Paris.\textsuperscript{12}

On appeal, the first choice-of-law question presented was whether Massachusetts or Swiss law governed Paris' right to assign or otherwise deal with his interest in the trust.\textsuperscript{13} The Appeals Court held that the law of

\textsuperscript{3} Id. at 687, 447 N.E.2d at 1269.
\textsuperscript{4} Id.
\textsuperscript{5} Id. at 686-87, 447 N.E.2d at 1269.
\textsuperscript{6} Id. at 687, 447 N.E.2d at 1269.
\textsuperscript{7} Id. at 688, 447 N.E.2d at 1270.
\textsuperscript{8} Id.
\textsuperscript{9} Id.
\textsuperscript{10} Id. at 687, 447 N.E.2d at 1269.
\textsuperscript{11} Id. UBS, by cross-claim, sued Paris to recover upon the loans it had made to him. Id. UBS had a default judgment against Paris on the cross-claim. Id.
\textsuperscript{12} Id. UBS's entitlement to the balance was not disputed by the parties in the appeal. Id.
\textsuperscript{13} 15 Mass. App. Ct. at 690, 447 N.E.2d at 1271. UBS appealed, seeking to enlarge its recovery. Id. at 687, 447 N.E.2d at 1269.
Massachusetts controlled Paris' right to assign his interest in the trust to UBS.\textsuperscript{14}

The second conflicts question considered by the Appeals Court was which law determined the validity of Paris' assignment in favor of UBS.\textsuperscript{15} Boston Safe argued that Swiss law should be applied to judge the effectiveness of the April 7, 1972, assignment as a means of accomplishing the secured transaction between Paris and UBS.\textsuperscript{16} The court noted that the master had received evidence of the Swiss law on the effectiveness issue and had decided that Swiss law was immaterial.\textsuperscript{17} The Appeals Court concurred with the master's conclusion that Massachusetts law governed.\textsuperscript{18} The court cited section 209 of the Restatement (Second) of Conflict of Laws as authority for the principle that the validity of an assignment is determined by the law of the state which has the most significant relationship to the parties and the assignment.\textsuperscript{19} According to the court, while Switzerland could claim contacts as the domicile of the creditor, and as the likely place of the ultimate delivery of the trust assets, Massachusetts clearly had the more significant relationship.\textsuperscript{20} The court noted that Massachusetts was the domicile of the trustee, Boston Safe, and of the original testatrix, Carter, and it was the place where the assets were held and administered as a trust.\textsuperscript{21} The court therefore concluded that Massachusetts law had the stronger claim.\textsuperscript{22}

On the issue of Paris' right to execute the assignment, the Appeals Court agreed with the master and the probate judge that, under Massachusetts law, Paris' right to receive the trust principal was "vested" at the time of Cheremeteff's death by the terms of the Carter will, which called upon the trustee to pay over the fund to Cheremeteff's appointee upon her death.\textsuperscript{23} According to the court, Paris had the right to assign his

\textsuperscript{14} \textit{Id.} at 690, 447 N.E.2d at 1271.
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.} The Appeals Court assumed, for the purpose of resolving the conflicts issue, that Swiss law would find the assignment of the securities was ineffective. The court observed, however, that it was not clear that the Swiss rule would extend to a transaction having significant contacts outside Switzerland, particularly when the effect would be to hurt a Swiss creditor. \textit{Id.} at 691 n.5, 447 N.E.2d at 1271 n.5.
\textsuperscript{19} \textit{Id.} at 690, 447 N.E.2d at 1271.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.} at 690-91, 447 N.E.2d at 1271.
\textsuperscript{23} \textit{Id.} at 689, 447 N.E.2d at 1270. Boston Safe contended that Paris had no right to execute the assignment of April 7, 1972, in favor of UBS. \textit{Id.} The beneficiary of a will, Boston Safe argued, could not assign trust assets before their actual distribution. \textit{Id.} Boston Safe therefore contended it rightfully made payments to Paris from the trust corpus prior to its distribution even though the bank knew Paris had committed himself otherwise to UBS. \textit{Id.}
interest before the actual distribution of the assets to him.\textsuperscript{24}

The Appeals Court also referred to the law of validation. According to the court, "[i]f the issue were still thought to be doubtful, that law should surely be chosen which would carry out and validate the transaction in accordance with intention, in preference to a law that would tend to defeat it."\textsuperscript{25} The Appeals Court held, therefore, that UBS was entitled to recover from Boston Safe the aggregate of the three post-April 7, 1972, distributions made to Paris, and affirmed the decree of the probate court.\textsuperscript{26}

The court's decision on the choice-of-law issue was correct. The usual conflicts rule is that the validity of a testamentary trust of personal property is determined by the local law of the testator's domicile at death when the trust is to be administered in the domiciliary state, and absent a settlor's designation that the law of a particular state should control.\textsuperscript{27} On the question whether the interest of a beneficiary can be assigned by him, the same principles apply.\textsuperscript{28} In Paris, the settlor Carter had not designated which law should govern the trust. She died domiciled in Massachusetts and the trust was administered by Boston Safe in the Commonwealth.\textsuperscript{29} It follows, therefore, that the law of Massachusetts governed the beneficiary Paris' right to assign his interest in the trust.

The \textit{lex validitatis} principle referred to by the Paris court is becoming an increasingly important policy consideration in conflicts law with respect to consensual transactions between parties. The parties normally expect that their transactions are valid. Protection of the expectations of the parties by application of choice-of-law rules furthers the needs of the parties and gives importance to the values of certainty, predictability and uniformity of results.\textsuperscript{30} Adherence to the law of validation is certainly a desirable development in Massachusetts conflicts law.

§ 2.3. Workmen's Compensation — Tort Suit by Next of Kin Against Employer. During the Survey year, the United States District Court for the District of Massachusetts, in \textit{King v. Williams Industries, Inc.},\textsuperscript{1}
applied the conflict of laws rule of Massachusetts in a workmen's compensation case. In King, the district court examined and adopted the approach taken by the Supreme Judicial Court of Massachusetts in Pevoski v. Pevoski and in Saharcinski v. Marcure, and further clarified Massachusetts conflicts law.

Jay King worked for Williams Industries, Inc. ("Williams Industries"), an Indiana corporation which engaged in plastic extrusion, from March of 1977 through September, 1979. King was a resident of Indiana when he was hired by Williams Industries, which was insured under the Indiana Workmen's Compensation Act. While working at Williams Industries, King was exposed to a carcinogenic chemical, polyvinyl chloride, which had been sold to the company by the Ethyl Corporation ("Ethyl"). He was diagnosed as having bile duct cancer, a terminal disease allegedly caused by his exposure to the toxic chemical while working and living in Indiana. In July, 1981, King and his family moved back to his family home in Massachusetts, where he died in February, 1982.

Before his death, King, his wife, and his children, brought a diversity action in the United States District Court for the District of Massachusetts against Williams Industries and Ethyl to recover damages for negligence and loss of consortium. Williams Industries moved to dismiss the suit, contending that Massachusetts choice-of-law rules required that Indiana law govern the rights and liabilities of the parties in the case, and that Indiana law, properly applied, barred plaintiffs' claims. The King family, in opposing Williams' motion, conceded that Indiana law would usually control under conflicts rules. They argued, however, that Massachusetts public policy, which is binding on a federal court in a diversity case, prohibited the application of Indiana law to the facts of this case. The district court, applying Indiana law, granted summary judgment for the defendant.

Jurisdiction in the King case was based upon diversity of citizenship. Consequently, the United States District Court was required to ascertain

---

4 565 F.Supp. at 323. The district court did not discuss the domicile-residence problem in its opinion. It would seem that Indiana was King's domicile during the 1977-79 period.
5 Id. at 322. After King's death, his estate was substituted as the party plaintiff and leave was granted to amend the complaint and add a claim for wrongful death. Id.
6 Id. The district court treated the defendant's motion as one for summary judgment since it found there was no material issue of fact in dispute. Id. at 322-23.
7 Id. at 322.
8 Id. at 327.
and follow the substantive law of Massachusetts,\(^9\) including its conflict of
laws rules.\(^10\) The court, addressing first the issue of tort liability,\(^11\) turned
to the case of \textit{Pevoski v. Pevoski},\(^12\) in which the Supreme Judicial Court of
Massachusetts had abandoned the vested rights \textit{lex loci delicti} rule in tort
conflicts cases. In \textit{Pevoski}, the Supreme Judicial Court stated that the
disposition of issues "must turn ... on the law of the jurisdiction which
has the strongest interest in the resolution of the particular issue
presented."\(^13\) The \textit{King} court noted that the significant contacts approach in
\textit{Pevoski} was tantamount to the adoption of the "most significant relation­ship" criterion of \textit{Restatement (Second) of Conflict of Laws} by the
Supreme Judicial Court.\(^14\)

In addition to \textit{Pevoski}, the district court also discussed the decision in
\textit{Saharceski v. Marcure}.\(^15\) In \textit{Saharceski}, the Massachusetts Supreme Ju­dicial Court resolved a choice-of-law problem in a workmen's compen­sation case in which employees, residents of Massachusetts who were hired
in Massachusetts by a Massachusetts corporation, were involved in an
automobile accident while driving through Connecticut in the course of
their employment.\(^16\) In finding that Massachusetts law governed, the
Supreme Judicial Court stated that the application of the law of the state
of common employment provided both a certain basis for the resolution of
the issue and knowledge that the maintenance of a tort suit would not
depend solely on the fortuitous place of the accident.\(^17\) The \textit{Saharceski}
Court concluded its consideration of the conflicts problem as follows:
"The elimination of happenstance, a sort of unknowing geographical
Russian roulette, as the controlling factor is particularly significant in a
case where no business was to be transacted in the jurisdiction where
the injury took place."\(^18\)

In \textit{King}, the United States District Court applied the principles estab­

\(^11\) 565 F. Supp. at 324.
\(^12\) 371 Mass. 358, 358 N.E.2d 416 (1976). In \textit{Pevoski}, the Court held that Massachusetts
law governed the issue of interspousal immunity between spouses domiciled in Massachu­setts, even though the suit for damages arose from an automobile accident in New York. \textit{Id. at}
358, 361, 358 N.E.2d at 417-18.
\(^13\) 371 Mass. at 360, 358 N.E.2d at 417.
\(^14\) 565 F. Supp. at 324. \textit{See Restatement (Second) of Conflict of Laws §§ 145-46
(1971).}
\(^16\) \textit{Id. at} 305, 366 N.E.2d at 1246. The employee-passenger brought suit in Massachusetts
against the employee-operator of the vehicle, seeking to recover damages for alleged
negligence. \textit{Id. Connecticut law permitted recovery in these circumstances. Id. The law of
Massachusetts precluded such recovery. Id.}
\(^17\) \textit{Id. at} 310-12, 366 N.E.2d at 1249.
\(^18\) \textit{Id. at} 311-12, 366 N.E.2d at 1249.
lished in Pevoski and Saharceski, and held that Indiana law governed the rights and liabilities of the parties. The court reasoned that all the significant events involved in the suit between the King family and Williams Industries occurred in Indiana — the contract of hire, the alleged negligence, the injury to King, and the diagnosis of his terminal cancer. According to the court, Massachusetts was merely a past residence of King and the residence of the plaintiffs at the time of King’s death. The court noted that the Indiana Workmen’s Compensation Act excluded actions by employees against employers for negligence and suits by the spouses and next of kin of employees against employers for loss of consortium or wrongful death.

Before reaching a definitive choice-of-law conclusion, the district court addressed the public policy argument raised by the King family. In conflicts cases, a forum state need not apply foreign law, otherwise applicable, which is repugnant to the forum state’s public policy. A forum state’s public policy is binding on federal courts in diversity cases. The plaintiffs relied upon the decision of the Supreme Judicial Court in Ferriter v. Daniel O’Connell’s Sons, Inc., as evidence that Massachusetts would consider it extremely important to permit Massachusetts dependents of an injured employee to recover for their own injuries. According to the plaintiffs, Ferriter enunciated a strong policy that Massachusetts would no longer allow a negligent employer to hide beneath the cloak of the exclusivity clause of a workmen’s compensation statute.

The United States District Court, however, agreed with the defendant that the Massachusetts workmen’s compensation statute also barred the plaintiffs’ claims. The court noted that the Ferriter decision made it clear that an employee’s negligence claims, as well as claims for wrongful death against an employer covered by chapter 152 of the General Laws, were

19 565 F. Supp. at 324.
20 Id.
21 See IND. CODE § 22-3-7-6 (1976). The Indiana act is a typical compulsory workmen’s compensation statute which guarantees compensation to an injured employee under principles of strict liability in exchange for immunity from tort liability for the employer. See R. LEFLAR, AMERICAN CONFLICTS LAW § 158 (3d ed. 1977); E. SCOLES & P. HAY, CONFLICT OF LAWS § 17.45 (1982).
26 565 F. Supp. at 326.
27 Id.
28 G.L. c. 152.
29 565 F. Supp. at 326.
barred by Massachusetts law. Consequently, the court found that Massachusetts public policy did not conflict with the bar contained in the Indiana Workmen’s Compensation Act. Furthermore, according to the court, Ferriter did not recognize an action for loss of consortium by family members where the employee was hired and injured outside of Massachusetts, and died as a result of the injury. Finally, the court determined that Massachusetts had no significant interest in the rights of Indiana employees, their spouses and their next of kin in relation to Indiana employers. In view of the Saharceski decision and the “most significant relationship” approach offered by the Restatement (Second), the court found no Massachusetts public policy against application of Indiana law to the claims of King’s wife and children. Having thereby resolved the choice-of-law and public policy issues, the district court held that the defendant Williams Industries was entitled to summary judgment on all of the plaintiffs’ claims against it. The court found that Massachusetts state courts would apply Indiana law to the facts of the case and that Indiana law clearly barred the plaintiffs’ claims.

The resolution of the choice-of-law question in King follows the approach taken in recent workmen’s compensation cases. Workmen’s compensation statutes were designed to provide a quick and certain remedy for employees who sustain work injuries by statutorily imposing absolute but limited and determinate liability upon the employer. These laws represent a compromise that inures to the benefit of both employer and employee. Social justice necessitates such a *quid pro quo* arrangement in our industrial world. It is logical, therefore, to choose the compensation law of the state with the substantial connection to the employment relationship. As the United States District Court’s analysis clearly indicates, only Indiana had a significant interest in the rights of the parties in this case.

Although the decision of the district court in King is not as authoritative as an opinion of the Supreme Judicial Court of Massachusetts, the King court was acting as a surrogate for the Supreme Judicial Court in a diversity case. The district court analyzed and applied the relevant decisions of the Supreme Judicial Court to the choice-of-law issues before it.

---

30 Id.
31 Id. at 327.
32 Id. at 326-27. The Ferriter case was concerned only with a Massachusetts injury and Massachusetts parties. There was no conflict of laws problem in the case.
33 Id. at 327.
34 See *Restatement (Second) of Conflict of Laws* at §§ 145-46, 184.
35 565 F. Supp. at 327.
36 Id.
Thus, the *King* opinion is important evidence of the conflicts law of Massachusetts. Clearly, Massachusetts courts are committed to a contacts approach to conflicts problems, more specifically, to the "most significant relationship" test of the Restatement (Second) of Conflict of Laws.  

§ 2.4. Choice-of-Forum Contract Provisions — Enforcement of Provision under Federal Law in Federal Courts. It has become increasingly common for parties to a commercial contract to select the forum in which they will bring disputes arising under their agreement. Historically, forum selection clauses were not favored by American courts. Many federal and state courts declined to enforce such clauses on the grounds that the clauses were contrary to public policy, or that their effect was to deprive the court of its jurisdiction. This anachronistic view is being abandoned by many courts in favor of enforcement of such clauses when enforcement is reasonable under the circumstances. The decision by the United States District Court for the District of Massachusetts in *C. Pappas Co., Inc. v. E. & J. Gallo Winery* illustrates this trend toward enforcement of forum selection provisions in contracts.

The plaintiff, C. Pappas Company, Inc. ("Pappas"), was a Massachusetts corporation with its principal place of business in Boston. Pappas, a wholesaler licensed under Massachusetts law to distribute alcoholic beverages, entered into an agreement with the defendant, the E. & J. Gallo Winery of Modesto, California ("Gallo"), whereby Pappas was designated a wholesale distributor of Gallo products in Massachusetts. The eighth term of the agreement provided that the law of California would govern construction of the terms of the contract, and that any cause of action arising between the parties under the agreement should be brought only in a court having jurisdiction in California.

Pappas brought suit in the United States District Court in Massachusetts against Gallo alleging, inter alia, violations of the federal antitrust laws and state law claims for breach of contract. The gravamen of Pappas' complaint was that Gallo had breached its contract with Pappas

---

38 The United States Court of Appeals for the First Circuit affirmed the decision of the United States District Court. *King v. Williams Industries, Inc.*, 724 F.2d 240 (1st Cir. 1984).


2 *Id.*

3 *Id.*


5 *Id.* at 1016.

6 *Id.*

7 *Id.*

8 *Id.*
and had entered into a conflicting contract with and conspired with another company in restraint of trade. Pappas sought damages and injunctive relief.

In response, the defendant Gallo filed a motion to dismiss or, in the alternative, to transfer the suit in compliance with the terms of the parties' agreement of distributorship. Citing apposite federal procedural rules, Gallo requested that the district court either dismiss the action for improper venue or transfer the suit to the United States District Court for the Eastern District of California. The court refused to dismiss the suit but transferred it to the Eastern District of California.

The first question addressed by the court in Pappas was whether the issue of enforcement of the forum selection clause in the distributorship contract should be decided by federal or state law. The court held that the enforcement issue was a federal law matter. The Pappas court thus agreed with a recent case in which the district court in Massachusetts had decided that "in the federal courts the question of enforcement of forum selection clauses is to be decided under federal law." The Pappas court then examined federal cases which have focused on forum selection clauses. The court cited the leading case of The Bremen v. Zapata Off-Shore Co., in which the United States Supreme Court held that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances." The district court in Pappas characterized the position of the United States Supreme Court as "the modern view." The court next set forth the standard in the First Circuit for establishing that a forum selection clause is unreasonable: the objecting party "must present evidence of fraud, undue influence, overweening bargaining power or such serious inconvenience in litigating in the selected forum that it is effectively deprived of its day in court.

The court noted that Pappas' principal argument was that the forum selection provision in the distributorship contract should not be enforced because it did not result from equal bargaining positions. Pappas por-

---

9 Id. at 1017.
10 Id.
11 Id. See FED. R. CIV. P. 12(b)(3); 28 U.S.C. §§ 1404(a), 1406(a) (1970).
13 Id. at 1017.
16 Id. at 10.
17 565 F. Supp. at 1017.
trayed itself as a small wholesaler coerced into signing the contract by Gallo, an industry giant.\textsuperscript{19} The district court rejected Pappas' adhesion contract argument. The court observed that Pappas was a major corporation which did a large volume of business throughout Massachusetts, and that both Pappas and Gallo were sophisticated companies accustomed to entering into business contracts involving large sums of money.\textsuperscript{20} Moreover, the court concluded, the defendant Gallo's insistence on the forum selection clause was for a reasonable purpose: to avoid the possibility of defending multiple lawsuits brought by its many distributors throughout the United States, and to give certainty and uniformity to the defendant's business operations by providing that all disputes would be judged in California courts under California law.\textsuperscript{21}

The plaintiff Pappas also contended that it would suffer substantial hardship if required to litigate the case in California.\textsuperscript{22} The district court, however, saw no evidence that the inconvenience of litigating in California would deprive Pappas of its day in court.\textsuperscript{23} Moreover, the court noted, because Pappas' complaint alleged a conspiracy in restraint of trade, the testimony of Gallo's management personnel in California would be important to the defendant.\textsuperscript{24} The court found that Pappas could not establish that so many more witnesses resided in Massachusetts than in California that a transfer would not be in the interests of justice.\textsuperscript{25}

The final question before the court was whether the case should be dismissed or transferred.\textsuperscript{26} The district court, stating that the United States Supreme Court in \textit{The Bremen} case had emphasized that the effect of a forum selection clause was not to "'oust' a court of jurisdiction,"\textsuperscript{27} refused to dismiss the action.\textsuperscript{28} Because Pappas had consented to bring its actions against Gallo in California under the terms of the distributorship contract, and because California was both the residence of the defendant Gallo and the place where the cause of action arose, the court ordered the case transferred to the United States District Court for the Eastern District of California.\textsuperscript{29}

The decision in \textit{Pappas} that the question of enforcement of forum selection clauses should be decided under federal law is clearly correct.

\begin{itemize}
\item \textsuperscript{19} 565 F. Supp. at 1017-18.
\item \textsuperscript{20} \textit{Id}.
\item \textsuperscript{21} \textit{Id}. at 1018.
\item \textsuperscript{22} \textit{Id}.
\item \textsuperscript{23} \textit{Id}.
\item \textsuperscript{24} \textit{Id}.
\item \textsuperscript{25} \textit{Id}.
\item \textsuperscript{26} \textit{Id}.
\item \textsuperscript{27} 407 U.S. at 12.
\item \textsuperscript{28} 565 F. Supp. at 1018.
\item \textsuperscript{29} \textit{Id}. at 1018-19.
\end{itemize}
Congress may provide for the location of trials in the federal courts. The question of proper venue in a particular federal court is essentially a matter of procedure peculiarly within the province of the federal courts. Federal venue questions do not raise substantive state issues. Neither the Rules of Decision Act\textsuperscript{30} nor the decision in \textit{Erie Railroad Co. v. Tompkins}\textsuperscript{31} applies.

In addition, the enforcement of the forum selection clause in \textit{Pappas} is representative of the trend in American courts today.\textsuperscript{32} Section 80 of the Restatement (Second) of Conflict of Laws supports enforcement of these clauses, stating that "'[t]he parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."\textsuperscript{33} Parties to a contract may not deprive any court of the jurisdiction which it would otherwise possess. A court with jurisdiction, however, has the discretion to effectuate a forum selection provision which is fair and reasonable and which serves the convenience of the parties. Such clauses are compatible with today's business practices. As the United States Supreme Court noted in \textit{The Bremen} case: "'[T]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce . . . exclusively on our terms, governed by our laws, and resolved in our courts."\textsuperscript{34}

The modern trend favoring the enforcement of forum selection clauses seems well established in the federal courts, and state courts are beginning to move in the direction of enforcement.\textsuperscript{35} Several older decisions of the Supreme Judicial Court of Massachusetts enunciated the principle that forum selection clauses are unenforceable because they violate the public policy which entrusts matters of jurisdiction and venue to the courts.\textsuperscript{36} It seems doubtful that these cases would be followed in Massachusetts today. Given the pre-eminence of the Restatement (Second) of Conflict of Laws in its conflicts decisions in recent years, the Massachusetts Supreme Judicial Court would undoubtedly honor the parties' choice of forum if the provision were fair and reasonable.

\textbf{§ 2.5. Contract Choice-of-Law Rule — Law of Jurisdiction with Greater Governmental Interest Controls.} Conflicts law pertaining to the validity of

\textsuperscript{31} 304 U.S. 64 (1938).
\textsuperscript{33} \textit{Restatement (Second) of Conflict of Laws} § 80 (1971).
\textsuperscript{34} 407 U.S. at 9.
\textsuperscript{35} See Scoles & Hay, \textit{supra} note 32, at §§ 11.5-11.6.
\textsuperscript{36} See, e.g., Nashua River Paper Co. v. Hammermill Paper Co., 223 Mass. 8, 111 N.E. 678 (1916).
contracts has been characterized by confusion. Until recently, American courts have applied any one of three different conflicts rules to determine the validity of contracts in a multistate setting, without acknowledging that the rules in question are often inconsistent. These theories are: (1) the law of the place of the making of the contract; (2) the law of the place of the performance of the contract; and, (3) the law intended by the parties to control the contract. The original Restatement of Conflict of Laws adopted the place-of-making rule, lex loci contractus. Automatic application of the lex loci contractus rule was generally rejected by the American courts, however, because the doctrine did not identify the state with the greatest interest in a disputed contract in a large number of cases. The indiscriminate use of the three traditional rules has continued, although to a lessening degree, in recent years.

An approach to the validity-of-contract problem which is receiving increasing approbation by the courts and publicists is the "grouping of contacts" theory. This new rule emphasizes that the law of the place which has significant contacts with the parties and with the transaction should govern the validity of the contract. Obviously, the "grouping of contacts" theory gives less certainty and predictability than the first Restatement's rigid place-of-making rule. Nevertheless, the rule permits a court to focus upon the law of the jurisdiction which has the paramount interest in the multistate transaction. The Restatement (Second) of Conflict of Laws has aligned itself with the "contacts" standard. In rejecting the dogma of the lex loci contractus, the Restatement (Second) states that the validity of a contract is governed by the law of the state with which the transaction has "its most significant relationship."

The Massachusetts Supreme Judicial Court recently indicated its willingness to abandon the traditional place-of-making rule in favor of "a more functional approach" when determining what law to apply in contract cases. During the Survey year, the United States District Court for the District of Massachusetts, in Bushkin Associates, Inc. v. Raytheon Co., considered the conflict of laws rule in a diversity contract case. The district court in Bushkin, noting the new approach taken by the Supreme Judicial Court, predicted that the Massachusetts court, when squarely confronted with the question, would abandon the place-of-making rule in

---

2 Restatement of Conflict of Laws § 332 (1934).
3 See Leflar, supra note 1, at § 145; Scoles & Hay, supra note 1, at § 18.14.
4 Restatement (Second) of Conflict of Laws § 188 (1971).
favor of interest analysis. Consequently, the district court’s opinion in *Bushkin* strengthens the anticipation that the Supreme Judicial Court will shortly discard the *lex loci contractus* rule in contract conflicts cases.

The plaintiffs, Bushkin Associates and Merle Bushkin ("Bushkin"), brought suit to recover on an oral fee agreement allegedly made between Bushkin and the defendant, Raytheon Company ("Raytheon"), for services in connection with Raytheon’s acquisition of Beech Aircraft Corporation ("Beech"). Bushkin also sought payment for the reasonable value of any information Bushkin gave Raytheon, and alleged that Raytheon had engaged in unfair and deceptive acts and practices. Raytheon moved for summary judgment, contending that the New York statute of frauds should apply to the case and that, under New York law, the oral agreement would be unenforceable. Bushkin answered that the Massachusetts statute of frauds, which would not invalidate the oral agreement, should control. The district court ordered summary judgment for Raytheon, holding that the New York statute of frauds governed the action and that, under New York law, the oral agreement was invalid.

The factual background in *Bushkin* identified New York and Massachusetts as the states connected with the transaction. Bushkin was a New York resident specializing in mergers and acquisitions. He was the president of Bushkin Associates, a corporation organized and based in New York. Raytheon was a Delaware corporation with its principal place of business in Massachusetts. Bushkin’s dealings with Raytheon concerning the acquisition of Beech began in 1971. Negotiations were carried on via telephone conversations between Bushkin in New York, and Raytheon in Massachusetts. Bushkin alleged that the oral fee agreement was made in a telephone call which occurred in January, 1975. During this conversation, Raytheon’s representative acknowledged that Raytheon was interested in acquiring Beech, and that Raytheon would pay a fee of one percent of the value of the transaction to Bushkin if the acquisition of Beech took place. Raytheon’s representative later told Bushkin that

---

7 *Id.* at 599.
8 *Id.* at 596.
9 *Id.* See G.L. c. 93A.
10 570 F. Supp. at 596.
11 *Id.*
12 *Id.* at 603.
14 *Id.* at 597.
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
Raytheon had decided that it was no longer interested in Beech.\textsuperscript{19} Subsequently, Raytheon contracted in writing with another company for consulting services concerning mergers and acquisitions, and, in February 1980, Raytheon acquired Beech with the help of its new consulting company, paying the latter $1,100,000 for its services.\textsuperscript{20}

The United States District Court in \textit{Bushkin} addressed the crucial question of whether New York or Massachusetts law governed the parties' oral agreement.\textsuperscript{21} The New York statute of frauds invalidated an oral agreement to pay compensation for services rendered in connection with the sale of a business, while the Massachusetts statute of frauds did not void such contracts.\textsuperscript{22} The court, in compliance with the \textit{Erie-Klaxon} doctrine applicable in cases involving diversity jurisdiction, followed the conflicts law of Massachusetts.\textsuperscript{23}

Bushkin argued that, in contract cases, the Massachusetts conflicts rule is that the law of the place where the contract was made governs.\textsuperscript{24} According to Bushkin, since the oral agreement in question was made in Massachusetts, Massachusetts law applied and the oral fee contract was valid.\textsuperscript{25} Raytheon responded that the Massachusetts Supreme Judicial Court had indicated that it was ready to abandon its place-of-making doctrine in favor of a more functional conflicts rule in deciding what law to apply in contract cases.\textsuperscript{26} Because the Supreme Judicial Court had signaled this new development in conflicts analysis in its opinion in \textit{Choate, Hall & Stewart v. SCA Services, Inc.,}\textsuperscript{27} the district court used the \textit{Choate, Hall} decision as a starting point for considering the conflicts problem in \textit{Bushkin}.\textsuperscript{28}

The United States District Court predicted that the Supreme Judicial Court would discard the place-of-making rule when next faced with the question of defining conflicts law in contract cases for Massachusetts.\textsuperscript{29} Therefore, according to the court, it was not crucial to decide where the contract between Bushkin and Raytheon was made.\textsuperscript{30} The court did find it

\textsuperscript{19} Id.
\textsuperscript{20} Id. at 598.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{24} 570 F. Supp. at 598.
\textsuperscript{26} 570 F. Supp. at 598-99.
\textsuperscript{28} 570 F. Supp. at 599.
\textsuperscript{29} Id.
\textsuperscript{30} Id. In this connection, the district court observed that the facts gave rise to a difficult
necessary, however, to examine the approaches referred to by the Supreme Judicial Court in Choate, Hall as alternatives to the old lex loci contractus rule.\textsuperscript{31} Although unable to select among the current theories because of the fact pattern in Choate, Hall, the Supreme Judicial Court had cited with approbation Currie's "interest" analysis and the Restatement (Second) of Conflict of Laws' "most significant relationship" test.\textsuperscript{32} The district court determined that the Restatement (Second) approach was not an effective means for resolving the conflicts problem in Bushkin because of the difficulty in definitively identifying the locations of contacts necessary to single out the state with the most significant relationship to the transaction.\textsuperscript{33} The court instead opted for "interest" analysis as the way to settle the conflict between New York and Massachusetts law.\textsuperscript{34} Interest analysis, the court stated, looks to the policies underlying each state's substantive law and then analyzes the facts of the case in view of these policies to determine which state has the superior interest in having its law applied.\textsuperscript{35} The district court first examined the purposes underlying the relevant part of the New York statute of frauds as seen in its legislative history and in New York court decisions.\textsuperscript{36} The court stated that the New York statute of frauds provision sought to protect the principals in the sale of a going business from unfounded claims of finder and to encourage certainty through the use of written fee contracts.\textsuperscript{37} According to the court, this policy included principals from outside of New York who used New York brokers and finders in order to benefit from New York's position as a national and international center for the purchase and sale of businesses.\textsuperscript{38} The court found that "Bushkin, as a New York City investment adviser, [fell] into the heart of New York's interest in maintaining, and encouraging New York's position as a business center."\textsuperscript{39} Turning to Massachusetts law, the court found that Massachusetts had only a minimal interest in applying the underlying policies of the law which did not invalidate oral fee agreements to the instant case.\textsuperscript{40} The court determined that the "soundness of Massachusetts policy or the

\textsuperscript{31} 570 F. Supp. at 599-600.
\textsuperscript{32} See 378 Mass. at 541, 392 N.E.2d at 1048-49.
\textsuperscript{33} 570 F. Supp. at 600.
\textsuperscript{34} Id. at 600-01.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 601.
\textsuperscript{38} Id. at 601-02.
\textsuperscript{39} Id. at 602. Bushkin's place of business was in New York and he encouraged Raytheon's interest in Beech from New York. Id.
\textsuperscript{40} Id.
stability of its financial community" was not an issue in *Bushkin*. According to the court, Massachusetts has no interest in denying the protection of New York's policy of protecting foreign principals from unmemorialized contracts, even at the expense of New York brokers and finders, to a Massachusetts company. The district court concluded that "interest analysis clearly tips the scale in favor of applying New York law to the facts of this case." Applying New York law, the *Bushkin* court found that the New York statute of frauds clearly invalidated the oral contract between *Bushkin* and Raytheon. The court also held that the statute of frauds barred *Bushkin*'s implied contract claim for the reasonable value of the information and services rendered to Raytheon. Finally, the court rejected *Bushkin*'s allegation that Raytheon engaged in unfair and deceptive acts and practices, noting that this claim merely restated *Bushkin*'s express and implied contract counts. The district court therefore allowed Raytheon's motion for summary judgment and dismissed *Bushkin*'s complaint.

In summary, the vested rights *lex loci contractus* doctrine is no longer viable conflicts law for contract cases in Massachusetts, despite the inopportuneness of the *Choate, Hall* decision for a definitive rejection of that rule. The Massachusetts Supreme Judicial Court clearly wishes to endorse the contacts or functional approach to contract conflicts issues already adopted by a large number of states. Hence, the United States District Court in *Bushkin* accurately reflected Massachusetts conflicts law when the court stated that it "respectfully anticipates that the [Supreme Judicial Court] will discard the strict requirements of the place-of-making rule when next confronted with the issue." It is not as certain, however, that the selection of interest analysis over "the most significant relationship" approach in the Restatement (Second) in *Bushkin* mirrors the current conflicts thinking of the Supreme Judicial Court.

The United States District Court's decision in *Bushkin* illustrates the use of interest analysis in resolving choice-of-law issues and correctly applied New York law. Aficionados of the Restatement (Second) would contend, however, that sections 6 and 188 of the Restatement (Second) would reach the same result. Supporters of the Restatement (Second)

---

41 Id.
42 Id.
43 Id.
44 Id. at 603.
45 Id.
46 Id.
47 570 F. Supp. at 599.
would also repudiate the suggestion in Bushkin that this approach "could degenerate into little more than mechanical contact counting." 49 The Restatement (Second) determines the state of most significant relationship by qualitative analysis, and not merely by quantitative considerations. 50 Moreover, the Supreme Judicial Court espoused the Restatement (Second) approach in a recent conflict contract case. 51 Although the district court's decision in Bushkin is certainly defensible, it may not be an accurate prediction of the approach the Supreme Judicial Court would take in a similar case.

49 570 F. Supp. at 600.
50 See Reese & Rosenberg, supra note 48.