Choice-of-Law Questions in Cyberfraud

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The first known choice-of-law rule dates back to around 119 B.C. Papyrus from a necropolis describes rules the Egyptians established to clarify whose law to apply in trade disputes with Greek merchants, with whom the Egyptians were beginning active commerce. Technology has advanced considerably since, and choice-of-law principles have evolved as well; however, some scholars feel that the latter have not kept pace with the former. The phenomenal growth of cyberspace brings this issue into sharp focus. Because it greatly facilitates interstate communication, cyberspace enables millions of users in dozens of jurisdictions to interact effortlessly; choice-of-law questions therefore will arise with increasing frequency and complexity.

Cyberspace's lack of a fixed physical location may stretch traditional choice-of-law rules to their limits and produce illogical results that bear little relation to either party's interests. A


2 See, for example, Friedrich K. Juenger, The Complex Litigation Project's Tort Choice-of-Law Rules, 54 La L Rev 907, 920 (1994) (referring to the Constitution's grant of federal common-law authority for maritime and admiralty cases, and the federal courts' refusal to recognize a similar grant in airline cases).

3 Some figures illuminate the rate of cyberspace's growth. The first bulletin-board system was created in 1978, and sixteen years later there were at least 60,000. Edward A. Cavazos and Gavino Morin, Cyberspace and the Law: Your Rights and Duties in the Online World 10 (MIT Press, 1994). Similarly, the number of computers hooked directly to the Internet grew from 727,000 in 1992 to over 1.3 million in 1993. Id. That number increased to over 2.2 million by January 1994. Philip Elmer-Dewitt, First Nation in Cyberspace, Time 62 (Dec 6, 1993).

4 This analysis also applies to international communication, of course, but this Comment will focus only on interstate questions.

5 See note 3.

6 One commentator notes, for example, that "[i]n cyberspace, [ ] the situs of the act and actor may not be the same." Michael P. Dierks, Computer Network Abuse, 6 Harv J L & Tech 307, 331 (1993). Because cyberspace allows the act to occur far away from the
flexible approach to choice-of-law questions can reduce that strain and allow courts to continue using conventional choice-of-law methods without resorting to nontraditional solutions.

To demonstrate that possibility, this Comment explores a hypothetical cyberfraud case affecting several states to demonstrate the inadequacy of applying certain choice-of-law approaches in such a situation. By so doing, this Comment highlights the need for flexibility in choice-of-law approaches, and shows how the Restatement (Second) test meets that need better than any other approach by allowing courts to maximize the satisfaction of all interests involved. This Comment also discusses proposals that would create a new law of cyberspace (and therefore eliminate the need for choice-of-law analysis), but concludes that such approaches are inappropriate and the Restatement (Second) test remains the best alternative.

I. FRAUD LAW

"Fraud" is a generic term that describes the many ways a party can lie or suppress the truth for personal gain. Typically, a plaintiff claiming fraud must show that the defendant made a false representation, knew its falsity, and intended the plaintiff to rely upon the representation. The plaintiff must further demonstrate that she thought the representation was true, relied on its truth, and suffered injury thereby.

While many jurisdictions incorporate most of these elements into their common-law fraud actions, significant differences
among states still exist. For example, Wisconsin requires that the defendant act intentionally in committing a fraud. Nebras-
ka finds fraud where the defendant displays either knowledge or recklessness. North Dakota law allows a finding of fraud based on mere negligence, and Washington allows fraud convictions on a strict liability basis. Moreover, other factors affecting the plaintiff's suit also may vary from one state to the next. For ex-
ample, statutes of limitations range from three years to six

11 See notes 12-15 and accompanying text.
12 Loula v Snap-On Tools Corp., 175 Wis 2d 50, 498 NW2d 866, 868 (Ct App 1993) ("The elements of fraud require a false representation of fact made with intent to de-

fraud . . . .").

Wisconsin also recognizes the tort of "misrepresentation" which is related to tortious fraud. Ollerman v O'Rourke Co., 94 Wis 2d 17, 288 NW2d 95, 99 (1980). A plaintiff may sue for strict-liability misrepresentation, negligent misrepresentation, or intentional misrepresentation. Id. Intent is not an element for strict-liability or negligent misrep-

sentation. The Wisconsin Supreme Court has stated, however, that "fraudulent misrepre-

sentation" means intentional misrepresentation, id, so intent is apparently an element of fraud.

13 Gibb v Citicorp Mortgage, Inc., 246 Neb 355, 518 NW2d 910, 916 (1994) ("In order to maintain an action for fraudulent misrepresentation, the plaintiff must allege and prove . . . (3) that when made, the representation was known to be false or made reck-

lessly without knowledge of its truth and as a positive assertion . . . .," citing Nielsen v Adams, 223 Neb 262, 388 NW2d 840, 846 (1986)). While Gibb holds that recklessness is not sufficient for "fraudulent concealment," this Comment will focus on misrepresenta-

tions, not concealment.

14 ND Cent Code § 9-10-02 (1993) states "[a] deceit [is] . . . [t]he assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true . . . ." North Dakota courts use this statutory definition in tort cases. Delzer v United Bank of Bismarck, 527 NW2d 650, 653 (ND 1995). North Dakota has a slightly different definition of "fraud" in contract cases. ND Cent Code § 9-03-08 (1993). Although § 9-03-08 is entitled "fraud" and § 9-10-02 is entitled "deceit," non-contract fraud cases will fall under § 9-10-02.

15 First Maryland Leasecorp v Rothstein, 72 Wash App 278, 864 P2d 17, 19 n 2 (1993) ("The nine essential elements of fraud are . . . (4) the speaker's knowledge of [the representation's] falsity or ignorance of the truth . . . ."). This definition of fraud has a long pedigree in Washington dating back to 1934. Webster v L. Romano Engineering Corp., 178 Wash 118, 34 P2d 428, 430 (1934); Sigman v Stevens-Norton Inc., 70 Wash 2d 915, 425 P2d 891, 895 (1967).

Under First Maryland, liability lies even when the speaker's ignorance of the truth is reasonable; therefore, the mens rea appears to be strict liability. A related line of cases has confirmed the possibility of strict-liability fraud, holding that "[i]t makes no difference whether the representations were made through mistake or with full knowledge of the facts. Even though such representations were made through honest mistake they constitute fraud in law." Western Lumber, Inc. v City of Aberdeen, 10 Wash App 325, 518 P2d 745, 746 (1973) (quoting Pratt v Thompson, 133 Wash 218, 233 P 637, 638 (1925)).
years, and the damages available to a plaintiff may differ among states.

In the case of interstate fraud, therefore, many of the most important questions will depend on which state's laws apply. How the courts resolve this question will have significant repercussions for the plaintiff, the defendant, and the states involved. A hypothetical case highlights how the different rules could affect the outcome in a cyberfraud case.

Expert, who lives in Wisconsin, dials from his home computer to a newsgroup devoted to coin collectors. The newsgroup is run out of the home of Operator, a collector living in Maryland. While on the newsgroup, Expert meets Seller, a resident of western Vermont. Expert is a specialist in early colonial coinage, and Seller asks Expert to identify a Vermont silver coin he found in the attic of his old house. Seller says he is thinking of selling the coin.

After looking at the high-resolution image Seller has scanned and sent to him, Expert realizes he is unsure about this pattern. Expert does have a book called Vermont Coinage, but, being too tired to walk across the room and page through it, he relies on

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States where a fraud claim must be brought within four years include Florida, Georgia, Nebraska, and New Mexico. See Fla Stat Ann § 95.11(3)(j) (West 1982); Ga Code Ann § 9-3-31 (Michie 1982); Neb Rev Stat § 25-207(4) (1943); and NM Stat Ann § 37-1-4 (1978).


States where a fraud claim must be brought within six years include Hawaii, Indiana, Maine, Michigan, Minnesota, New York, North Dakota, South Dakota, Vermont, and Wisconsin. See Hawaii Rev Stat § 657-1(4) (1985); Ind Code Ann § 34-1-2-1 (West 1983); 14 Me Rev Stat § 752 (West 1980); Mich Comp Laws Ann § 600.5813 (West 1987); Minn Stat Ann § 541.05(6) (West 1988); NY Civ Prac L & R § 213(8) (McKinney 1990); ND Cent Code § 28-01-16(6) (1991); SD Cod Laws § 15-2-13(6) (1984); 12 Vt Stat Ann § 511 (Equity 1973); and Wis Stat Ann § 893.93(1)(b) (West 1983).

Rhode Island allows ten years for a fraud claim to be brought. RI Gen Laws § 9-1-13 (1985).

17 For example, North Dakota categorically refuses nominal damages in fraud cases, while New Jersey allows them. Olson v Fraase 421 NW2d 820, 826 (ND 1988); Nappe v Anschelewitz, Barr, Ansell & Bonello, 97 NJ 477, 37 A2d 1224, 1228-30 (1984).
his (fallible) memory and tells Seller the coin “is a very common issue from that period, worth about $5,000.” Seller files away a copy of the high-resolution image and Expert’s reply.

The next day, acting on Expert’s advice, Seller sells the coin to Buyer, a collector living in Nebraska, for $6,500. Their agreement took place on the newsgroup and was detailed enough to constitute a legally-binding contract. Seller mails the coin from the post office in Granville, New York, which happens to be closer to his rural home than any Vermont post office.

Six months after the sale, Seller buys *Vermont Coinage*, but it does not occur to him to look up the coin. A little over four years after buying the book, Seller finally looks through it and quickly identifies the coin in question, finding out that it was actually quite uncommon and worth $80,000. Seller cannot locate Buyer, and sues Expert in federal court in Burlington, Vermont, for tortious fraud.\(^8\)

In this fictional scenario, the federal court must choose which state’s laws to apply—Maryland’s, Nebraska’s, New York’s, Vermont’s, or Wisconsin’s.\(^9\) If the court chooses to apply the law of Maryland, where the newsgroup is “located,” the court will throw out Seller’s claim due to Maryland’s three-year statute of limitations for fraud claims.\(^2\) This is because courts normally start tolling the statute of limitations for fraud when the plaintiff

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\(^{18}\) See note 7. Seller is limited to a tortious fraud claim because there is no contract between him and Expert.

\(^{19}\) It is possible for the court to use different states’ laws on different issues—for example, to use Wisconsin’s law for the substantive elements of tortious fraud, and Maryland’s law for the statute of limitations. Such a splitting depends on whether the court applies the same choice-of-law approach to each issue. Due to the large number of permutations such splitting would cause, this Comment will not consider them.

\(^{20}\) Maryland’s statute of limitations for tortious fraud is found in Md Cts & Jud Proc Code Ann § 5-101 (1984). In jurisdictions where the statute of limitations is considered to be a procedural matter, the forum state’s statute of limitations will be applied. 54 CJS Limitation of Actions § 28 (1987 and Supp 1995). Conversely, where the statute of limitations is thought to be a substantive question, courts may apply the statute of limitations of whichever state has the strongest interest or the most significant relationship. Id.

Vermont appears to fall into the first category. The Vermont Supreme Court ruled in 1969: “Statutes of limitation affect the remedy rather than the right. And this Court has held that a cause of action which accrued in a foreign jurisdiction could not be maintained here after the time limited in our statute had expired.” *Jacques v Jacques*, 128 Vt 140, 259 A2d 779, 780 (1969). Nonetheless, this rule might change if Vermont reconsiders its choice-of-law rule, as has been predicted. See note 29. Many states that adopt the Restatement (Second) approach (see notes 85-115 and accompanying text) also use the significant-relations test for choosing statutes of limitation. 54 CJS Limitation of Actions § 28. At any rate, in the interest of showing how statutes of limitation can affect outcomes, this Comment will contrafactually hypothesize that the Federal court in Vermont may indeed take foreign statutes of limitation into account.
reasonably should have discovered the damage;\textsuperscript{21} under the hypothetical, this occurred when Seller bought \textit{Vermont Coinage} but failed to consult it. His claim would also fail under the four-year statute of limitations for fraud in Nebraska, where Buyer took possession.\textsuperscript{22} Furthermore, if the court applies the law of Wisconsin, where Expert made the allegedly tortious statement, Seller also would lose: Wisconsin requires the defendant to have acted intentionally, and Expert appears only to have been reckless.\textsuperscript{23} Nor would Seller prevail in New York, where he relinquished possession of the coin to the mails, because that state requires knowledge or intent for a fraud action to succeed.\textsuperscript{24} Indeed, Seller can succeed only if the court applies the law of his home state, Vermont. In Vermont, a plaintiff has six years to file a fraud claim\textsuperscript{25} and need not show knowledge or intent on the part of the defendant.\textsuperscript{26}

\textsuperscript{21} See, for example, \textit{Hecht v Resolution Trust Corp.}, 333 Md 324, 635 A2d 394, 399 (1994); \textit{Jameson v Graham}, 159 Neb 202, 66 NW2d 417, 419 (1954); \textit{Bader v Fleschner}, 463 F Supp 976, 981 (SD NY 1978); \textit{Estate of Delligan}, 111 Vt 227, 13 A2d 282, 287-88 (1940); \textit{Stroh Die Casting Co. v Monsanto Co.}, 177 Wis 2d 91, 502 NW2d 132, 135-37 (Ct App 1993).

\textsuperscript{22} Neb Rev Stat § 25-207(4) (1985).

\textsuperscript{23} \textit{Loula}, 498 NW2d at 868. There would be evidentiary problems for Seller. Nonetheless, given Expert's specialized knowledge in the area, his wrong answer on a relatively easy question may be enough to show negligence or recklessness.


\textsuperscript{25} 12 Vt Stat Ann § 511.

\textsuperscript{26} At first blush, Vermont cases appear to require intent or knowledge for a fraud claim to lie. \textit{Lewis v Cohen}, 157 Vt 564, 603 A2d 352, 354 (1991) ("An action for fraud and deceit will lie upon an intentional misrepresentation . . . so long as the misrepresentation was . . . known to be false by the maker . . . .," quoting \textit{Union Bank v Jones}, 138 Vt 505, 411 A2d 1338, 1342 (1980)).

Further examination shows, however, that knowledge or intent may be imputed where the defendant carelessly passes off as fact what is really just opinion: "A representation of a fact, as of the party's own knowledge, if it prove false, is . . . inferred to be willfully false and made with an intent to deceive . . . ." \textit{Cunningham v Miller}, 150 Vt 263, 552 A2d 1203, 1204 (1988) (citing the "leading case" of \textit{Cabot v Christie}, 42 VT 121, 126 (1869) (emphasis in original)). Again, "Intentional [sic] passing off belief for knowledge [is] of the same quality as conscious misstatement of facts and furnish[es] the element of knowledge required to make the false representation fraudulent." \textit{Cunningham}, 552 A2d
II. CURRENT CHOICE-OF-LAW DOCTRINE

It seems clear, therefore, that the court's decision about which state's law to apply will make enormous differences to the parties. Following the *Erie* doctrine, a federal court must apply the choice-of-law rule of the state in which it sits. In this hypothetical, because the suit was filed in Vermont, the court must follow Vermont's choice-of-law approach.

A. Restatement (First): *Lex Loci Delicti*

1. *The law.*

Vermont follows the traditional choice-of-law rule, known as *lex loci delicti*: the law of the place of the wrong controls. This approach, also embodied in the Restatement (First) of the Conflict of Laws, rests on respect for states' territorial sanctity; states may apply their own laws to activities within their borders. This approach is also lauded for providing "certainty, uniformity, and predictability of outcome" because it avoids the complex and unpredictable multi-factor analysis that typifies competing approaches.

The difficulty, highlighted by the hypothetical, is that an act may occur "in" several states. Anticipating this problem, the Restatement (First) of the Conflict of Laws states, "[t]he place of wrong is in the state where the last event necessary to make an

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27 *Erie R.R. Co. v Tompkins*, 304 US 64, 78 (1938). *Erie* applies because Seller's suit is in federal court solely due to diversity jurisdiction.


Vermont has hinted that it may be ready to abandon the *lex loci* approach in favor of the Restatement (Second) (see notes 75-93 and accompanying text), but has not yet had occasion to reconsider it. *Calhoun v Blakely*, 152 Vt 113, 564 A2d 590, 592 n 2 (1989). The federal court sitting in Vermont continues to predict that Vermont will switch to Restatement (Second). *Nordica USA, Inc. v Deloitte & Touche*, 839 F Supp 1082, 1086 (D Vt 1993).

30 Restatement (First) of the Conflict of Laws § 377 (1934).

31 *Travelers Indemnity Co. v Lake*, 594 A2d 38, 44 (Del 1991) (overruling *lex loci* but nonetheless explaining its foundational underpinnings). The Restatement (First) of the Conflict of Laws confirms this, noting that "[e]ach state has legislative jurisdiction to determine the legal effect of acts done or events caused within its territory." Restatement (First) of the Conflict of Laws § 377 comment a.

32 *Boudreau v Baughman*, 322 NC 331, 368 SE2d 849, 854 (1988).

33 See notes 57-115 and accompanying text.
actor liable for an alleged tort takes place.” To illustrate what constitutes a “last event,” the Restatement sketches several examples. If A, standing in Idaho, shoots B, standing in Montana, Montana becomes the “place of wrong” because that is where the “force impinged upon his body.” By the same logic, if A’s factory in Idaho emits sulfur dioxide which kills B’s trees in Montana, the latter represents the place of wrong because that is where “the force takes effect on the thing.”

This emphasis on the end result carries over into fraud cases as well. The Restatement (First) states that, in fraud cases, “the place of wrong is where the loss is sustained, not where fraudulent representations are made.” This rule makes sense because common-law fraud does not become actionable unless some proximate loss (usually financial) results. Since it necessarily occurs after the fraudulent misrepresentation that induced it, the loss normally will constitute the “last event necessary” to make the defendant liable. For example: if A, from her home in Idaho, writes B, in Montana, a letter containing fraudulent statements that induce B to send A money, the “place of wrong” is Montana, where B parted with the money. In such tort cases, the court simply must determine where the plaintiff sustained a loss.

2. Application and commentary.

Applying the rule of lex loci to the hypothetical appears easy at first blush. All five states involved agree that a plaintiff must suffer some sort of damage or injury before an action for fraud will lie, so the “last event” occurred when Seller sold the coin

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34 Restatement (First) of the Conflict of Laws § 377 (emphasis added).
35 Based on id at illus 1.
36 Based on id at illus 4.
37 Id at n 4.
38 See notes 9 and 39.
39 Based on Restatement (First) of the Conflict of Laws § 377 illus 5.
40 Maryland law states that “[i]n order to recover damages in an action for fraud or deceit, a plaintiff must prove . . . (5) that the plaintiff suffered compensable injury resulting from the misrepresentation.” Ellerin v Fairfax Savings, 337 Md 216, 652 A2d 1117, 1123 (Ct App 1995) (quoting Nails v S & R, Inc., 334 Md 398, 639 A2d 660, 668-69 (Ct App 1994)).
Nebraska law states that “[t]o recover in an action for fraud . . . the plaintiff must prove that . . . (6) as the result of such reliance, the plaintiff suffered damage.” Henderson v Forman, 240 Neb 939, 486 NW2d 182, 186 (1992) (quoting Broekemeier Ford v Clatanoff, 240 Neb 265, 481 NW2d 416, 420 (1992)).
for $73,500 less than it was worth.\textsuperscript{41} Therefore, the court would probably analyze the hypothetical much as in the last example.

In that example, where B mailed money to A, the "place of loss" meant where B relinquished possession of the goods to the postal service. Under similar reasoning, New York's law would apply in this Comment's hypothetical because Seller dropped the coin off at the post office in that state.

While the preceding analogy has certain flaws,\textsuperscript{42} the Vermont court might well apply it under a \textit{lex loci} rule. Assuming New York is indeed the \textit{lex loci}, Seller cannot successfully sue Expert: even though the action satisfies the five-year statute of

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\textsuperscript{41} One could make a plausible argument that the critical moment really is when Buyer and Seller formed their contract on the newsgroup. For a more detailed discussion of that scenario, see note 42.

\textsuperscript{42} The weakness is that, in the hypothetical, Buyer and Seller were in some sense "in" Maryland when they struck the deal together on the newsgroup; there is no analogous center to the A-B postal relationship. One could argue that the real loss occurred when the deal was made and Seller therefore became legally bound, all of which happened "in" Maryland. In such a case, a contract approach would be more appropriate.

In fact, in \textit{Bailey v Chattem, Inc.}, 684 F2d 386, 393 (6th Cir 1982), the court (applying Restatement (First) of the Conflict of Laws § 377 n 4) found that the place where the loss was sustained was where the plaintiff "relied on [the defendant's] misrepresentation to his detriment by assigning his patent rights [to the defendant]." Emphasis added. If making an enforceable agreement to deliver a coin to Buyer is analogous to assigning the coin to Buyer, then a strong case exists for saying the loss was sustained in Maryland, not New York. This would be to Expert's advantage, because Maryland's three-year statute of limitations for fraud would bar Seller's claim (see note 16). This ambiguity is reflected in the Restatement (Second) of Conflict of Laws, which tries to elucidate where the "place of loss" is in such a case: "... the place of loss may be considered to be either the place where the plaintiff entered into the contract or the place where he relinquished the assets... ." Restatement (Second) of Conflict of Laws § 148 comment c (1971). Therefore, at least two answers seem possible: where Seller relinquished the coin (New York), or where he entered into the contract with Buyer (Maryland).

Four answers become possible if we explore the contract analogy further. If the court rejects the contention that Seller and Buyer entered into the contract in Maryland, then they must have formed their contract either in Vermont (where Seller received Buyer's acceptance) or in Nebraska (where Buyer dispatched the acceptance). Expert would win under Nebraska's laws and lose under Vermont's, (see notes 22-26 and accompanying text). Either way, a new set of laws could come in to the picture.
limitations, New York requires knowledge or intent for a fraud action to lie.

This result appears unjust. It seems unfair to deny Seller recovery simply for choosing the wrong post office. Although Expert had no intent to cheat Seller, his advice was certainly negligent, perhaps reckless, and cost Seller $73,500. To make matters worse, Seller probably could maintain a fraud action under Vermont law, which does not require knowledge or intent on the part of defendant and which provides a generous statute of limitations (six years). Moreover, lex loci's supposed advantage of predictability fails to materialize for Seller, who would never suspect that an incidental state's rule would control the case. For Expert, the result appears even less foreseeable.

To an extent, party expectations usually will suffer in cyberfraud cases. Users often remain unaware of the physical locations of the Internet addresses they visit and may know even less about the residency of their fellow sojourners in cyberspace. Contrast this situation with the society for which the lex loci rule developed:

When the doctrine of lex loci delicti was first established in the mid-nineteenth century, people only occasionally crossed state boundaries. Under those circumstances, there was legitimacy in a rule which presumed that persons changing jurisdictions would be

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44 See note 24.
45 Expert gained nothing from the incident and probably stands to lose a great deal.
46 Cunningham v Miller, 150 Vt 263, 552 A2d 1203, 1204-05 (1988).
48 If the court were to apply Maryland’s law (see note 42) then that would be even less predictable—neither party would have expected Maryland law to apply, and they may not even have known the newsgroup was located in Maryland. This depends, however, on certain factual variables—for example, if Seller and Expert had to program in the newsgroup’s phone number, they would know its area code and hence its state. That is not usually necessary for newsgroups, however. As with World Wide Web sites, the computer finds the location without requiring the user to pinpoint a particular phone number. On the other hand, if the hypothetical took place on a dial-in, bulletin-board system, Seller and Expert would have had better notice because that normally requires entering the relevant phone number.

Assuming the users did not know the newsgroup’s location, Vermont is probably the most “foreseeable” of any state in the hypothetical. It would have been foreseeable to Seller, since he lives there, and possibly to Expert too, since it was a Vermont coin (though this is debatable).

49 See note 48.
50 Even if a user knows the location of an Internet address, that does not mean she knows the location of the other visitors at that site.
aware of the different duties and obligations they were incurring when they made the interstate journey.\textsuperscript{51}

Much of the activity that takes place in modern society does not fit this description; cyberspace represents an even greater departure from this conception because of the many activities that take one into foreign jurisdictions with no notice thereof.\textsuperscript{52}

In fact, the \textit{lex loci} rule has declined steadily in popularity: in 1983, twenty-one states applied \textit{lex loci}.\textsuperscript{53} By the beginning of 1994, only thirteen states followed it.\textsuperscript{54} This stems partly from the shortcomings the hypothetical points out: the \textit{lex loci} rule developed when Americans, being less mobile, almost certainly knew when they were engaging in interstate dealings.\textsuperscript{55} Invoking \textit{lex loci} in cyberfraud cases has the opposite effect; it exposes parties to potentially harsh fraud standards in states with which they did not know they had any contacts.\textsuperscript{56} This rule, therefore, can lead to unpredictable and unjust results in cyberfraud cases.

\textsuperscript{51} \textit{First Natl Bank in Fort Collins v Rostek}, 182 Colo 437, 514 P2d 314, 316 (1973).
\textsuperscript{52} See note 48.

Nevada may have abandoned \textit{lex loci}; its Supreme Court declared in \textit{Hermanson v Hermanson}, 1994 WL 713121 (Nev 1994) that "this court has adopted the substantial relationship test to resolve conflict of law questions." Id at *2 (citing \textit{Sievers v Diversified Mortgage Investors}, 95 Nev 811, 603 P2d 270 (1979)). But \textit{Sievers} was a contractual choice-of-law case, so it is not clear whether \textit{Hermanson} only applies to contractual choice-of-law, or whether its broad language also sweeps in tort choice-of-law.

\textsuperscript{55} Restatement (Second) of Conflicts of Law ch 7 at 413 (1971) (Introductory Note).
\textsuperscript{56} Note that this problem also exists for defendants. If Seller had been able to sue under New York law, Expert would be unexpectedly subject to the fraud law of a state with which he never knew he had any contact.
B. Lex Fori

1. The law.

For states following a lex fori philosophy, the analysis is extremely simple—the forum state's law applies. Such an approach offers predictability as its main advantage; once jurisdiction and venue problems are resolved, no choice-of-law questions remain. By its nature, the lex fori rule applies easily, and judges need not attempt to interpret the laws of states with which they have no familiarity.

The disadvantage, of course, lies in the rule's arbitrariness: a plaintiff could easily forum shop and know with certainty that her efforts would succeed. It remains unclear whether this approach would promote or discourage judicial efficiency. On the one hand, parties would spend less time in court arguing choice-of-law questions; on the other hand, the plaintiff would spend more time seeking a favorable forum. Potential equity concerns also arise, as the plaintiff could more easily seek a state with laws that disadvantage the defendant. Furthermore, the lex fori method may seriously disserve the policies and interests of the various states involved because it gives these considerations no weight.

No states formally admit to following a lex fori approach, but scholars argue that Michigan and Kentucky "follow a sufficiently blatant form of forum favoritism in tort conflicts" to qualify them as lex fori states.

2. Application and commentary.

If the Vermont court in the hypothetical followed lex fori, it would apply its own law. As noted earlier, this would probably allow Seller to prevail. In one sense, this result seems just—applying Vermont laws allows the injured party to recover, more nearly fits Seller's expectations, and does not wholly violate

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58 Symeonides, 42 Am J Comp L at 611 (cited in note 54); updated by Symeonides, 43 Am J Comp L 1 (cited in note 54). The Tennessee Supreme Court has also noted a de facto lex fori regime in Michigan and Kentucky. See Hataway v McKinley, 830 SW2d 53, 59 (Tenn 1992). Both Symeonides and Hataway cite Foster v Leggett, 484 SW2d 827, 829 (Ky 1972) (applying the law of the forum state if that state has "enough" contacts), and Olmstead v Anderson, 428 Mich 1, 400 NW2d 292, 302 (1987) (applying lex fori unless another state has a more significant interest).

59 See notes 25-26 and accompanying text.
Expert's expectations. While it runs against Wisconsin's policy of protecting its citizens from prosecution for unintentional fraud, it serves Vermont's interest in protecting its citizens from fraudulent activity.

If this approach reaches the right result, however, it does so for the wrong reasons. The test makes no attempt to fulfill the parties' expectations, does not try to balance state interests, and does not seek the more just or efficient solution; any positive results are largely coincidental. A slight change in the hypothetical demonstrates this. Assume Seller actually lived in Wisconsin and found the coin while visiting his brother in Vermont. Seller bought Vermont Coinage and discovered Expert's error while still living in Wisconsin, but was planning to move to Vermont within a year. Seller does some legal research and perceives an advantage in waiting to sue until he arrives in Vermont, which he in fact does. Under this scenario, rote application of lex fori would defeat Wisconsin's arguably greater interests and more significant relation to the case.

C. Governmental Interest Analysis

1. The law.

Lex fori has not been seriously considered by most states in recent years, and the lex loci approach drew sharp criticism.

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50 See notes 45-52 and accompanying text.

51 These interests attributed to Vermont and Wisconsin are presumed from their respective strict-liability and intent-based fraud laws (see notes 12 and 26 and accompanying text).

52 It is not clear there is any generally efficient solution. In the coin hypothetical, Expert and Seller are both low cost avoiders: Expert could easily have researched Seller's inquiry more carefully or worded his response less assuredly, and Seller could easily have sought a second opinion or (six months later) looked in Vermont Coinage and contacted Buyer before Buyer vanished. Similarly, in cyberfraud cases generally, who the best cost avoider is will depend heavily on the facts. Furthermore, even if one party were consistently the best cost avoider, no choice-of-law approach can guarantee that that party would bear the burden. Choice-of-law rules depend on factors (such as where the parties reside, where the "last act" occurred, and the interest of the states involved) that themselves are only tangentially related to cost avoidance.

53 Wisconsin would have a greater interest because both parties lived there at the time of the sale, the misrepresentation was both made and received in Wisconsin, Seller relinquished possession of the coin to the mails in Wisconsin, and the contract between Seller and Buyer might have been made in Wisconsin (but see note 42).

54 Lex fori was a predominant approach through early American history, however. Friedrich K. Juenger, Choice of Law and Multistate Justice 89 (Martinus Nijhoff Publishers, 1993) (cited in note 1).
almost from inception.65 These developments inspired legal scholars to develop better choice-of-law methods, and the first major contribution came from Professor Brainerd Currie.66

Currie developed his proposal, often called “governmental interest analysis,” in response to the rigid lex loci rule.67 Under governmental interest analysis, the court must consider the policies behind the state laws relevant to the case at hand and then determine which state’s laws would best advance those policies. Currie viewed choice-of-law rules primarily as a tool for implementing state policy,68 but he believed that other legitimate factors could influence the outcome indirectly. For example, he felt that the substantive state laws in question already would incorporate private interests and expectations,69 leaving no need for the courts to weigh such factors independently. After weighing the states’ interests, the court would determine if a “true conflict” existed—whether two or more states have legitimate interests in their laws being applied.70 In “true conflict” cases, the court would apply lex fori.71

2. Application and commentary.

If the Vermont court in the hypothetical followed this governmental interest analysis, it probably would apply Vermont law. Several states have legitimate interests to advance: Wisconsin seeks to protect its citizens from being prosecuted for uninten-

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66 See notes 67-71. This is not to imply that other scholars did not make significant contributions as well. See Juenger, Choice of Law at 92-98 (cited in note 1). Currie’s contribution, however, is considered a watershed in choice-of-law law.
70 Comment, Let the Chips Fall Where They May, 26 UC Davis L Rev at 1059-60 (1993). If only one state had a true policy interest, then there is a “false conflict” and the interested state’s law applies over the disinterested state’s law. Id at 1058-59.
71 Currie advocated this lex fori default rule “simply because a court should never apply any other law except when there is a good reason for doing so.” Brainerd Currie, Married Women’s Contracts: A Study in Conflict-of-Laws Method, 25 U Chi L Rev 227, 261 (1958).
tional fraud, Vermont seeks to give its citizens a means of recovering for fraudulent acts, New York and Nebraska have an interest in not allowing parties to use their mails for fraudulent activities, and Maryland has a similar concern regarding its telephone lines. The first two interests probably have the strongest claim. In any event, a "true conflict" exists and therefore the court must therefore revert to lex fori.

This final step, which incorporates a default lex fori rule, has received heavy criticism. Identifying the conflict of state interests does not normally pose difficulty. Instead, the problem arises when a court must resolve this conflict. Reflexively applying the law of the forum state may ignore the relative merits of the states' policies, give no weight to the concerns of the parties, frustrate justified expectations, fail to consider the needs of interstate commerce, and leave unaddressed the problem of predictability. Problems also inhere in an attempt to discern the policies behind a state's law: legislatures do not always have a clear-cut goal in mind when enacting a certain rule, or their goal may not appear clearly in the text or the legislative history. The court may be divining a fiction when engaging in governmental interest analysis.

Applying Vermont law seems the best result under the hypothetical. Yet governmental interest analysis, like lex fori, seems to reach this right result for the wrong reason. Automatic default to the forum state whenever a conflict arises seems no better than lex loci. These criticisms help explain why only three jurisdictions follow the governmental interest analysis.

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73 Hataway, 830 SW2d at 58 (citing Gregory E. Smith, Choice of Law in the United States, 38 Hastings L J 1041, 1048 (1987)).
74 See, for example, McNollgast, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation, 80 Georgetown L J 705, 710-12 (1992) (noting that legislation rarely embodies the ideals of its supporters because compromises must be made to ensure passage, sometimes resulting in the inclusion of contradictory goals).
75 For a spirited defense of interest analysis, see Bruce Posnak, Choice of Law—Interest Analysis: They Still Don't Get It, 40 Wayne L Rev 1121 (1994).
76 One could easily imagine additional scenarios in which the forum state is largely peripheral. For example, if Seller flew to Wisconsin on a business trip and sold the coin while there, it would begin to look like Wisconsin law should control. Under the governmental interest analysis, however, the Vermont and Wisconsin interests would cancel just as before, and Vermont's law would prevail simply because Seller happened to bring the suit there.
77 Symeonides, 42 Am J Comp L at 611 (cited in note 54); updated by Symeonides, 43 Am J Comp L 1 (cited in note 54). The three jurisdictions are California, the District of
D. Leflar’s Choice-Influencing Considerations

1. The law.

Another approach, known as “choice-influencing considerations,” was advanced by Professor Robert Leflar shortly after Currie offered his governmental interest analysis. Leflar proposed that courts consider five criteria when making choice-of-law decisions: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum’s governmental interests; and (5) application of the better rule of law. One aspect of Leflar’s method that distinguishes it from governmental interest analysis lies in the breadth of interests it recognizes. Instead of focusing on only one actor—the state—Leflar attempts to address the needs of the interstate system, the judicial system, and the community of law. In that respect, his approach avoids some of the pitfalls of Currie’s interest analysis and thus has proved more popular with the states: five jurisdictions follow Leflar’s choice-influencing considerations.

Nonetheless, Leflar’s approach has suffered criticism for favoring the forum state. While the first two criteria do not seem to favor the forum state, the final three criteria do. Choosing the forum state’s law offers the clearest way to simplify the judicial task and advance the forum state’s interest. Concerning the fifth criterion, judges seldom consider their state’s laws inferior to those of other states. This approach therefore presents the same lex fori concerns as noted earlier, including forum shopping, potential inequities, and failure to weigh the interests of


Id at 282.

See notes 72-76 and accompanying text.

Symeonides, 42 Am J Comp L at 611 (cited in note 54); updated by Symeonides, 43 Am J Comp L 1 (cited in note 54). The five states following the Leflar “choice-influencing considerations” test consist of Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin. See Wallis v Mrs. Smith’s Pie Co., 261 Ark 622, 550 SW2d 453, 456-57 (1977) (emphasizing governmental interest and the better choice of law); Bigelow v Halloran, 313 NW2d 10, 12 (Minn 1981) (emphasizing (in tort cases) governmental interest and the better choice of law); Clark v Clark, 107 NH 351, 222 A2d 205, 208-09 (1966); Woodward v Stewart, 104 RI 290, 243 A2d 917, 923 (1968); Hunker v Royal Indem. Co., 57 Wis 2d 588, 204 NW2d 897, 902-03 (1973).

Smith, Choice of Law, 38 Hastings L J at 1049 (cited in note 73).

Id.
non-forum states.\textsuperscript{84}

2. \textit{Application and commentary.}

Under Leflar's choice-influencing considerations, the court would probably opt for Vermont's law. Once again, the right result appears to emerge for the wrong reason—excessive favoritism of the forum state's law. Applying the forum state's law could well lead to inappropriate results such as those noted immediately above. Like the approaches of \textit{lex loci}, \textit{lex fori}, and governmental interest analysis, Leflar's choice-influencing considerations seem too rigid to handle the complex scenarios that cyberspace interactions might introduce.

E. Restatement (Second): Most Significant Relationship

1. \textit{The law.}

If Vermont followed the majority rule instead, it would apply the "most significant relationship" test for torts embodied in the Restatement (Second) of Conflict of Laws.\textsuperscript{85} That test directs courts adjudicating tort cases to use the law of the state where the injury occurred unless another state has a more significant relationship to the case.\textsuperscript{86} Consequently, the law of the state that has the "most significant relationship to the occurrence and the parties" will control.\textsuperscript{87} To determine which state has the most significant relationship, the court must consider where the injury occurred, where the injury-causing conduct occurred, where the parties live, and where their relationship is "centered."\textsuperscript{88}

This Restatement's Section 148 deals more specifically with questions of fraud.\textsuperscript{89} Under Section 148, the court must consider where the plaintiff relied on the defendant's representations, where the plaintiff received the representations, where the defendant made them, and where they each live.\textsuperscript{90} In addition, the

\textsuperscript{84} See notes 57-63 and 72-77 and accompanying text.
\textsuperscript{85} Restatement (Second) of Conflict of Laws § 145 (1971).
\textsuperscript{86} Id § 145(1).
\textsuperscript{87} Id.
\textsuperscript{88} Id § 145(2).
\textsuperscript{89} Restatement (Second) of Conflict of Laws § 148 (1971).
\textsuperscript{90} Id § 148(2)(a)-(d). This section also includes two other factors to consider which are not relevant to this hypothetical: where an object that was the subject of a transaction between the plaintiff and defendant is located, and where the plaintiff is supposed to perform her part of a contract that the defendant induced her to enter by fraud. Id § 148(2)(e)-(f). Since there is no transaction or contract between Seller and Expert, this Comment does not consider either factor.
Restatement's Section Six instructs the court to consider broader choice-of-law concerns:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.91

These criteria underlie all of the Restatement (Second) approaches, and any analysis of Sections 145 and 148 must occur with these Section Six factors in mind.

2. Application and commentary.

In the hypothetical, applying Section 145 alone remains inconclusive because no state clearly has a more significant relationship than any other.92 The injury occurred either in Vermont, where Seller was misled; in New York, where he mailed the coin; in Maryland, where he and Buyer were “present” when making the contract; or in all three.93 The injury-causing conduct occurred in Wisconsin. The parties live in Vermont and Wisconsin. The newsgroup in Maryland represents the “center,” if any, of their relationship.

Vermont, however, becomes the likely choice under Section 148. Seller acted in reliance either in Vermont, Maryland, or New York.94 Seller received the representations in Vermont. Expert made the representations in Wisconsin. The two parties live in Wisconsin and Vermont. The question of where the relationship is “centered” is omitted from Section 148, so Maryland’s role diminishes. The Restatement (Second) also instructs that, in fraud cases, the defendant’s home is not as important as the

91 Id § 6.
92 Under the § 145 analysis, Nebraska appears to have no significant relationship. Id § 145.
93 See note 42.
94 See note 42.
plaintiff's home, so Wisconsin's interest also diminishes. Furthermore, this test emphasizes "significant relationships" and contacts, so New York probably drops out of consideration due to its peripheral role.

Section Six factors muddy the waters in the hypothetical. The Restatement (Second) states that "[p]robably the most important function of choice-of-law rules" is to ensure the interstate system's smooth functioning, but this does not clearly favor any state. Choosing Vermont law in the hypothetical could have a chilling effect on interstate communications in cyberspace. The very real risk of unwittingly becoming subject to the laws of any state, without warning, could easily deter users like Expert. On the other hand, choosing Wisconsin's law could send a message to cyberfraud victims that they may have no remedy if the perpetrator operates in a pro-defendant state. While such an outcome would not deter users from exploring cyberspace, it could discourage them from relying on agreements or statements made there. This would ultimately be to the detriment of cyberspace as an interstate marketplace or public forum, thus failing Section Six's emphasis on the interstate system. Choosing New York or Nebraska law in this scenario also could have a chilling effect on the interstate system, because such a choice would make cyberspace voyagers fear being unpredictably haled into court in states that were quite incidental to an Internet communication. Choosing Maryland law could have the same chilling effect as that noted for Vermont: users would become worried about where the computers they visit in cyberspace are "really" located, and avoid certain addresses for fear of subjecting themselves to certain states' laws.

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95 Restatement (Second) of Conflict of Laws § 148 comment i.
96 See, for example, the discussion in id at comment b.
97 This may not be surprising in the case of torts. The Restatement (Second) notes that in the law of torts, the "difficulties and complexities . . . have . . . prevented the courts from formulating a precise rule, or series of rules, which provide a satisfactory accommodation of the underlying factors . . ." Restatement (Second) of Conflict of Laws § 6 comment c.
98 Id at comment d.
Weighing the relevant policies of the states involved also does not point clearly to one state. Vermont’s pro-plaintiff fraud laws presumably reflect a strong interest in protecting Vermont fraud victims, but Wisconsin’s pro-defendant fraud laws reflect an equally strong interest in preventing unjust fraud prosecutions of Wisconsin citizens. The protection of justified expectations also does not determine the answer, since neither party had reason to know in which state the other lived. Furthermore, they probably did not know of their “presence” in Maryland. This approach cannot provide certainty and predictability either, given that Internet users meet parties from unknown states with great frequency. In the end, the ambiguous results of the Section Six analysis neither add to nor detract from the Section 148 finding that Vermont’s laws should control.

Seller’s suit therefore should succeed. While this outcome is not easily predictable, it seems reasonably just. Seller can recover for the injury Expert carelessly caused. The result also seems to arise for the right reason: the court must consider all the relevant factors, including predictability, the parties’ expectations, the physical location of their contact, their domiciles, the policies and interests of the states involved, the needs of the interstate system, and any other important factors. Here, the choice of Vermont’s law results not from an arbitrary default rule, but from a careful balancing of all relevant considerations regarding

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100 Because no citizens of Maryland, Nebraska, or New York are parties to the suit, those states do not have strong policy interests in the hypothetical case.

101 New York was even less within the parties’ expectations than the other four states. If the parties had any justified expectations at all, they probably were limited to the acceptable use policy (“AUP”) that controls the newsgroup. See Cavazos and Morin, Cyberspace and the Law: Your Rights and Duties in the On-line World 44-45 (MIT Press, 1994) (cited in note 3). For this hypothetical, however, the assumption is that no AUP exists, or, if it does, that it says nothing about fraud.

The Restatement (Second) comments that “it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state.” Restatement (Second) of Conflict of Laws § 6 comment g. This would indicate that Expert, believing under Wisconsin law that he cannot be held liable for fraud as long as he does not deliberately lie, should not have to submit to Vermont’s lower mens rea requirement. An equally strong argument, however, can be made the other way: Seller, depending on Vermont’s fraud law to protect him from almost all false statements, should not be frustrated by Wisconsin’s high mens rea requirement.

At any rate, the Restatement (Second) holds that parties have no justified expectations when they act without thinking of the possible legal consequences. Id. This would probably mean that neither Seller nor Expert have justified expectations in the hypothetical.

102 See notes 84-94 and accompanying text.
CHOICE OF LAW IN CYBERFRAUD

fairness, efficiency, conflicting needs, and appropriate legal principles. In part because of its comprehensiveness, the “most-significant-relationship” test has become increasingly popular and now represents the plurality rule, followed by twenty-two states.\(^{103}\)

Nonetheless, scholars have not hesitated to criticize the Restatement (Second) as a chaotic jumble of eclectic approaches.\(^{104}\) An unwieldy aggregation such as this presents serious disadvantages. It may be time consuming or cumbersome to apply.\(^{105}\) It may give the judge excessive freedom by allowing her to choose among so many criteria in deciding the case; as such, the Restatement (Second) may act as a shield for judicial bias and discourage judicial candor.\(^{106}\) The other methods do not offer immunity from judicial bias, but their more focused and bright-line approaches presumably are more resistant to such influence.

\(^{103}\) Symeonides, 42 Am J Comp L at 609-10 (cited in note 54); updated by Symeonides, 43 Am J Comp L 1 (cited in note 54). This is eight more than the fourteen states observed following the Restatement (Second) in 1983. Kay, Theory into Practice, 34 Mercer L Rev at 586 n 399 (cited in note 53). The twenty-two states include Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, Oregon, Tennessee, Texas, and Washington. See Ehredt v DeHavilland Aircraft Co. of Canada, 705 P2d 446, 453 (Alaska 1985); Bryant v Silverman, 146 Ariz 41, 703 P2d 1190, 1191 (1985); First Natl Bank in Fort Collins v Rostek, 192 Colo 437, 514 P2d 314, 320 (1973); O’Connor v O’Connor, 201 Conn 632, 519 A2d 13, 21-22 (1986) (“most significant relationship” rule applied only when lex loci produces an arbitrary or irrational result); Travelers Indemnity v Lake, 594 A2d 38, 47 (Del 1991); Bishop v Florida Specialty Paint Co., 389 S2d 999, 1001 (Fla 1980); Johnson v Pischke, 108 Idaho 19, 21-22 (1985); Ingersoll v Klein, 46 Ill 2d 42, 262 NE2d 593, 596 (1970); Hubbard Manufacturing v Greeson, 515 NE2d 1071, 1073-74 (Ind 1987) (“most significant relationship” rule applied only when the place of the tort (under lex loci) is an insignificant contact); Fuerste v Bemis, 156 NW2d 831, 833 (Iowa 1968); Lee v Ford Motor Co., 457 S2d 193, 194 (La Ct App 1984); Adams v Buffalo Forge Co., 443 A2d 932, 934 (Me 1982); Pevoski v Pevoski, 371 Mass 358, 358 NE2d 416, 417 (1976) (lex loci applies unless another state has a more substantial interest); Mitchell v Craft, 211 S2d 509, 512 (Miss 1968) (lex loci applies unless another state has a more significant relationship); Kennedy v Dixon, 439 SW2d 173, 184 (Mo 1969); Harper v Silva, 224 Neb 645, 399 NW2d 826, 828 (1987); Morgan v Biro Manufacturing, 15 Ohio St 3d 339, 474 NE2d 286, 288-89 (1984); Brickner v Gooden, 525 P2d 632, 637 (Okla 1974); Casey v Manson Construction & Engineering Co., 247 Or 274, 428 P2d 898, 904-05 (1967); Hataway v McKinley, 830 SW2d 53, 59 (Tenn 1992); Gutierrez v Collins, 583 SW2d 312, 318 (Tex 1979); Johnson v Spider Staging Corp., 87 Wash 2d 577, 555 P2d 997, 1000 (1976).

There may actually be a twenty-third state following the Restatement (Second). The language of the Nevada Supreme Court in Hermanson v Hermanson, 1994 WL 713121 (Nev 1994) may have indicated a switch to the Restatement (Second) for tort choice-of-law questions. See note 54.

\(^{104}\) See, for example, Juenger, Choice of Law at 105-06, 142-43 (cited in note 1).

\(^{105}\) Indeed, this Comment’s application of the Restatement (Second) to the hypothetical is much more cumbersome than the applications of the other tests. See notes 40-44, 59-61, 72-74, 82-84, and 92-101, with accompanying text.

\(^{106}\) Juenger, Choice of Law at 149-50 (cited in note 1).
Such fairness and efficiency concerns deserve full consideration, but do not defeat the most-significant-relationship test. Its greatest advantage lies in its capacity to find the right outcome in a wide range of cases;\textsuperscript{107} by including parts of \textit{lex loci},\textsuperscript{108} \textit{lex fori},\textsuperscript{109} governmental-interest analysis,\textsuperscript{110} and choice-influencing considerations,\textsuperscript{111} the Restatement (Second) retains the flexibility to follow those approaches whenever they would generate the best answer. In other words, its significant decrease in error costs is potentially large enough to outweigh its admitted increase in decision costs.\textsuperscript{112}

There are reasons to expect this approach to have real advantages in cyberspace. Historically, significant advances in telecommunications and mobility have led to more cases involving multiple states in complex fact patterns. Faced with these cases, many courts have sought increased flexibility in choice-of-law rules and therefore have adopted the Restatement (Second).\textsuperscript{113}

\begin{itemize}
\item \textsuperscript{107} Juenger writes that the Restatement (Second) reflects "the American judiciary's tendency to look for sound results irrespective of doctrinal niceties." Juenger, \textit{Choice of Law} at 142 (cited in note 1).
\item \textsuperscript{108} The Restatement (Second) initially directs the court to consider where the injury occurred; only if another state has a more significant relationship should the court move away from \textit{lex loci}. Restatement (Second) of Conflicts of Law § 145(2)(a) (1971).
\item \textsuperscript{109} See factor (b) of the Restatement (Second) § 6(2) (note 91 and accompanying text), which emphasizes the importance of the forum state's policy interests. Factor (g) also favors the forum state since forum law will normally be the easiest to apply. Id.
\item \textsuperscript{110} See factors (b) and (c) of the Restatement (Second) § 6(2) (note 91 and accompanying text), which roughly correspond to the governmental interests identified in Currie's test (notes 67-68 and accompanying text).
\item \textsuperscript{111} See factors (a), (b), (e), (f), and (g) of the Restatement (Second) § 6(2) (note 91 and accompanying text), which roughly correspond to factors (2), (4), (5), (1), and (3) respectively of Leflar's choice-influencing considerations (notes 79 and accompanying text).
\item \textsuperscript{112} "Error costs" here means the likelihood and severity of making the wrong decision in a given case. "Decision costs" means the time and effort for the judiciary of applying the Restatement (Second) test to a given case. Judicial trends strongly suggest that the Restatement (Second)'s decreased error costs outweigh its higher decision costs: many states have switched from the bright-line \textit{lex loci} test to the Restatement (Second) test, while no states have discarded the Restatement (Second) for a lower decision-cost alternative. It seems implausible that courts naturally gravitate toward the most inefficient approach, so we may assume that their adoption of the Restatement (Second) implies that its lower error costs justify its higher decision costs.
\item \textsuperscript{113} See, for example, \textit{Rostek}, 514 P2d at 318 (stating that "accidents occurring in states not the domicile of all the parties are commonplace in today's society. The law should not deal with them as if they were rare and exotic hypotheticals . . . ."); \textit{Travelers}, 594 A2d at 44 (stating "the vested rights theory [underlying \textit{lex loci}], with its emphasis on territorial boundaries, had little relevance in the modern industrial world . . . . boundaries are of less significance today by reason of the increased mobility of our population and of the increasing tendency of men to conduct their affairs across boundary lines." (quoting the Restatement (Second) of Conflict of Laws ch 7 at 413 (Introductory note))); \textit{Kennedy} 439 SW2d at 182-84 (listing instances of travel-related cases where applying the Re-
Implicit in that decision is an assessment that the decreased error costs outweighed the increased decision costs. This makes intuitive sense: complex scenarios usually require increased freedom of decision to arrive at the right answers, and the right answer seems more important than a simple and quick decision.

If increased flexibility usually offers the best means for addressing greater complexity, this argument becomes even stronger in the realm of cyberspace. Cyberspace likely will lead to considerably more complex interstate fact patterns than the earlier transportation and communications advances that have encouraged the switch to the Restatement (Second) test. Just as it became easier to fly to an office in a far-away state than it had been to ride a horse and buggy there, so too will it become easier to visit that office electronically (through the World Wide Web, for example, or by e-mail) than to fly there. Indeed, it may become easier than writing a letter or using the telephone. Similarly, an individual is much more likely to encounter people from foreign jurisdictions on newsgroups and Internet Relay Chat than on the streets or in the cafes of one's home town. It will be easier to make an offer available in a multitude of states, or to post a statement in many states, than to do likewise via the mails, telephone, or facsimile machines. The argument therefore becomes one of degree—interstate interactions occur with a significantly greater degree of frequency and ease (and, as an extension, greater complexity) in this new medium. Such changes mirror the very circumstances that made states seek maximum flexibility before; that flexibility presumably works, since no state has abandoned the Restatement (Second) to return to a more rigid approach. It would be unwise, therefore, to jettison this flexibility in an area of law that seems likely to require even more flexibility.

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114 For example, the Supreme Court of Florida found that the flexibility of the Restatement (Second) overcame the "stable and objective standard" of lex loci in Bishop, 389 So.2d at 1000-01.

115 To paraphrase the Supreme Court of Illinois, if the main objective is to have a rule that promotes predictability of outcome and ease of application, the solution would be to always apply Alaska's law (since it is our nation's largest and coldest state) in every case, regardless of the fact pattern—courts would effortlessly know which law to apply, and all parties would know with perfect certainty which law would control. Ingersoll, 262 NE2d at 595.
III. OTHER APPROACHES

Some scholars have advanced proposals that would solve choice-of-law problems at a more fundamental level, eliminating the need for any choice in the first place. This approach would provide a more satisfactory result than the Restatement (Second), because, by preventing problems, it obviates the need for solutions. If only one set of laws applied to cyberspace conflicts, all the difficulties concerning party expectations, inconsistent outcomes, forum shopping, and conflicting state policies would disappear.

A. Federal Common Law for Cyberspace

Federal law is the one set of laws that every state and territory shares in common. The consistent application of a federal common law to cyberfraud, or to any cybercrime, would have numerous advantages. Federal judges would save time because they would not need to determine which state’s law applies. Parties to cyberspace interactions would know in advance that federal law controls their activities, so their expectations would be satisfied. Plaintiffs would not have any incentive to shop among various state courts, and any conflicts arising from inconsistent choice-of-law decisions would vanish.

Nonetheless, this approach suffers from a severe flaw because it probably violates the Erie doctrine. Erie states: “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.... There is no federal general common law.” Congress

118 See notes 117-118, 124-135, 144-46, and 149 and accompanying text.
117 For a more complete discussion of a federal common-law solution to cyberspace crimes, see Comment, Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases, 26 UC Davis L Rev 1045, 1066-76 (1993). While that comment focuses on defamation cases, many of its points have general applicability and could hold for any form of cyberspace crime.
118 At least one scholar has found an additional ground for supporting the development of a federal common law, at least in complex multistate torts, arguing that a federal common law approach would be of a higher quality than state law. Friedrich K. Juenger, The Complex Litigation Project’s Tort Choice-of-Law Rules, 54 La L Rev 907, 921-24 (1994) (cited in note 2) (referring to the “vagaries” of state law that have “reached new lows” in recent decades).
119 Erie R.R. v Tompkins, 304 US 64 (1938).
120 Id at 78. Erie applies when a case is in federal court for diversity reasons, as this hypothetical would be.

Some scholars feel that Erie should not apply whenever a case involves a “uniquely
has never passed a law directing the federal courts to develop a common fraud law or a common law for cyberspace; the Constitution also does not speak to either issue. Consequently, *Erie* appears to forbid the development of a cyberspace federal common law.

Even aside from the *Erie* problem, the creation of a federal common law for cyberspace remains unsatisfying because of its national limitation. Using federal law would eliminate conflicts among the laws of several American states, but would fail to resolve any similar conflicts among several nations. Due to doctrinal and practical reasons, therefore, a federal common law for cyberspace would not provide a satisfactory solution.

Scholars have noted that federal common law does exist in certain areas, such as admiralty law. Comment, 26 UC Davis L Rev at 1073 (cited in note 117); Friedrich K. Juenger, *The Complex Litigation Project’s Tort Choice-of-Law Rules*, 54 La L Rev 907, 921-23 (1994) (cited in note 2). Both derive their idea from Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 Fordham L Rev 167, 174-84 (1985). Their approach would add a “uniquely federal interest” category to the two categories listed in *Erie* (constitutional or congressional grants of common-law-making power), but this view does not find support in the Constitution. Juenger argues that the Founding Fathers lacked the necessary foresight to grant federal courts common-law making power for complex multistate torts, but if only they had had the foresight, they surely would have agreed. Juenger, *The Complex Litigation Project*, 54 La L Rev at 920 (cited in note 118) (referring to the Constitution’s grant of federal common-law authority for maritime and admiralty cases, but the federal courts’ refusal to recognize a similar grant in airline cases: “the perceived need for a uniform national law is no less pressing in aerial than in aquatic disasters.”). While such arguments surely have some substantive merit, they amount to an open call for a repeal of, or at least a severe curtailment of, *Erie*. Such constitutional questions are beyond the scope of this Comment.

If Congress were to pass a statute calling for the creation of a federal common law for all conflicts arising from cyberspace interactions, the *Erie* problem would disappear. Such a statute might pass constitutional muster, since most cyberspace interactions pass state boundaries and thus come under the Commerce Clause. US Const, Art I, § 8, cl 3. Even interactions that are not strictly “commerce” may be covered because any interstate communications can be said to have a “substantial effect” on interstate commerce. *Wickard v Filburn*, 317 US 111, 129 (1942).

In contrast, proposals for a separate cyberlaw would probably succeed at resolving international conflicts. See notes 124-52 and accompanying text.
B. Creation of a Separate Cyberlaw

Some proposals reach even further, envisioning the creation of a separate and legally binding law peculiar to cyberspace. Such a development would boast the same advantage as the application of federal law—namely, it would eliminate the need for difficult choices among several sets of laws. Furthermore, a separate cyberlaw might prove even more appropriate because cyberspace has assumed many of the characteristics of a physical place. Millions of users interact “in” cyberspace and have “addresses” there. A separate cyberlaw, therefore, conforms most closely with the notion of cyberspace as a place unto itself. The appeal of a separate cyberlaw has not escaped the attention of legal scholars, who have seen several ways to create it.

1. Customary cyberlaw.

Because of its decentralized, laissez-faire development, cyberspace has won comparisons to the old American West. As in the West, a “pioneer” spirit shaped the early development of cyberspace. That spirit still dominates cyberspace, even if the original pioneers now form a small minority of all users. The existence of this common culture and sense of purpose has helped regulate affairs in cyberspace. This “cyberian ethic” relies on a common understanding about acceptable behavior, and policing has occurred at the local level. Some scholars feel this customary cyberlaw can provide the basis of a more fully developed cyberlaw. Thus, in the coin hypothetical, the federal court in Burlington would apply customary cyberlaw instead of a specific state law.

The concept of customary law is familiar to legal scholars. It has formed a key part of international law for many years. In

124 See note 3 and accompanying text.
125 Some users have borrowed the name of a real location to dub their ethereal place “Cyberia.” See Robert L. Dunne, Deterring Unauthorized Access to Computers: Controlling Behavior in Cyberspace through a Contract Law Paradigm, 35 Jurimet J 1, 8-10 (Fall 1994). For an apt description of cyberspace as a separate “place,” see Dunne. Id.
126 Dunne, Contract Law Paradigm, 35 Jurimet J at 10 (cited in note 125).
127 Robin C. Widdison, post to NEWJURIS Cyberlaw conference, September 21, 1993.
128 Dunne, 35 Jurimet J at 10 (cited in note 125).
129 Id at 11.
130 Id at 12.
132 Statute of the International Court of Justice, Art 38 (1)(b) (June 26 1945), ex-
that context, the repeated actions of nations, the views of eminent international law scholars, and the texts of nonbinding statements can become customary legal precedent and thus binding in international courts. Also, American courts often look to customary practices of an industry as persuasive, but not conclusive, authority in particular cases.133

An important principle therefore emerges: "practices developed by parties themselves can eventually rise to the level of enforceable, that is, judicially recognizable, rules of behavior without ever being codified by a legislative body."134 Cyberlaw could therefore evolve from customary precedents. Federal courts could enforce common Internet practice as cyberlaw, or "courts" in cyberspace could adopt it.135

Nonetheless, the adoption of customary cyberlaw has several potential drawbacks.136 First, unlike international law or industry, the membership of cyberspace does not remain stable or constant. Rather, its ranks swell dramatically each year, with perhaps millions of new users annually.137 Attempts to define cyberspace's customs today may thus unfairly deny tomorrow's newcomers a chance to influence the evolution of the "cyberethic."138 Even apart from equitable considerations, a snapshot of today's cyberspace customs may prove inaccurate, fading quickly as newcomers with different customs soon constitute a majority.139 In other words, cyberspace custom may not

133 As just one example, see Bimberg v Northern Pacific Railway, 217 Minn 187, 14 NW2d 410, 413 (1944) ("Local usage and general custom... will not justify or excuse negligence. They are merely foxholes in one of the battlefields of law, providing shelter but not complete protection... ").


135 See notes 149-152 and accompanying text.

136 One such drawback, discussed more fully at notes 147-48, is that parties may ask the court to interpret what cyberspace's customary law really is. In that case, the court would need to apply the interpretive canons of one jurisdiction or another, thereby returning to the choice-of-law difficulties enumerated earlier.

137 See note 3.

138 This drawback holds true whenever newcomers join a society that has rules and is to some degree inevitable. Normally, it does not pose great equitable difficulties because the number of newcomers is a fraction of the total society. Where the newcomers form a significant proportion of the society, however, and begin to constitute a majority, equity concerns necessarily increase.

139 Dunne agrees, stating that "Cyberia has outgrown its legal system [of customary law]." Dunne, 35 Jurimet J at 15 (cited in note 125).
have achieved the stability necessary to provide useful or desirable legal precedent.

A second concern arises from the sheer number of cyberspace "inhabitants." The denizens of cyberspace outnumber the actors in international relations, and in most industries, by at least a thousandfold. Almost five million computers connect to the Internet alone, some scholars have advanced an estimate of around twenty million Internet users, with an even larger number in cyberspace. To speak of "customs" shared by twenty million people may verge on fiction. Even if a coherent set of customs exists, courts may find it too difficult to obtain enough evidence to glean a meaningful picture of the custom in question.

2. Contractual cyberlaw.

Because customary cyberlaw may prove too unstable or nebulous for judicial purposes, some scholars have advocated a contractual model for cyberlaw. Such an approach would address at least some of the problems with customary cyberlaw. The contract’s language would supply the certainty and specificity lacking when customary law is in flux. Furthermore, the contract could serve as a condition for entry to cyberspace. Therefore, any user in cyberspace will have consented to its terms, and a universal understanding will exist where none would emerge via customary cyberlaw alone.

One could easily imagine such a contract. A "model code" of cyberspace conduct, specifying offenses and penalties, would provide the substantive part of the contract. Sites and provid-

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140 Christopher Anderson, The Accidental Superhighway, 336 The Economist 3 (July 1, 1995).
141 Id. Also see Dunne, 35 Jurimet J at 3 (citing the estimate of Philip Elmer-Dewitt, First Nation in Cyberspace, Time 62 (Dec 6, 1993)).
142 Dunne, Contract Law Paradigm, 35 Jurimet J at 11 ("Indeed, in a community of 20 million there probably is no such thing as a common understanding."). See also John Dale, post to NEWJURIS Cyberlaw conference, September 24, 1993 (stating that the different areas of cyberspace already have sharply divergent principles of etiquette).
143 The whole point may be moot anyway. Judge Richard Posner has suggested that courts tend to pay less attention to custom when the parties have no contractual relationship. Richard A. Posner, Economic Analysis of Law, 229-45 (Little, Brown and Co., 3d ed 1986).
144 Dunne, 35 Jurimet J at 1 (cited in note 125); Lance Rose, post to NEWJURIS Cyberlaw conference, September 24, 1993.
145 The concept of a model code, as well as the other details of the contractual cyberlaw system posited here, are based on the ambitious proposal outlined in Dunne, 35 Jurimet J at 13-15 (cited in note 125).
ers that adopt the code would restrict or refuse access for users logging on from sites and providers that have not adopted the code. All participating sites and providers would require users to agree to the contract before signing on. Local system operators would enforce the contract by restricting or eliminating the access of users who violate its terms. This would encourage a universally shared set of rules in cyberspace that the federal court in Burlington could enforce in the coin hypothetical.

Like customary cyberlaw, however, this approach suffers from certain shortcomings. Its major drawback lies in the in-

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146 Given cyberspace's decentralized nature, no one authority could impose such a contractual approach from above. Instead, a gradual bottom-up method must provide the avenue for voluntary adoption. Dunne suggests targeting educational institutions, which comprise nearly one quarter of all Internet hosts, as catalysts by asking them to adopt the contract first. Id at 13.

147 One fairness concern relates to the question of who would draft the code and contract defining cyberspace offenses and penalties. It would be impossible to seek input and approval from all cyberspace users, so scholars have advocated a more sensible and manageable approach: assemble a task force or committee to develop the code of cyberspace conduct. Hardy, 55 U Pitt L Rev at 1037 (cited in note 134). The inequity in such an approach stems from the fact that the law for several key cyberspace issues would be written by a group of unelected scholars. Some such delegation seems inevitable, however, given the impossibility of holding binding referenda throughout cyberspace on all relevant issues. Furthermore, the drafters could mitigate this inequity a great deal by seeking wide input from cyberspace users. Id.

One might also wonder whether the imposition of such a cyberspace contract would amount to an adhesion contract. The contract's effectiveness depends on adoption by a critical number of sites whose endorsement would lead to broad adoption by other sites. See discussion in Dunne, 35 Jurimet J at 13. Should it achieve such widespread adoption, users could find their access to cyberspace severely curtailed. Indeed, sites and providers might categorically refuse requests to alter the contract's terms because doing so would jeopardize their access to all other systems and providers. This would effectively eliminate what little bargaining power users might have had. Courts might look very unfavorably on the unilateral imposition of contract terms where one party has no power to bargain. Furthermore, as cyberspace becomes increasingly important for business and communications purposes, courts may find heavy-handed contract imposition even more intolerable. The entire endeavor might become illegal as an adhesion contract if it achieves domination.

While such a lack of choice causes legitimate concerns, it probably does not rise to the level of unconscionability. "Unconscionability ... [includes] an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Williams v Walker-Thomas Furniture Co., 350 F2d 445, 449 (DC Cir 1965). The "absence of meaningful choice" would probably apply if cyberspace becomes as essential to daily life as, for example, the telephone. The second element, however—"contract terms which are unreasonably favorable to the other party"—is probably lacking. The sites and providers presumably restrict access for fear of losing important connections to other sites, not to victimize users. The fear of losing access to important sites would probably qualify as "reasonable" in most courts, thus avoiding the unconscionability requirement. Another, more traditional, definition of an unconscionable agreement defines it as one "such as no man in his senses and not under delusion would make on the one hand, and no honest or fair man would accept, on the other." Greer v
herent incompleteness of all contracts: no fixed agreement can foresee all conflicts among parties, especially when the parties number in the millions. The contract surely would cover certain topics inherently relevant to cyberspace, such as copyright infringement, encryption, pornography, and privacy issues. Common-law fraud, however, probably would not leap to the drafters' minds. Indeed, any cyberspace contract likely would fail to address a whole host of illegal activities, thus providing no guidance in many areas. As a result, the parties would still need to resort to the laws of the "real world," thereby wrestling with the very choice-of-law conflicts the contract approach had hoped to eliminate.\footnote{Not all scholars propose a contract paradigm solely for the purpose of avoiding choice-of-law questions, of course, but that is the relevant goal for this Comment's hypothetical.}

Even in the unlikely event that a contract managed to cover all major crimes, torts, and other illegal activity that might occur in cyberspace, the need for a choice-of-law approach might remain. Contractual language, even when relatively on point, often must undergo judicial interpretation to settle disputes about the interstices. In such a case, it will matter which state's interpretive rules apply to the cyberspace contract, so the choice-of-law question recurs.

3. Cyberlaw courts.

The ultimate manifestation of the separate cyberlaw approach immerses the entire judicial process in the cyberlaw realm. The preceding discussions of customary law and contract approaches envisioned enforcement by the federal court in Burlington. The need for ultimate recourse to a "real world" court in those cases brought back the troublesome choice-of-law questions that a separate cyberspace law sought to avoid. The creation of a separate judicial system in cyberspace would solve that problem. These cyberlaw courts would hear individual cases, meting out justice according to cyberlaw principles.\footnote{These cyberlaw principles could stem from customary cyberlaw (see notes 126-43 and accompanying text), contractual cyberlaw (see notes 144-48 and accompanying text), or from some other source of cyberlaw that this Comment does not envisage.} By drawing entirely on cyberlaw, even for interpretation of the interstic-
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es, these cyberlaw courts would provide a purely cyberlaw solution.

Disadvantages remain, however. The lack of democratic accountability of a cyberspace court represents one fundamental shortcoming. Judges in the "real world" must either face election themselves, or be appointed by officials who face election. In cyberspace, on the other hand, no such democratic checks appear to exist. Holding a fair and binding election in cyberspace would prove impractical if not impossible.

More importantly, cyberspace courts would enjoy only a small range of remedies. Unless cyberspace users agreed to place their worldly belongings under the binding control of the cyberspace courts—a most unlikely scenario—cyberspace courts would have power only over cyberspace. They could restrict or eliminate the offender's access to areas of cyberspace. They could not, however, force the offender to pay anyone anything, to relinquish possession of any real world object, or to perform any action in the real world. Consequently, in cases where one party has suffered financial loss, such as the coin hypothetical, cybercourts would prove powerless to order an effective remedy.

This criticism may well lose force in the future. If cyberspace continues to expand, people may find it more convenient to route their financial dealings through cyberspace, make a Web site their primary place of business, or rely on computer-mediated communication as their primary connection to the world. The more people live their lives in cyberspace, the more real power cybercourts will have.

For the near future, however, the advantage of totally eliminating choice-of-law questions comes at a great cost. By avoiding real world courts entirely, the parties also forego the police power of the state that makes real world court decisions enforceable. A cybercourt proponent might argue that the solution lies in a binding agreement, enforceable in real world courts, to obey whatever verdict the cyberspace court hands down. This would resemble the binding effect of arbitration agreements, which courts routinely enforce. Such an approach, however, differs little from the contractual paradigm discussed above, and suffers from

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150 US Const, Art II, § 2, cl 2, and Art III, § 1 outline the appointment process and tenure of federal judges.
151 One major difficulty, for example, would lie in limiting each user to one vote. Users can easily have multiple addresses in cyberspace and thus vote multiple times. Moreover, savvy users would likely encounter little trouble voting several times even from the same address.
the same weaknesses.\textsuperscript{152} Once the parties sign agreements with real-world implications, courts will use real-world law to interpret the agreements and the choice-of-law specter returns.

**CONCLUSION**

The foregoing hypothetical demonstrates the results of various choice-of-law approaches to a complex cyberfraud case. The extreme ease of interstate communication and dealing makes cyberfraud cases complex, and this complexity exposes the disadvantage of a rigid and mechanical rule like \textit{lex loci}. It also highlights the potential weaknesses of the governmental interest analysis and the choice-influencing considerations approach: each supplies needed flexibility over \textit{lex loci}, but also reverts too easily to a default rule favoring the forum state.\textsuperscript{153} As cases become increasingly complex, the wisest choice will favor desirable results over discrete and simple rules. Maximum flexibility can best meet the challenges presented by increasingly difficult fact patterns. The Restatement (Second) of Conflict of Laws provides more flexibility than either Professor Currie's or Professor Leflar's approaches because it allows the decision maker to weigh all of their elements and others too. This approach, while cumbersome, seems most capable of providing appropriate outcomes.

More ambitious solutions might eliminate the choice-of-law difficulties altogether by imposing a single legal regime on cyberspace conflicts. Fully satisfactory models have yet to emerge, however. The judicial creation of a federal common law for cyberspace would violate the \textit{Erie} doctrine. The creation of a separate cyberspace law would avoid that difficulty, but it remains unclear whether a customary cyberlaw approach would provide a sufficiently stable and equitable answer. Contractual paradigms may appear to work, but will succumb to the same choice-of-law difficulties in the end. The use of cyberspace courts offers the surest way to avoid choice-of-law questions, but it would also lead to unenforceable or weak solutions in many cases.

The most effective approach to complex cyberfraud cases, therefore, lies in the Restatement (Second) approach to conflicts of law. That approach allows the court to consider all relevant

\textsuperscript{152} See notes 144-48 and accompanying text.

\textsuperscript{153} This favoring of the forum state is explicit in the governmental interest analysis, and implicit in the choice-influencing considerations method.
factors, weigh them, and choose the most sensible result. While the most-significant-relationship test can become cumbersome and impose high decision costs, it enjoys greater flexibility for finding the right answer, a key criterion for conflicts arising in cyberspace.