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CONFLICTS — INSURANCE — ENVIRONMENTAL LAW
— LIMITED *RENVOI* EXCEPTION WILL BE UTILIZED
WHEN *LEX LOCI CONTRACTUS* INDICATES THAT
FOREIGN JURISDICTION WOULD APPLY MARYLAND
LAW TO SUBSTANTIVE ISSUE. *American Motorists
Insurance Co. v. ARTRA Group, Inc.*, 338 Md. 560, 659 A.2d
1295 (1995).

I. INTRODUCTION

Toxic industrial waste dumps represent one of the greatest modern hazards to the environment in our country.¹ By one count, there are approximately 30,000 such sites in the United States, ranging from large commercial dumps to one or two barrels of waste deposited on a roadside.² The cost of cleaning up these toxic waste sites is as staggering as their number: it has been estimated that as much as five hundred billion dollars is required just to remedy contamination at the 10,000 most heavily contaminated dumps.³ As a result, a flood of litigation to determine liability for remedial efforts has ensued between insurers who issued comprehensive general liability (CGL) policies to commercial and industrial polluters, and the insured businesses whose products and wastes have contaminated soil and groundwater.⁴ In *American Motorists Insurance Co. v. ARTRA Group, Inc. (American Motorists)*,⁵ the Court of Appeals of Maryland addressed the increasingly litigated issue of insurance liability for environmental remediation efforts while at the same time adding a new wrinkle to the classic legal conundrum of conflict of laws.

In 1991, American Motorists Insurance Co. filed a declaratory judgment action against ARTRA Group, Inc. to determine its duty to defend ARTRA in a suit filed by the purchaser of ARTRA's former manufacturing facility.⁶ The new owner had sued ARTRA to recover the costs of remedying extensive pollution at the facility,

1. See generally Charles Child, *The Waste of Superfund*, CRAIN'S DET. BUS., Feb. 16, 1989.

2. See *id.* at 22.

3. See *id.*

4. See *infra* notes 41, 42 and accompanying text.

5. 338 Md. 560, 659 A.2d 1295 (1995).

6. See *id.* at 563-64, 659 A.2d at 1296-97.

which had allegedly occurred over a period of decades as a result of the plant's normal business practices.⁷

The *American Motorists* court stated, in dicta, that an exception to Maryland's settled contractual conflict-of-laws doctrine of *lex loci contractus*⁸ would exist when a contract is formed in a state whose courts would apply the law of Maryland as the state with the most significant contacts to the litigation.⁹ The court of appeals further noted that an insurer had no duty to defend or indemnify an insured against the costs of cleaning up longstanding environmental contamination under a CGL policy which contained a pollution exclusion clause precluding all coverage except where the release of pollutants is "sudden and accidental."¹⁰

The court of appeals's treatment of the conflict of laws and insurance issues is both noteworthy and troubling. The *American Motorists* court's holding on conflict of laws suggests that the court may be contemplating a change from Maryland's adherence to *lex loci contractus*.¹¹ More importantly, although the court of appeals stated that its adoption of *renvoi*,¹² a controversial conflict-of-laws doctrine, promotes the conflict-of-laws goals of "simplicity, predictability, and uniformity,"¹³ the holding is not a step towards adoption of a modern approach to contractual choice of law theory.¹⁴ It is instead merely a loophole to justify the application of Maryland law when *lex loci contractus* prescribes otherwise.¹⁵

The court of appeals's adoption of a narrow construction of the "sudden and accidental" pollution exclusion exception to CGL policies brings Maryland into line with the majority of state and federal

7. See *id.* at 564, 590-93, 659 A.2d at 1296-97, 1307-09.

8. *Lex loci contractus* literally means "the law of the place of contracting." 15A C.J.S. *Conflict of Laws* § 11(1) (1967). The term more specifically describes several methods of determining which jurisdiction's law should be applied. See *infra* notes 100-08, 122 and accompanying text for a detailed discussion of *lex loci contractus*.

9. See *id.* at 573, 659 A.2d at 1301.

10. See *id.* at 590-93, 659 A.2d at 1310-11.

11. *Lex loci contractus* and more recent choice-of-law theories are discussed more fully *infra* notes 99-115 and accompanying text.

12. *Renvoi* is a controversial conflict-of-laws doctrine under which the court deciding a case adopts the choice-of-laws principles of another jurisdiction for purposes of determining the applicable substantive law. *Renvoi* is discussed more fully *infra* notes 139-72 and accompanying text.

13. *American Motorists*, 338 Md. at 579, 659 A.2d at 1304.

14. See *id.* at 580, 659 A.2d at 1305. The court's position that *lex loci contractus* is an outdated doctrine and is no longer appropriate in all factual settings is discussed *infra* notes 214-16 and accompanying text. See also *infra* notes 107, 122-38 and accompanying text for a discussion of exceptions to the principle of *lex loci contractus*.

15. See *infra* notes 241-44.

courts which have recently decided this issue.¹⁶ It is not what the court said, but rather what it failed to address, that makes this decision vexatious; the court of appeals did not consider the drafting history of the policy language, which is inconsistent with the insurer's claim that the "sudden and accidental" exception precludes coverage except where the polluting event is of a short-lived or instantaneous nature.¹⁷

II. HISTORICAL DEVELOPMENT

A. *Comprehensive General Liability Insurance Policies*

1. An Introduction to Liability Insurance

Insurance is based on the theory of buying and selling contingent or unknown risks.¹⁸ When an insurance policy is sold, the contingent risk of loss is transferred from the insured to the insurer.¹⁹ Liability insurance is a contractual undertaking by which the insurer agrees to defend and indemnify the insured against the contingent risk of liability for damages resulting from bodily injury or injury to the property of others.²⁰ An insurer's duty to defend arises when suit is filed against an insured by a tort plaintiff who alleges injuries or damages which are within, or "potentially within," the scope of the policy's coverage.²¹ When this "potentiality of coverage" exists, the

16. *See infra* note 55.

17. *See American Motorists*, 338 Md. at 586-93, 659 A.2d at 1308-11. The court of appeals based its opinion on whether ambiguity existed in the phrase "sudden and accidental" and did not address the issue of the intent of the insurance industry in adopting this language. *See id.*; *see also infra* notes 34-69.

18. *See* 44 C.J.S. *Insurance* § 2 (1993) (defining insurance as a contractual undertaking by one party to indemnify another against "loss, damage, or liability" stemming from a contingent event).

19. *See id.* Insurance involves a contingent risk of loss borne by one party being transferred to another party, and that risk being distributed among "similarly situated individuals." *Id.*

20. *See* 44 C.J.S. *Insurance* § 9 (1993). The duty to defend arises as a result of the insurer's contractual promise to do so in the insurance policy. *See* Andrew Janquitto, *Insurer's Duty to Defend in Maryland*, 18 U. BALT. L. REV. 1, 3-4 (1988). Not all liability policies provide a duty to defend; some types of liability policies provide only liability coverage. *See id.* When the insurance policy provides a duty to defend, the insurer must defend against or pay any claim within the coverage of the policy. *See id.*

21. *See* *Chantel Assocs. v. Mount Vernon Fire Ins. Co.*, 338 Md. 131, 656 A.2d 779 (1995); *Aetna Cas. & Sur. Co. v. Cochran*, 337 Md. 98, 651 A.2d 859 (1995); *see also* *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1220 (Ill. 1992).

insurer is obligated to defend the insured in the litigation and indemnify the insured for any costs incurred as a result.²²

2. The Insurer's Duty to Defend

Generally, an insurer's defense duty is broader than its indemnification duty.²³ In *Brohawn v. Transamerica Insurance Co.*,²⁴ the Court of Appeals of Maryland held that the obligation of an insurer to defend its insured under a contract provision is determined by the allegations of the tort action.²⁵ If the tort-plaintiff alleges to have a claim covered by the policy, the insurer's duty to defend arises.²⁶ Even if the alleged facts are not clearly within the policy coverage, the insurer must still defend the insured if the claim may potentially be covered by the policy.²⁷ A potentiality of coverage exists if the insured establishes that there is a "reasonable potential that the issue triggering coverage will be generated at trial."²⁸

Comprehensive general liability (CGL) policies are general liability policies designed to protect businesses against any contingent risks of loss which may arise as a result of normal operations and which may, as a result, jeopardize a business' financial stability.²⁹

22. See *Chantel*, 338 Md. at 138, 656 A.2d at 784; Janquitto, *supra* note 20, at 2-3.

23. See *Outboard Marine*, 607 N.E.2d at 1220. The insurer will be obligated to defend claims which either definitely or potentially fall within its scope of coverage. See Janquitto, *supra* note 20, at 2.

24. 276 Md. 396, 347 A.2d 842 (1975).

25. See *id.* at 407-08, 347 A.2d at 850.

26. See *id.* at 407, 347 A.2d at 850.

27. See *id.* The "potentiality" rule created by the *Brohawn* court implies that only when the insurer can show conclusively as a matter of law that there is no possible factual or legal basis through which the insurer's duty to indemnify may arise will the insurer be relieved of the duty to defend. See Janquitto, *supra* note 20, at 15. Although commonly referred to as liability insurance, policies which specify a duty of the insurer to defend the insured also provide "litigation insurance" to protect the policyholder from the cost of defending adverse legal actions. See *Brohawn*, 276 Md. at 410, 347 A.2d at 851. Under the *Brohawn* and *Outboard Marine* holdings, the insurer would be liable for defense of claims for which if the defense is successful it will not become obligated to pay. See Janquitto, *supra* note 20, at 13-14 (stating insurer is obliged to defend even bad-faith claims filed solely to raise potentiality of coverage).

28. *Aetna Cas. & Sur. Co. v. Cochran*, 337 Md. 98, 111-12, 651 A.2d 859, 866 (1995).

29. See Nancer Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610, 620-21 (1990).

3. History and Construction of the Pollution Exclusion Clause and the "Sudden and Accidental" Exception

Standard-form CGL policies are drafted by the Insurance Services Office (ISO).³⁰ Those policies issued from 1973 to 1985 generally excluded coverage for pollution releases unless the release was "sudden and accidental."³¹ Typically found as exclusion "f" in the standard ISO policy form,³² the exclusion clause precluded coverage for:

bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*³³

The apparent intent of the insurance industry in drafting this clause was to eliminate coverage for damages caused by intentional or expected discharges of hazardous material during the normal course of business.³⁴ Whether the drafters intended to preclude coverage for unintentional releases or merely unintentional damages remains unclear.³⁵ It appears, however, that the insurance industry did not consider limiting coverage to accidental releases of short duration.³⁶ As such, two legal interpretations of "sudden and acci-

30. *See id.* at 621. The ISO is a trade organization for the insurance industry and serves the industry by drafting standardized policy forms and obtaining the approval required for the issuance of its forms from governmental regulatory agencies. *See id.*

31. *See id.* at 612.

32. *See id.* at 612-13.

33. *See id.* at 613; *see also* *American Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 564-65, 659 A.2d 1295, 1297 (1995).

34. *See* Ballard & Manus, *supra* note 29, at 625-26. The explanatory memoranda provided to state insurance regulators in 1970 by the Insurance Rating Board (IRB) and the Mutual Insurance Rating Bureau (MIRB), two insurance industry associations tasked with drafting policy language, suggested that the primary purpose of exclusion "f" was to preclude liability only for pollution related injuries that were intended or expected. *See id.*

35. *See id.* at 625-27.

36. *See supra* note 34. This explanatory memorandum was described as a "paradigm of ambiguity," because the IRB and MIRB stated that the purpose of the exclusion was to preclude coverage in cases where the injuries resulting from the pollution were intended or expected, while the exclusion clause itself referred to the *releases* of pollution, not to the damages or injuries resulting from the releases. *See* Ballard & Manus, *supra* note 29, at 626. The confusion and lack of clarity in the insurers' purpose in adopting this clause has led to confusion over whether the insurance industry meant to cover releases of pollution that

dental" have evolved.³⁷ Under the "unintentional and unexpected" view, discharges of pollutants which are merely unintended and unexpected, such as the gradual pollution by leakage of toxic wastes into the ground, will be covered.³⁸ If "sudden" is construed to have a temporal element of abruptness or swiftness, however, coverage for damages resulting from such gradual releases is precluded.³⁹

Enforcement of environmental laws such as the Comprehensive Environmental Response and Liability Act (CERCLA)⁴⁰ by federal,

were unintentional, or merely to cover releases of pollution where the damages were unintentional. *See id.* at 626-27. The lack of clarity also created a problem in situations where the policyholder had intentionally discharged waste, but without intention to cause, or expectation of causing, environmental damage. *See id.* at 625-27. In its focus on intentional versus unintentional discharges and damages, the insurance industry failed to consider whether or not the pollution exclusion should preclude coverage except where the releases of pollution were of a temporal nature. *See id.* at 627. *But see infra* note 68 (discussing Supreme Court of New Jersey's holding that clause must be construed in manner consistent with which it was presented to state insurance regulators).

37. *See supra* notes 44-91.

38. *See Ballard & Manus, supra* note 29, at 633-34. Courts deciding early cases involving the "sudden and accidental" clause read it expansively and held that damages which resulted from pollution releases were not excluded from coverage as long as the releases were merely "unexpected and unintended." *See, e.g., Lansco, Inc. v. Department of Env'tl. Protection*, 350 A.2d 520 (N.J. Super. Ct. Ch. Div. 1975) (holding that an oil spill presumably caused by vandalism and neither expected nor intended by the insured was sudden and accidental within meaning of exclusion clause), *aff'd*, 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976); *Farm Family Mut. Ins. Co. v. Bagley*, 409 N.Y.S.2d 294 (N.Y. App. Div. 1978) (holding coverage not precluded by "sudden and accidental" exception where insured intentionally sprayed chemicals on his land and chemicals traveled through air to land on adjoining property, causing damage thereto); *see also Ballard & Manus, supra* note 29, at 633-35. Some courts went even further, reading the exception statement as requiring coverage where merely the *damage*, rather than the release of pollution, was "unintended and unexpected." *See Ballard & Manus, supra* note 29, at 637-38. In doing so, these courts held that the exclusion clause was simply a restatement of the term "occurrence." *See, e.g., Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co.*, 451 A.2d 990 (N.J. Super. Ct. Law Div. 1982); *see also Ballard & Manus, supra* note 29, at 637-38. According to Ballard & Manus, an occurrence is an accident or unintended, sudden, unexpected event which results, during the policy period, in bodily injury or property damage neither expected nor intended by the insured. *See Ballard & Manus, supra* note 29, at 623-24. In essence, these holdings were tantamount to the exception swallowing the exclusion clause. *See id.*

39. *See Ballard & Manus, supra* note 29, at 638-40. During the past ten years, courts have taken a more restrictive approach to this issue, holding that coverage was precluded when the release of pollution was not of a temporal nature. *See id.* *But see infra* note 42 for a description of a possible reconciliation between the two interpretations of "sudden."

40. 42 U.S.C. §§ 9601-9622 (1994); *see also infra* note 181 (discussing applicable Maryland environmental protection statutes).

state, and local governments has led to costly remediation efforts on the part of CGL policyholders.⁴¹ As a result, a nationwide barrage of litigation has ensued between insureds and insurers concerning liability for environmental remediation costs under CGL policies,⁴² much of it surrounding the interpretation of this exception to the pollution exclusion clause.⁴³

4. Court Interpretations of "Sudden and Accidental": "Abrupt" or "Instantaneous" versus "Unintended and Unexpected"

There is a difference of opinion as to whether the word "sudden," as used in the context of the pollution exclusion clause, has temporal meaning.⁴⁴ The Supreme Court of Illinois, in *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*,⁴⁵ held that the term

41. See Ballard & Manus, *supra* note 29, at 611. Individuals and corporate entities who must pay for the remedying of environmental misdeeds occurring years ago are attempting to hold insurers liable under policies which covered those years. See *id.* at 612.

42. See *id.* at 612-13. In terms of furthering the goals of liability insurance, an interpretation of the exclusion which provides coverage for unintended and unexpected pollution releases is consistent with the general principles of business liability insurance: to provide coverage for unintended and unexpected acts which lead to liability of the policyholder, and thereby threaten its financial stability while excluding coverage for losses or damages resulting from acts intended or expected to cause loss or damage. See *id.* at 628-29.

Ballard and Manus have also suggested a possible reconciliation of "sudden" and "gradual," arguing that these two words are not antonyms as frequently asserted by the insurers. See *id.* at 619-20. Instead, both terms may describe an event which has an unanticipated beginning but thereafter progresses gradually, such as a "sudden illness." See *id.*; see also *Morton Int'l Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 831, 871 (N.J. 1993), *cert. denied*, 510 U.S. 112 (1994).

43. See *supra* note 39.

44. The term "sudden" has been held ambiguous and to mean "unintended" or "unexpected" by the highest courts of Colorado, Georgia, Illinois, New Jersey, Washington, West Virginia, and Wisconsin. See, e.g., *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1087 (Colo. 1991); *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686, 688 (Ga. 1989); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1218-20 (Ill. 1992), *modified*, 670 N.E.2d 740 (Ill. 1996); *Morton Int'l, Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 831, 847-48 (N.J. 1993), *cert. denied*, 510 U.S. 112 (1994); *Queen City Farms, Inc. v. Aetna Cas. & Sur. Co.*, 882 P.2d 703, 721 (Wash. 1994), *modified*, 891 P.2d 718 (Wash. 1995); *Joy Techs., Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493, 497-500 (W. Va. 1992); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 573-74 (Wis. 1990); see also *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 151 (7th Cir. 1994). But see *infra* note 55 for a listing of states and federal courts which have held the exclusion exception to be unambiguous.

45. 607 N.E.2d 1204 (Ill. 1992).

"sudden" was ambiguous.⁴⁶ This case involved allegations of environmental contamination resulting from frequent spills and leaks of contaminants into lakes and streams occurring over a 13-year period.⁴⁷ The *Outboard Marine* court noted that the dictionary definition of the word "sudden" was both "unforeseen" and "unexpected" as well as "abrupt, rapid, or swift."⁴⁸ The court also stated that other state and federal courts were divided on the issue of whether sudden meant "abrupt" or "unintended and unexpected."⁴⁹ The court concluded that since "sudden" was ambiguous, it must be construed in favor of the insured.⁵⁰ "Sudden" was therefore construed to mean "unintended or unexpected."⁵¹

The *Outboard Marine* court also held that since an accidental release or discharge was defined by the policy as a "continuous or repeated release," a gradual release of a continuous or repeated nature would be an accidental release or exposure.⁵² The court concluded that when the policy was viewed as a whole, the intent of the contracting parties was that the policy's coverage would protect the insured from liability for damages arising from unexpected or unintended releases of pollution, including those that may have been continuous.⁵³ The court held that the insurer had a duty under the policy to defend the insured against damages suits filed by the United States Environmental Protection Agency (EPA) and by state officials if it was possible that at least some of the releases could be considered unexpected and unintended.⁵⁴

46. *See id.* at 1218.

47. *See id.* at 1208, 1213-14.

48. *See id.* at 1218.

49. *See id.*; *see also supra* note 44; *infra* note 55.

50. *See Outboard Marine*, 607 N.E.2d at 1218. It is a general principle of law that ambiguities in a written contract are always construed against the party which drafted the contract. *See, e.g., id.* at 1212-13; *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 667 A.2d 617 (1995) (holding Maryland follows same principle).

51. *See Outboard Marine*, 607 N.E.2d at 1218.

52. *See id.* at 1219.

53. *See id.* The *Outboard Marine* court concluded that a definition of "sudden" in the context of the pollution exclusion clause would be inconsistent with the policy as a whole because an "occurrence," the event triggering coverage, was defined in the policy as "an accident, including continuous or repeated exposure to conditions, which results in . . . property damage neither expected nor intended from the standpoint of the insured." *Id.* The court stated that in light of the policy's definition of "accident" as including "continuous or repeated exposure(s)," an accident could be characterized as a "gradual" event. *See id.* Therefore, a construction of "sudden" as quick or instantaneous would lead to the incongruous interpretation that coverage was provided if the releases of pollutants were quick or instantaneous and gradual or "continuous or repeated." *See id.*; *see also Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1092 (Colo. 1991).

54. *See Outboard Marine*, 607 N.E.2d at 1220-21. The *Outboard Marine* court

A significant number of states, however, have held the "sudden and accidental" exception to be unambiguous and to preclude coverage if the damage-producing pollution release is not quick or instantaneous.⁵⁵ For example, in *United States Fidelity and Guaranty Co. v. Star Fire Coals, Inc.*,⁵⁶ the sudden and accidental exception was held to be unambiguous under Kentucky law by the United States Court of Appeals for the Sixth Circuit.⁵⁷ The *Star Fire* court found that under the pollution exclusion clause, no coverage existed where the insured, a coal processing company, had discharged excessive amounts of coal dust over a period of several years, causing bodily injury and property damage to nearby residents.⁵⁸ In holding

reversed a grant of summary judgment for the insurer in which the lower court held that the insurer had no duty to defend or indemnify insured. *See id.* at 1221.

55. The term "sudden" has been held unambiguous in the context of the pollution exclusion clause exception and has been ascribed a temporal meaning by the highest courts of Florida, Massachusetts, Michigan, Minnesota, North Carolina, and Ohio. *See, e.g.,* Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700 (Fla. 1994); Lumbermens Mut. Cas. Co. v. Belleville Indus., 555 N.E.2d 568 (Mass. 1990); Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392 (Mich. 1991); Board of Regents of the Univ. of Minn. v. Royal Ins. Co., 517 N.W.2d 888 (Minn. 1994); Waste Management of the Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986); Hybud Equip. Co. v. Sphere Drake Ins. Co., 597 N.E.2d 1096 (Ohio 1992). *See generally* Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc., 40 F.3d 146, 151-52 (7th Cir. 1994) (discussing how other courts have treated this issue).

Several United States courts of appeals have held the "sudden and accidental" exception to the pollution exclusion clause unambiguous under state law. *See, e.g.,* Cincinnati Ins. Co., 40 F.3d at 152 n.8; Aeroquip Corp. v. Aetna Cas. & Sur. Co., 26 F.3d 893 (9th Cir. 1994) (construing California law); Aetna Cas. & Sur. Co. v. General Dynamics Corp., 968 F.2d 707 (8th Cir. 1992) (construing Missouri law); Hartford Accident & Indem. Co. v. United States Fidelity & Guar. Co., 962 F.2d 1484 (10th Cir. 1992) (construing Utah law); Northern Ins. Co. v. Aardvark Assocs., Inc., 942 F.2d 189 (3d Cir. 1991) (construing Pennsylvania law); New York v. AMRO Realty Corp., 936 F.2d 1420 (2d Cir. 1991) (construing New York law); A. Johnson & Co. v. Aetna Cas. & Sur. Co., 933 F.2d 66 (1st Cir. 1991) (construing Maine law); United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co., 875 F.2d 868 (6th Cir. 1989) *aff'g without opinion*, 693 F. Supp. 617 (M.D. Tenn. 1988) (construing Tennessee law); United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988) (construing Kentucky law); Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984) (construing New Hampshire law); *see also* United States Fidelity & Guar. Co. v. Morrison Grain Co., 734 F. Supp. 437 (D. Kan. 1990) (construing Kansas law), *aff'd*, 999 F.2d 489 (10th Cir. 1993). *See generally* Cincinnati Ins. Co., 40 F.3d at 151-52 (discussing how other courts have treated this issue). *See supra* note 44 for a listing of state and federal courts which have held the exclusion exception to be ambiguous.

56. 856 F.2d 31 (6th Cir. 1988).

57. *See id.* at 34-35.

58. *See id.* at 35.

that courts must give all terms in an insurance contract their plain meanings when they are not ambiguous, and that the term "sudden" necessarily contained a temporal element,⁵⁹ the *Star Fire* court rejected an interpretation of "sudden and accidental" as "unexpected and unintended."⁶⁰

In *Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc.*⁶¹ the Supreme Judicial Court of Massachusetts answered certified questions from the United States District Court for the District of Massachusetts⁶² concerning Massachusetts's position on whether ambiguity existed in the "sudden and accidental" exception to the pollution exclusion clause.⁶³ The insured in *Lumbermens* was alleged to have released oil contaminated with polychlorinated biphenyls (PCBs) into a nearby river.⁶⁴ PCB is a substance widely known to be toxic and commonly used until 1978 to manufacture electric power transmission equipment.⁶⁵ The releases occurred as a result of both normal plant activities, in which PCB-laden oil accumulated on the factory floor was washed into storm drains, and two extraordinary events, a flood and a fire at the factory both of which resulted in the runoff of water containing PCBs into the storm drains.⁶⁶

The *Lumbermens* court needed to determine what meaning would be ascribed to the word "sudden" in the context of the exception.⁶⁷ The court held that the term "sudden" was not ambiguous, and that the word "sudden" did in fact have a temporal aspect to it.⁶⁸ The

59. *See id.* The court stated that this "language is clear and plain, [and is] something only a lawyer's ingenuity could make ambiguous." *Id.* at 34; *see also Morrison Grain*, 734 F. Supp. at 447 (stating that pollution exclusion "is not merely a restatement of the definition of occurrence." Rather than merely meaning "unexpected and unintended," the exclusion clause limits policy coverage "to accidents distinct in time and place"), *aff'd*, 999 F.2d 489 (10th Cir. 1993); *American Motorists Ins. Co. v. General Host Corp.*, 667 F. Supp. 1423, 1428 (D. Kan. 1987), *aff'd*, 946 F.2d 1482 (10th Cir. 1991), *vacated in part on other grounds*, 946 F.2d 1489 (10th Cir. 1991).

60. *See Star Fire*, 856 F.2d at 34.

61. 555 N.E.2d 568 (Mass. 1990).

62. Questions were certified by *In re Achusnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution*, 725 F. Supp. 1264 (D. Mass. 1989). Answers to certified questions were followed in *Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc.*, 938 F.2d 1423 (1st Cir. 1991).

63. *See Lumbermens*, 555 N.E.2d at 572-73.

64. *See Lumbermens*, 938 F.2d at 1424-26. PCBs were outlawed in 1978 because of their high toxicity. *See id.* at 1424. The type of PCBs used at Belleville's plant, however, was a kind which was over time 99.6% biodegradable into nontoxic substances, leaving only 0.4% of the material hazardous. *See id.*

65. *See id.* at 1424-26.

66. *See id.* at 1426.

67. *See Lumbermens*, 555 N.E.2d at 571.

68. *See id.* at 572-73. The *Lumbermens* court refused to consider evidence of the drafting history of the pollution exclusion. *See id.* Although finding the term

Lumbermens court consequently concluded that only “[i]f the release was abrupt and also accidental” would coverage exist for the damage resulting from the pollution discharge.⁶⁹

5. The “Microanalysis” Approach: A Failed Attempt to Characterize Long-Term Polluting Activities as “Sudden and Accidental”

Some insureds have argued that they should be provided coverage under a “microanalysis” approach to the release of pollutants.⁷⁰ Under the microanalysis theory, gradual releases of pollution occurring over a substantial period of time are redefined as a series of discrete, individual, and abrupt or instantaneous discharges.⁷¹ Under

“sudden” unambiguous in the exclusion clause, the *Lumbermens* court also stated in dicta that because there was no evidence that drafting history was either considered by the policyholder before purchasing the policy or affected contract negotiations, the drafting history could not be used to resolve ambiguity present in the policy. *See id.* at 573. The court reasoned that since the drafting history was not the subject of contract negotiations, it could not be considered as parol evidence in interpreting the contract. *See id.* Instead, the *Lumbermans* court held, the use of drafting history to construe an insurance policy was similar to the use of statutory drafting history to determining the meaning of ambiguous legislation. *See id. But cf.* *Morton Int’l Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 831 (N.J. 1993), *cert. denied*, 510 U.S. 112 (1994). The *Morton* court discussed the drafting history of the pollution exclusion, the “sudden and accidental” exception, and the insurance industry’s representation to state insurance commissions that the purpose of the clause was to eliminate coverage only for releases of pollution which were intended or expected to result in injury or damage. *See id.* at 844-73. The *Morton* court concluded that in light of the insurance industry’s intent expressed to regulators that to preclude coverage only when the discharge of pollutants was intentional, the insurance companies had misrepresented their intentions in adopting the language. *See id.* at 873-74. Thus, if the insurers intended to restrict coverage to only situations where the release of pollution was “abrupt and accidental,” insurance premiums should have been significantly reduced. *See id.* at 871-73. The *Morton* court consequently held that the “sudden and accidental” exception must be construed to preclude coverage only when the pollution releases were intentional. *See id.* at 875.

69. *Lumbermens*, 555 N.E.2d at 572. The court stated that the “abruptness of the commencement” of a pollution release was the critical element in determining whether the discharge was “sudden.” *See id.* If “sudden” was “to have any meaning or value in the exception to the pollution exclusion clause” it must pertain to an “abrupt” pollution discharge. *Id.*

70. *See infra* notes 168-69.

71. *See Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 503 N.W.2d 793, 797 (Minn. Ct. App. 1993) (holding that discharges of pollution at landfill which occurred as result of toxic waste being placed in landfill over period of twenty years resulting in contamination of groundwater could not “reasonably” be classified as “sudden”); *see also infra* notes 168-69. In *Sylvester*, the policy-

this characterization, the gradual discharges would fit within the restricted "temporal" or "unambiguous" construction of the pollution exception.⁷² This argument generally has been unsuccessful,⁷³ criticized as illogical and in opposition to the underlying intent of insurers to exclude from coverage those insureds who deliberately and intentionally pollute.⁷⁴

In *Anaconda Minerals Co. v. Stoller Chemical Co.*,⁷⁵ the insured used flue dust from steel mills in the production of fertilizer.⁷⁶ Flue dust, contaminated with lead, arsenic and other toxic metals, was regularly stored outside the plant on the ground where it was dispersed by the elements.⁷⁷ The insured also dumped contaminated metal processing sludge, off-specification flue dust,⁷⁸ and other toxic materials in open piles around the factory where they contaminated the environment.⁷⁹

holder, who was the operator of a landfill from which toxic materials had seeped into the ground and contaminated the groundwater, argued that the court should analyze each release of contaminants from the landfill as a discrete and individual discharge rather than looking at the nature of the contamination as a whole. *See id.* The court refused to follow this approach on the basis that "under that theory all releases would be sudden," and that "[o]ne can always isolate a specific moment at which pollution actually enters the environment." *Id.* (quoting *Ray Indus., Inc. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 768 (6th Cir. 1992)). The *Sylvester* court stated that under this approach of classifying each individual release of pollutants from the landfill as "sudden and accidental" the "exception essentially would swallow the 'rule.'" *Id.*

72. *See infra* notes 168-69.

73. While state authority on the issue is sparse, several United States district courts and courts of appeals have rejected this approach. *See, e.g.*, *Bureau of Engraving, Inc. v. Federal Ins. Co.*, 5 F.3d 1175, 1177-78 (8th Cir. 1993) (construing Minnesota law as rejecting the "discharge-by-discharge" theory on basis of the *Sylvester* court's holding); *Ray Indus. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 768 (6th Cir. 1992) (rejecting policyholder's argument that each release of toxic chemicals from landfill which occurred over a period of several years was "sudden when viewed in isolation" under theory that every release would therefore be sudden, and stating that the court was not satisfied that releases "were brief or momentary"); *Lumbermens Mut. Cas. Co. v. Belleville Indus.*, 938 F.2d 1423, 1428 (1st Cir. 1991) (rejecting microanalytical approach because "almost any event can be labelled unexpected, [b]ut [this] approach would eviscerate the exclusion for pollution"); *United States Fidelity & Guar. Co. v. Star Fire Coals, Inc.*, 856 F.2d 31, 35 (6th Cir. 1988) (rejecting as "impossible" insured's characterization of regular discharges of coal dust over period of several years as "'sudden' within the plain and obvious meaning of that term"); *Sylvester*, 503 N.W.2d at 797 (rejecting "microanalysis theory" as allowing exception to "swallow the rule").

74. *See supra* notes 71, 73; *infra* notes 75-81.

75. 773 F. Supp. 1498 (D. Utah 1991), *aff'd*, 990 F.2d 1175 (10th Cir. 1993).

76. *See id.* at 1500-01.

77. *See id.* at 1501.

78. *See id.* Off-specification flue dust is waste material generated by "aborted runs" of the manufacturing processes. *See id.*

79. *See id.*

The *Anaconda* court held that the term "sudden" was synonymous with "abruptly" or "quickly" rather than "unexpected," and concluded that routine discharges of pollutants occurring over a lengthy period were not "sudden" discharges.⁸⁰ The *Anaconda* court further held that intentional and routine discharges were neither sudden and accidental nor unexpected and unintended.⁸¹

6. Maryland's Treatment of the Pollution Exclusion in the Lower Courts: Looking to the "Plain Meaning" of the Policy Terms

In *Bentz v. Mutual Fire, Marine & Inland Insurance Co.*,⁸² homeowners contracted a termite exterminator to treat their home.⁸³ They sued the termite exterminator and its insurance company after the exterminator's agent improperly applied pesticides to the interior of the dwelling and to exposed exterior portions, rendering the house uninhabitable.⁸⁴ The exterminator's insurance clause contained the pollution exclusion clause, and the homeowners sought a declaratory judgment that the exclusion clause did not exclude their claim.⁸⁵

The Court of Special Appeals of Maryland held that the sudden and accidental exception was not ambiguous, and that the terms "sudden" and "accidental" were "well defined in the standard dictionaries."⁸⁶ Furthermore, the *Bentz* court stated that the terms "sudden" and "accidental" were neither intrinsically unclear nor unclear in the context of the insurance policy.⁸⁷ Thus, a reasonable person reading this language would be able to determine its meaning on its face without any special knowledge about the insurance contract and would also be able to determine its meaning from the context of the policy.⁸⁸ The *Bentz* court concluded that the negligent application of pesticides was within the "sudden and accidental" exception: the discharge was accidental because it was "unintended," and was sudden because the chemicals were sprayed directly on the home, an "instantaneous" contact.⁸⁹

80. See *id.* at 1504. The *Anaconda* court stated that "[t]o strip 'sudden' of its temporal element" and construe it as meaning only "'unexpected' . . . would render 'accidental' mere surplusage." *Id.* at 1505.

81. See *id.* at 1508.

82. 83 Md. App. 524, 575 A.2d 795 (1990).

83. See *id.* at 526, 575 A.2d at 796.

84. See *id.* at 527, 575 A.2d at 796.

85. See *id.* at 530, 575 A.2d at 798.

86. *Id.* at 537, 575 A.2d at 801.

87. See *id.*

88. See *id.*; see also *American Motorists Ins. Co. v. General Host Corp.*, 667 F. Supp. 1423, 1429 (D. Kan. 1987) (stating that the court "declines to contort the plain language of the policy").

89. See *Bentz*, 83 Md. App. at 540, 575 A.2d at 803.

Although the *Bentz* court concluded that the pollution clause did not exclude coverage when the harm directly resulted from the improper use of toxic substances,⁹⁰ it did not have the opportunity to determine the effect of the exclusion clause when the pollution resulted from the insured's inappropriate storage and disposal practices. The majority of the liability cases arise from contamination resulting from the insureds' improper methods of storing and disposing of hazardous materials.⁹¹ The liability of an insurer under Maryland law when contamination occurred in this manner remained unsettled until the *American Motorists* decision.⁹²

B. Conflict of Laws

1. Introduction to Conflict of Laws

In general, conflict of laws is a distinct subject area of legal study. It is concerned with principles and policies that courts apply when taking into consideration elements of law of other jurisdictions.⁹³ These principles aspire generally to promote fairness and uniformity between jurisdictions, to define the extent to which the laws of a state should have effect on another, and to determine whether the rules of one or another state should be enforced in a given set of circumstances.⁹⁴

90. *See id.*

91. *See, e.g.*, *Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co.*, 451 A.2d 990 (N.J. Super. Ct. Law Div. 1982) (involving negligent site selection, design, and maintenance of landfill); *Lansco v. Department of Env'tl. Protection*, 350 A.2d 520 (N.J. Super. Ct. Ch. Div. 1975), *aff'd per curiam*, 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976) (involving oil spill caused by vandals); *Powers Chemco, Inc. v. Federal Ins. Co.*, 533 N.Y.S.2d 1010 (N.Y. App. Div. 1988), *aff'd*, 548 N.E.2d 1301 (N.Y. 1989) (involving buried hazardous wastes); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374 (N.C. 1986) (determining liability of hauler of toxic wastes); *Techalloy Co. v. Reliance Ins. Co.*, 487 A.2d 820 (Pa. Super. Ct. 1984) (involving dumping or storing of chemicals). *But cf.* *Farm Family Mut. Ins. Co. v. Bagley*, 409 N.Y.S.2d 294 (N.Y. App. Div. 1978) (involving liability of insured who was hired to spray pesticide on a customer's crops, but inadvertently contaminated neighboring property). *See generally* Ballard & Manus, *supra* note 29, at 611-12, 634-41.

92. *See infra* notes 174-80, 184, 276-303 and accompanying text.

93. *See* EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* § 1.1 (2d ed. 1992).

94. *See* 15A C.J.S. *Conflict of Laws* § 1(1) (1967). The doctrine of recognizing the laws of foreign jurisdictions or rights created pursuant to foreign laws is referred to as "comity." 15A C.J.S. *Conflict of Laws* § 3(3) (1967). Recognition of foreign laws and rights is not binding on the forum which recognizes those rights; it is a purely voluntary gesture of good will which "carr[ies] with it no

In practice, conflict-of-laws analysis attempts to ensure that a case will be considered under the appropriate body of law regardless of the forum.⁹⁵ Courts advance these objectives by means of policies and procedural rules that serve to reduce or eliminate incentives to forum shop, promote uniformity and fairness in judgments, and ensure consistency in the outcome of litigation regardless of jurisdiction.⁹⁶ While conflict of laws has been the object of levity for some commentators,⁹⁷ many authorities have declared that determining contractual rights across jurisdictions can give rise to tremendous confusion and difficulty.⁹⁸

2. *Lex loci contractus*

Early American conflict-of-laws theorists focused on the ideas of “comity of nations” and “vested rights.”⁹⁹ From these rule-based

implication of relinquishment of sovereignty.” *Id.* As such, the comity which a court extends to recognize rights created under the laws of other jurisdictions is a “comity of nations” (or states), not a comity of courts. *See id.* at 375-77; *infra* note 90. The comity-of-nations principle is also applicable where a state in the United States gives effect to the laws of a sister state. *See* 15A C.J.S. *Conflict of Laws* § 3(7) (1967). The comity-of-states doctrine, as applied in the conflict of laws, is an inquiry entirely distinct from the Full Faith and Credit requirement of the United States Constitution, which generally requires that the states give full effect to judgments, contracts, records, and other “public acts” of sister states. U.S. CONST. art. IV, § 1. States are not required to give full effect to statutes and rules of decision of another state if doing so would interfere with the “local policy” of the forum state. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 498 (1941).

95. *See* 15A C.J.S. *Conflict of Laws* § 1(1) (1967).

96. *See* American Motorists Ins. Co. v. ARTRA Group, Inc., 338 Md. 560, 578-79, 659 A.2d 1295, 1304 (1995). The court of appeals stated that *lex loci contractus* had traditionally been followed by Maryland courts to achieve “simplicity, predictability, and uniformity in contract law.” *Id.*; *see infra* notes 100-02.

97. Conflict of laws has been humorously described in verse as “[a]ll about courts without jurisdiction handing out misery, pain and affliction.” THURMAN ARNOLD, FAIR FIGHTS AND FOUL: A DISSENTING LAWYER’S LIFE 21-22 (1965). *See infra* note 230 for the full text of Arnold’s poem and a modern addition thereto.

98. *See* 16 AM. JUR. 2D *Conflict of Laws* § 74 (1979).

99. *See* SCOLES & HAY, *supra* note 93, §§ 2.4 to .5. The major proponent of the comity-of-nations doctrine was Supreme Court Justice Joseph Story. *See id.* § 2.4. The principle of “comity” was an attempt to balance the forum nation’s goal of preserving its sovereignty with the need to give due regard to the laws of foreign nations to protect their interests. *See id.* § 13; *see also supra* note 94. The principle of “vested rights” is that when a right or obligation is created (or vested) under the law of a nation or state, that right then constitutes property and other states have an obligation to protect the right or enforce the obligation unless there is a compelling reason to do otherwise. *See* 15A

approaches developed the doctrine of *lex loci contractus*,¹⁰⁰ or "the law of the place of making" of a contract, which is followed by a majority of states, including Maryland.¹⁰¹ The phrase *lex loci contractus*, in the general sense, is used to describe a number of different approaches to the choice of law governing a contract.¹⁰² Maryland

C.J.S. *Conflict of Laws* § 3(4) (1967). Joseph Beale, the leading American scholar on the vested-rights theory, propounded that a "right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere." JOSEPH H. BEALE, 3 CASES ON THE CONFLICT OF LAWS 517 (1901), cited in SCOLES & HAY, *supra* note 93, § 2.5.

100. *Lex loci contractus* literally means "the law of the place of contracting." 15A C.J.S. *Conflict of Laws* § 11(1) (1967). The term more specifically describes several methods of determining which jurisdiction's law should be applied. See *id.* These methods are "the law of the place of making" (*locus celebrationis*) and "the law of the place of performance" (*locus solutionis*). *Id.* §§ 11(1)-(3). Maryland's interpretation of *lex loci contractus* is discussed in the text accompanying *infra* notes 103, 104. The traditional conflict-of-laws rule underlying enforcement of contracts is that a contract which is valid in the jurisdiction where it is created "is considered valid everywhere, and will be enforced everywhere," unless enforcement would violate statutory law or the "settled public policy" of the forum, or otherwise "work injury" to citizens of the forum jurisdiction. See 15A C.J.S. *Conflict of Laws* § 4(10) (1967). This approach follows Beale's vested-rights theory and is the basis for *lex loci contractus*. See *supra* note 99.
101. *American Motorists*, 338 Md. at 581, 659 A.2d at 1305; see also SCOLES & HAY, *supra* note 93, § 18.21. Several states still follow the more rigid and mechanical principles of the Restatement (First) of Conflict of Laws, such as *lex loci contractus*. See SCOLES & HAY, *supra* note 93, § 18.21. The states that still follow this approach include: Alabama, Connecticut, Florida, Georgia, Iowa, Maryland, Michigan, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, Virginia, and Wyoming. See, e.g., *Fried v. North River Ins. Co.*, 710 F.2d 1022 (4th Cir. 1983) (construing North Carolina law); *Wells v. 10-X Mfg. Co.*, 609 F.2d 248 (6th Cir. 1979) (construing Michigan law); *Mullinax Eng'g Co. v. Platte Valley Constr. Co.*, 412 F.2d 553 (10th Cir. 1969) (construing Wyoming law); *Morgan v. Mar-Bel, Inc.*, 614 F. Supp. 438, 441 (N.D. Ga. 1985) (dictum); *Starkenstein v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 572 F. Supp. 189 (M.D. Fla. 1983); *Harrison v. Insurance Co. of N. Am.*, 318 So. 2d 253 (Ala. 1975); *King Int'l Corp. v. Voloshin*, 366 A.2d 1172 (Conn. Super. Ct. 1976); *Joseph L. Wilmotte & Co. v. Rosenman Bros.*, 258 N.W.2d 317 (Iowa 1977) (limiting use of most significant relationship test to arbitration provision); *Traylor v. Grafton*, 273 Md. 649, 332 A.2d 651 (1975); *Sandoval v. Valdez*, 580 P.2d 131 (N.M. Ct. App. 1978); *Nordenstrom v. Swedberg*, 143 N.W.2d 848 (N.D. 1966); *Telex Corp. v. Hamilton*, 576 P.2d 767 (Okla. 1978); *Union Savings Bank v. DeMarco*, 254 A.2d 81 (R.I. 1969); *Witter v. Torbett*, 604 F. Supp. 298 (W.D. Va. 1984); see also SCOLES & HAY, *supra* note 93, § 18.21 n.2. But see *infra* note 111 (noting that some states' decisions are compatible with both *lex loci contractus* and the Second Restatement).
102. See generally *American Motorists*, 338 Md. at 570, 659 A.2d at 1300 (1995) (describing a number of different appeals to choice of contract law); Kramer

courts follow the rule that applies the substantive law of the jurisdiction where the step making the contract valid and binding occurs.¹⁰³ The stated reasons for Maryland's preference for the *lex loci contractus* approach to contractual conflict-of-laws issues are simplicity, uniformity, and predictability.¹⁰⁴

Although simplicity and uniformity have traditionally been the major factors cited for Maryland's adherence to *lex loci contractus*, the application of the doctrine has several drawbacks, some of which have been exacerbated by the advent of modern technology and the rise of electronic commerce.¹⁰⁵ The application of *lex loci contractus* to a suit on a contract completed in a different jurisdiction from that where the majority of the negotiations occurred, or a jurisdiction different from that in which performance will occur, may lead to an arbitrary and unreasonable application of law.¹⁰⁶ These problems,

v. Bally's Park Place, Inc., 311 Md. 387, 390, 535 A.2d 466, 467 (1988); *supra* note 100. Prior to *American Motorists*, Maryland had already recognized two exceptions to *lex loci contractus*: the public policy exception, and Maryland's adoption of Section 187 of the Restatement (Second) of Conflict of Laws (1971), which allows contracting parties to specify which jurisdiction's law would govern any disputes arising from the contract. See *National Glass, Inc. v. J.C. Penney Properties, Inc.*, 336 Md. 606, 610-12, 650 A.2d 246, 248-49 (1994); see also *Bethlehem Steel Corp. v. G.C. Zarnas & Co.*, 304 Md. 183, 498 A.2d 605 (1985) (citing public policy exception); *Kronovet v. Lipchin*, 288 Md. 30, 43-46, 415 A.2d 1096, 1104-06 (1980) (citing Maryland's acceptance of Section 187 of the Restatement (Second) of Conflict of Laws which allows contracting parties to choose which law will govern the contract); *Kramer*, 311 Md. at 395-96, 535 A.2d at 469-70 (holding that enforcement of gambling debt made in New Jersey casino was not against Maryland public policy because, although casino gambling is illegal in Maryland, other types of gambling were permitted under Maryland law); see generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

103. See *Travelers Indem. Co. v. Allied-Signal, Inc.*, 718 F. Supp. 1252, 1253 (D. Md. 1989). This case is discussed for its *renvoi* holding *infra* notes 153-72. See also *Kramer*, 311 Md. at 390, 535 A.2d at 467.

104. See *American Motorists*, 338 Md. at 578, 659 A.2d at 1304.

105. See *id.* at 580, 659 A.2d at 1304-05. The growth of electronic commerce and contemporary business practices have eroded the certainty of the place of contracting, and reduced its significance to the negotiations and consummation of a contract. See *id.* Interstate commerce utilizing telephonic and facsimile transmission may make it difficult to determine "where" a contract was formed. See, e.g., *Johnson Matthey, Inc. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, 593 A.2d 367, 372 (N.J. Super. Ct. App. Div. 1991) (noting that where negotiations and approval of a contractual purchase involve contacts located in numerous states the place of contracting may be difficult to discern as well as irrelevant); see also *Cochran v. Ellsworth*, 272 P.2d 904, 908 (Cal. Ct. App. 1954) (stating that *lex loci contractus* has been criticized for "frequently elevat[ing] fortuitous and insignificant circumstances to crucial importance in establishing the controlling law").

106. See *American Motorists*, 338 Md. at 580, 659 A.2d at 1305.

among others, have led many states to discard traditional *lex loci contractus* approaches.¹⁰⁷

3. Modern Approaches

In general, modern approaches to conflict-of-laws problems, including the Second Restatement of Conflict of Laws (1971) (Second Restatement), stress ascertaining the interests of involved jurisdictions.¹⁰⁸ One group of early modern conflict-of-law theorists focused on determining which jurisdiction had the greatest "governmental interests" in the litigation.¹⁰⁹ Other scholars set about attempting to devise modern rules of solving legal conflicts which would allow courts to determine, in a predictable and consistent manner, the jurisdiction with the greatest interest in the litigation.¹¹⁰

107. See SCOLES & HAY, *supra* note 93, § 2.6.

108. See *id.*; see also *infra* notes 109-12.

109. See SCOLES & HAY, *supra* note 93, § 2.6. The modern approaches concentrated on examination of "legal relationships" rather than application of mechanical rules of law. See *id.* Professor Brainerd Currie was one of the first legal scholars to advocate this approach. See *id.* Currie's "interest analysis," which gained support during the 1960s, started with the principle that every state had an interest in its courts applying the state's own laws. See *id.* Under Currie's approach, the forum first determines whether a "conflict" actually exists. See James A. McLaughlin, *Conflict of Laws: The New Approach to Choice of Law: Justice in Search of Certainty, Part Two*, 94 W. VA. L. REV. 73, 77-78 (1991). A "false conflict" exists if it is determined that the applicable laws of the involved states either point to the same conclusion, or it is discovered that one state's law is not applicable to the situation. See SCOLES & HAY, *supra* note 93, § 2.6. A "true conflict" occurs if both state's laws are not only different, but each one is also applicable. See *id.* In the case of a true conflict, the court is to consider whether a "restrained interpretation" of the law of one of the concerned jurisdictions would avoid the conflict. See *id.* If the conflict is "unavoidable," however, Currie advocates that the law of the forum should apply. See *id.* Currie's "forum-biased" approach has been severely criticized for promoting forum shopping as well as a failure to achieve fairness in results, predictability, and consistency. See *id.*; McLaughlin, *supra*, at 77-82.

110. See SCOLES & HAY, *supra* note 93, § 2.9. The leading scholar of the "value-oriented" approach was Robert Leflar, who proposed five "choice-influencing" considerations which in theory both reflected the elements that guide, or ought to guide, a court's choice of law. See *id.* § 2.9. The five elements were: "(1) predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interest, and (5) the application of the better rule of law." *Id.*; see also McLaughlin, *supra* note 109, at 83-86. The fifth factor has spawned the greatest controversy. See McLaughlin, *supra* note 109, at 83-86. Although the "better rule of law" approach has been adopted by various jurisdictions, it has been criticized for being a truism and merely setting to paper the procedures already widely used in practice. See *id.* In addition, in practice the "better law . . . almost invariably . . . [is] found to be that of the forum." SCOLES & HAY, *supra* note 93, § 2.11.

The Second Restatement, released in 1971, attempted to combine the theories proposed during its drafting in the 1950s and 1960s.¹¹¹ The Restatement focuses on determining the jurisdiction with the "most significant relationship" to the litigation.¹¹² Specifically, in

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111. See SCOLES & HAY, *supra* note 93, § 2.13. The jurisdictions which now follow, or are in a transition to follow, the Second Restatement are: Arizona, Colorado, Delaware, the District of Columbia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New York, Oregon, Puerto Rico, Rhode Island, Texas, Vermont, and Washington. See, e.g., *Dr. Franklin Perkins Sch. v. Freeman*, 741 F.2d 1503 (7th Cir. 1984) (construing Illinois law); *FMC Fin. Corp. v. Reed*, 592 F.2d 283, 241 (5th Cir. 1979) (construing Mississippi law); *Commercial Ins. Co. v. Pacific-Peru Constr. Corp.*, 558 F.2d 948 (9th Cir. 1977) (construing Hawaii law); *In re Parkwood, Inc.*, 461 F.2d 158 (D.C. Cir. 1971); *Power Motive Corp. v. Mannesmann Demag Corp.*, 617 F. Supp. 1048 (D. Colo. 1985); *Rhode Island Hosp. Trust Nat'l Bank v. Ohio Cas. Ins. Co.*, 613 F. Supp. 1197 (D.R.I. 1985), *rev'd on other grounds*, 789 F.2d 74 (1st Cir. 1986); *Lincoln Nat'l Life Ins. Co. v. NCR Corp.*, 603 F. Supp. 1393 (N.D. Ind. 1984), *aff'd*, 772 F.2d 315 (7th Cir. 1985); *F.E. Meyers Co. v. Pipe Maintenance Services, Inc.*, 599 F. Supp. 697 (D. Del. 1984); *Fojo v. American Express Co.*, 554 F. Supp. 1199 (D.P.R. 1983); *Bernstein v. Fidelity Union Life Ins. Co.*, 449 F. Supp. 327 (E.D. Mo. 1978); *Taylor v. Security Nat'l Bank*, 514 P.2d 257 (Ariz. 1973); *Unigard Ins. Group v. Royal Globe Ins. Co.*, 594 P.2d 633 (Idaho 1979); *Lewis v. American Family Ins. Group*, 555 S.W.2d 579 (Ky. 1977); *Bushkin Assocs., Inc. v. Raytheon, Co.*, 473 N.E.2d 662 (Mass. 1985); *New England Merchants Nat'l Bank v. Lost Valley Corp.*, 400 A.2d 1178 (N.H. 1979); *State Farm Mut. Auto. Ins. Co. v. Estate of Simmons*, 417 A.2d 488 (N.J. 1980); *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984); *Pioneer Credit Corp. v. Carden*, 245 A.2d 891 (Vt. 1968); *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 425 P.2d 623 (Wash. 1967).

Some states' decisions, however, are compatible with both the *lex loci contractus* principle and the "center-of-gravity" test of section 188 of the Second Restatement. See SCOLES & HAY, *supra* note 93, § 18.21 nn.2-3. These states are Arkansas, Massachusetts, Ohio, and Tennessee. See, e.g., *Ladd v. Ladd*, 580 S.W.2d 696 (Ark. 1979); *Bushkin Assocs., Inc. v. Raytheon, Co.*, 473 N.E.2d 662 (Mass. 1985); *Nationwide Mut. Ins. Co. v. Ferrin*, 487 N.E.2d 568 (Ohio 1986) (holding Ohio adhered to law of place of contract formation to determine interpretation, but also citing factors from section 188 of Second Restatement); *Central States Southeast and Southwest Areas Pension Fund v. Kraftco., Inc.* 589 F. Supp. 1061 (M.D. Tenn. 1984), *rev'd on other grounds*, 799 F.2d 1098 (6th Cir. 1986). See also *supra* note 101 for a listing of states which have not adopted the Second Restatement.

112. See SCOLES & HAY, *supra* note 93, § 2.13. The Second Restatement has been characterized as "schizophrenic" because it employs presumptive rules reminiscent of both the *lex loci contractus* approach as well as an analytical interests analysis to determine the jurisdiction with the "most significant relationship" to the litigation. See McLaughlin, *supra* note 100, at 77. The interests analysis consists of the following factors: "(1) the needs of the interstate and international systems, (2) the relevant policies of other interested states including their interests in having their law applied to the particular issue, (3) the protection of party expectations, (4) the basic policies underlying the particular field of

section 188¹¹³ the place of making the contract, as well as the places of negotiation and performance, become factors to be considered in determining which state has the most significant relationship.¹¹⁴ Section 193 of the Second Restatement states that, in the case of insurance contracts, the law of the state where the "parties understand" the principal risk to be located will be applied to the contract unless some other state's law is determined to have a "more significant relationship."¹¹⁵

law, (5) the objectives of certainty, predictability, and uniformity of result, and (6) the ease of determining and applying the law previously identified as applicable." SCOLES & HAY, *supra* note 93, § 2.13. The presumptive rules serve as the context within which the analytical factors will be evaluated. *See id.* § 2.13. For example, when determining the law governing a contract (in the absence of an effective choice by the parties, section 188), the court is to consider, in applying the six analytic principles listed above, the following five contacts, and thereby determine which jurisdiction has the most significant relationship to the contract: (1) the place of contracting, (2) the place of negotiations, (3) the place of performance, (4) the location of the subject matter, and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties. *See* SCOLES & HAY, *supra* note 93, § 2.14 n.1 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971)). The substantive law of the jurisdiction with the most significant contacts will be applied to the contract. *See id.* The Second Restatement has drawn criticism because of its substitution of analysis for set rules, the subjectivity involved in determining the jurisdiction with the most significant relationships, and also because of the danger that courts might apply it in a forum-biased manner. *See* SCOLES & HAY, *supra* note 93, § 2.15. Despite the criticism, however, acceptance of the Second Restatement appears to be growing. *See* McLaughlin, *supra* note 109, at 77. For a list of states that have adopted or are in the process of adopting the Second Restatement's contract principles see *supra* note 111. Maryland continues to abide by *lex loci contractus* and has not adopted the contract law principles of the Second Restatement. *See supra* note 101.

113. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971) (applying to contracts that do not expressly state a forum); *see also supra* note 112.
114. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2a-c) (1971). Subsection 3 states that if negotiation and performance of the contract occur in the same state, that state's law will generally apply. *See id.* § 188(3).
115. *Id.* § 193. Section 193 pertains to "Fire, Surety or Casualty" insurance contracts and includes contracts for liability insurance. *See id.* The law of the state where the insured risk is principally located may not control the insurance contract if the insured risk is a chattel which has no principal location and is moved continuously from state to state. *See id.* § 193 cmt. b. If the insurance contract is invalid under the law of the state of the risk's principal location, but is valid under the law of another state with a substantial relationship to the risk, that other state's law may control the contract. *See id.* § 193, cmt. d. If the risk's principal location is transferred from one state to another, the state law of the new location may control. *See id.* Choice-of-law provisions in insurance contracts which specify the law of a state other than the state in which the insured risk is located often will not be recognized if the specified state's law affords the insured less protection than the law of the state in which the insured risk is principally located. *See id.* § 193 cmt. e.

4. Exceptions to Conflicts Doctrines

Regardless of which conflict-of-laws doctrine is followed, the court of the forum state may wish to apply the law of a jurisdiction different than that which the forum's conflicts doctrine directs it to apply.¹¹⁶ Three major exceptions to conflicts doctrines allow the forum state to do this. First, the public policy exception allows the forum state to apply its own law when the law of the foreign jurisdiction is contrary to the forum state's settled public policy.¹¹⁷ Second, the forum may apply *renvoi*, a conflicts principle which directs the forum to look at the conflicts rules, as well as the substantive law, of the foreign state.¹¹⁸ If the foreign state, under its own conflicts doctrine, would apply the law of the forum or a third state, then the forum court would as well.¹¹⁹ The doctrine, in effect, puts the forum court in the place of the foreign court.¹²⁰ Third, courts that follow the Second Restatement may apply another state's conflicts doctrine in certain circumstances, such as when the forum's relationship to the subject of the dispute is limited, and thereby determine whether the forum's own substantive law, or that of a different state, should be applied to the litigation.¹²¹

a. The Public Policy Exception: Rejecting Another State's Law

The public policy exception is employed if the forum state decides that the law of the state it is directed to apply is contrary to the forum's settled public policy.¹²² The public policy exception will not be invoked for mere differences between the laws of the forum and non-forum state. The public policy exception is triggered following examination of "pertinent Maryland law"¹²³ and a determination that the foreign law is an abrogation of the relevant local law or public policy.¹²⁴ Illustrative of this process is *Kramer v. Bally's Park Place*,

116. Generally, a court will avoid application of the referenced state's law if application of that law will produce a result inconsistent with the objectives of conflict of laws, such as an unfair outcome or a result different than that which would have occurred had the case been decided in another jurisdiction. See *supra* notes 94-96 and accompanying text.

117. See *infra* notes 107, 122-38 and accompanying text.

118. See *infra* notes 139-63 and accompanying text.

119. See *infra* notes 141-52 and accompanying text.

120. See *infra* notes 141-52 and accompanying text.

121. See *infra* notes 173-74 and accompanying text.

122. See 15A C.J.S. *Conflict of Laws* §4(4) (1967); *supra* note 102.

123. See *Kramer v. Bally's Park Place, Inc.*, 331 Md. 387, 393, 535 A.2d 466, 468 (1988).

124. See, e.g., *Bethlehem Steel Corp. v. G.C. Zarnas & Co.*, 304 Md. 183, 187-90, 498 A.2d 605, 608 (1985) (holding that Pennsylvania common law permitting clauses in construction contracts providing for indemnity against results of one's own negligence was abrogated by Maryland statutory law specifically providing that such clauses are void and unenforceable as against public policy).

*Inc.*¹²⁵ which permitted the enforcement of a gambling debt¹²⁶ incurred by a Maryland resident in a New Jersey casino that had been reduced to judgment in New Jersey under New Jersey law.¹²⁷ Examining Maryland law, the court of appeals found Maryland statutory provisions permitting the enforcement of gambling debts¹²⁸ and several forms of legalized gambling.¹²⁹ Thus, the court determined that Maryland did not have a strong public policy against gambling, despite the fact that casino gambling was unlawful in Maryland.¹³⁰ The court, therefore, declined to apply the public policy exception and following *lex loci contractus* permitted enforcement of the debt under New Jersey law.¹³¹

The public policy exception to *lex loci contractus* is necessarily narrow.¹³² If Maryland consistently declined to follow its stated conflict-of-laws rules to the prejudice of other states in cases where Maryland law was merely "different" than, as opposed to in conflict with, other states' laws, those states might refuse to apply Maryland law to cases involving litigation of significant interest to Maryland.¹³³

If strong public policy exists, however, a court will generally apply Maryland law rather than another state's law.¹³⁴ In *National Glass, Inc. v. J.C. Penney Properties, Inc.*,¹³⁵ Maryland's high court declined to follow *lex loci contractus* and applied Maryland substantive law, rather than Pennsylvania law, to a dispute between a property owner and a glass supplier who brought a materialman's lien against the property owner.¹³⁶ The subcontract was executed in Pennsylvania and contained a provision by which the glass supplier waived its right to bring such a lien.¹³⁷ This provision was valid in Pennsylvania, but Maryland statutory law proscribed such a waiver as being void and against Maryland's stated public policy.¹³⁸

125. 311 Md. 387, 535 A.2d 466 (1988); see *supra* note 102.

126. See *Kramer*, 311 Md. at 398, 535 A.2d at 468-71.

127. See *id.* at 388-89, 535 A.2d at 366-67.

128. See *id.* at 393-95, 535 A.2d at 469-70.

129. See *id.* at 395-96, 535 A.2d at 470.

130. See *id.* at 391-96, 535 A.2d at 468-70.

131. See *id.* at 398, 535 A.2d at 471.

132. See SCOLLES & HAY, *supra* note 93, § 3.15.

133. See *Kramer*, 311 Md. at 391-96, 535 A.2d at 468-70.

134. See, e.g., *Bethlehem Steel Corp. v. G.C. Zarnas & Co.*, 304 Md. 183, 187-90, 498 A.2d 605, 608 (1985) (holding that Pennsylvania common law permitting clauses in construction contracts providing for indemnity against results of one's own negligence was abrogated by Maryland statutory law specifically providing that such clauses are void and unenforceable as against public policy).

135. 336 Md. 606, 650 A.2d 246 (1994).

136. See *id.* at 614-15, 650 A.2d at 250.

137. See *id.* at 609, 650 A.2d at 247.

138. See *id.* at 613-14, 650 A.2d at 250.

b. Renvoi: A Logical Means of Escape from Repugnant Law?

The doctrine of *renvoi*¹³⁹ has not enjoyed unqualified support in American jurisprudence.¹⁴⁰ The basis of the *renvoi* doctrine is that when a forum court is referred to the law of another state through the application of the forum's own conflict of laws principles, the forum court will look not only at the substantive law of that state, but to that state's choice-of-law principles.¹⁴¹ The forum court will, in effect, place itself in the position of a court of that jurisdiction and determine whose law should apply under the referenced jurisdiction's choice of law principles.¹⁴² For example, if a Maryland court applies the *renvoi* doctrine to a dispute involving a contract executed in New York for the construction of a building in Maryland, the Maryland court will first look to the law of New York, which is the state of contract formation.¹⁴³ The court would next apply New York's choice-of-law principle — "the most significant relationships" test espoused by Section 188 of the Second Restatement.¹⁴⁴ If the Maryland court then determines that, although the contract was executed in New York, Maryland has the most significant relationship

139. *Renvoi* translates from French as "to send back." See 15A C.J.S. *Conflict of Laws* § 7 (1967). The principle of *renvoi* is that when a forum resorts to the use of foreign law to decide a case the forum will apply the foreign state's conflict-of-laws rule as well as its substantive law. See *id.* *Renvoi* was criticized and rejected by early commentators for leading to circular reasoning and for wrongfully allowing the procedural rules of foreign jurisdictions to control the forum court. See *id.*; see also Ernest O. Schreiber, Jr., *Doctrine of Renvoi in Anglo-American Law*, 31 HARV. L. REV. 523 (1918) (calling for rejection of *renvoi*); Ernst G. Lorenzen, *The Renvoi Theory and the Application of Foreign Law*, 10 COLUM. L. REV. 327, 344 (1910) (stating that *renvoi* is "no part of the Conflict of Laws of the United States").

140. Early commentators were critical of *renvoi* due to its penchant for circular reasoning, to which there appeared no equitable solution. See Schreiber, *supra* note 139, at 528, 533. *Renvoi* was also objected to on the grounds that the subrogation of the forum's own conflict-of-laws rule to those of a foreign jurisdiction constituted an affront to the sovereignty of the forum court and state. See *id.* at 534; see also Lorenzen, *supra* note 139, at 344 (stating that *renvoi* was no part of American law). Lorenzen claimed that *renvoi* was a manipulative theory that courts used to circumvent the just application of foreign law. See Lorenzen, *supra* note 139; see also 15A C.J.S. *Conflict of Laws* § 7 (1967).

141. See SCOLES & HAY, *supra* note 93, § 3.13; see also *supra* note 139.

142. See Rhoda S. Barish, Comment, *Renvoi and the Modern Approaches to Choice-of-Law*, 30 AM. U. L. REV. 1049, 1061-63 (1981).

143. See *supra* notes 99-103 and accompanying text (noting that Maryland follows *lex loci contractus*).

144. See *supra* notes 99, 108-15 and accompanying text (noting that New York follows Second Restatement in conflicts-of-laws issues).

to the dispute, the court will be directed to apply Maryland law.¹⁴⁵

If a Maryland court, however, decides a suit over a contract executed in New York for construction of a building in Delaware, the court may determine that under New York's conflict-of-laws principles, Delaware has the most significant relationships to the dispute.¹⁴⁶ The court will then utilize Delaware's conflict-of-laws principles and apply them to the facts of the case.¹⁴⁷ If examination of Delaware's conflict-of-laws principles leads the court to the conclusion that Delaware's substantive law should be applied to the case, the court will then decide the case using Delaware substantive law.¹⁴⁸ This is known as a "transmission."¹⁴⁹

Renvoi's major flaw is readily apparent under the first example, where the court is referred back to Maryland law. Upon remission from New York's choice-of-law principles, the court would be obliged under *renvoi* to look again at Maryland "whole law," including its choice-of-law principles.¹⁵⁰ Since the contract was executed in New York, Maryland's contractual choice-of-law principle, *lex loci contractus*, will again refer the court to the whole law of New York, which will refer the court again to Maryland, and so forth, in an endless cycle of searching for the appropriate body of substantive law to apply.¹⁵¹ *Renvoi* has been rejected by many jurisdictions as a result of this defect in its logic.¹⁵²

Despite the drawbacks of the *renvoi* doctrine, its use has received support as a method to foster consistency and uniformity in the outcome of litigation and as a deterrent to forum shopping.¹⁵³ It is

145. See Barish, *supra* note 142, at 1062. If the forum is referred back to its own substantive law by the conflict-of-laws principles of the referenced state the procedure is known as a "remission." See *id.*

146. See *id.* at 1063. The process of "transmission" occurs when the referenced state's conflict-of-laws principles refer the court to the laws of a third state. See *id.* at 1064.

147. See *id.*

148. See *supra* note 111 (noting that Delaware follows approach of the Second Restatement).

149. See *supra* note 146. If a *renvoi* transmission or remission is only to the substantive law of the forum or another state, a "partial *renvoi*" occurs. See Barish, *supra* note 142, at 1063. If the *renvoi* transmission or remission is to the "whole law" of the other state — that state's conflicts rules as well as its substantive law — a "total *renvoi*" occurs. See *id.* Under a total *renvoi*, the forum adjudicates the dispute as if it were the court of the state to which the forum court was referred by its own choice of laws rule. See *id.*

150. See Schreiber, *supra* note 139, at 528, 533; see also *supra* note 149 (defining concept of "whole law"). See also *supra* note 140 for a description of criticisms of the logic of *renvoi*.

151. See Schreiber, *supra* note 139, at 528, 533.

152. See 15A C.J.S. *Conflict of Laws* § 7 (1967 & Supp. 1985).

153. See Barish, *supra* note 142, at 1065. *Renvoi* has been viewed more favorably

suggested that courts utilize *renvoi* principles in order to protect the interests of jurisdictions involved in a conflict of laws dispute and to identify the presence or absence of actual conflicts.¹⁵⁴ By analyzing the objectives underlying the substantive law and conflict-of-laws principles of the jurisdictions involved, the forum may be able to achieve a consistent and equitable decision while avoiding the endless cycles of searching inherent in the traditional, mechanical operation of *renvoi*.¹⁵⁵ The forum may also break the endless cycle by simply accepting a *renvoi* reference back and applying its own substantive law to the case.¹⁵⁶ In some cases there may not even be an actual "conflict."¹⁵⁷ The forum may find that in looking at the whole body of law of the foreign jurisdiction, that state's choice-of-law principles instruct the court to apply that jurisdiction's internal law, so that the jurisdictions involved agree on which substantive law should govern the dispute.¹⁵⁸ The application of *renvoi* may also allow the forum to avoid applying a disfavored legal principle of the foreign jurisdiction without the undesirable side effect of potentially antag-

recently as an "escape device" allowing a court to avoid the application of repugnant foreign law while exhibiting consideration for the laws of a foreign jurisdiction. *See, e.g.,* *Travelers Indem. Co. v. Allied-Signal, Inc.*, 718 F. Supp. 1252, 1254-55 (D. Md. 1989) (predicting that Maryland would adopt *renvoi* and apply Maryland law to declaratory judgment action concerning insurer's liability for costs related to cleanup of pollution occurring in Maryland under insurance policies issued in New Jersey and New York, because those courts would apply Maryland law as the state with the most significant relationship to the litigation); Barish, *supra* note 142, at 1066-67; *see also* *Nolan v. Berger*, 203 N.E.2d 274, 278 (Ohio P. Ct. 1963) (noting that litigation of claims involving title to real estate is one of few instances where use of *renvoi* is considered appropriate, and the forum therefore applies the whole law of the referenced state as if it were the court of that state, and thereby applies substantive law of the forum); *cf. Davis v. P.R. Sales Co.*, 304 F.2d 831, 833-34 (2d Cir. 1962) (approving of *renvoi* in the case of conditional contract of sale, but holding that its use would not affect substantive law applied to the case). *But see* *Eastern Stainless Corp. v. American Protection Ins. Co.*, 829 F. Supp. 797, 800-01 (D. Md. 1993) (predicting Maryland would apply *renvoi* only in "exceptional situations" such as when "important public policy" is at issue). *See generally* SCOLES & HAY, *supra* note 93, § 3.13 n.8 and accompanying text.

154. *See* Barish, *supra* note 142, at 1067-68; SCOLES & HAY, *supra* note 93, § 3.13.

155. *See* Barish, *supra* note 142, at 1066-68.

156. *See* SCOLES & HAY, *supra* note 93, § 3.13.

157. *See id.*

158. *See id.*; *see also* Barish, *supra* note 142, at 1066. False conflicts have been interpreted as occurring when: (1) the laws of the involved jurisdictions are in agreement or the outcome of the litigation would not differ depending upon which state adjudicated the claim; or (2) one jurisdiction discloses a legitimate interest in having its law applied to the claim while the other jurisdiction holds no such interest. *See* 16 AM. JUR. 2D *Conflict of Laws* § 85 (1979). Courts are split over which of the above described interpretations is correct. *See id.*

onizing the other involved jurisdiction by openly declaring a public-policy exception.¹⁵⁹

Despite the general lack of enthusiasm for *renvoi* among this country's judiciary, the United States District Court for the District of Maryland applied *renvoi* in *Travelers Indemnity Co. v. Allied-Signal, Inc.*¹⁶⁰ In this case, the insurer sought a declaratory judgment that it had no duty to pay the costs of remedying pollution at the insured's manufacturing facilities.¹⁶¹ The insurance policies at issue were delivered to the insured's headquarters in New York, and later New Jersey.¹⁶² The contaminated facilities were located in Maryland.¹⁶³ The insurer argued that Maryland substantive law, which precluded coverage for environmental clean-up costs, was applicable, while the insured argued that New York and New Jersey substantive law applied.¹⁶⁴

In holding that Maryland substantive law was applicable, the *Travelers* court noted that a Maryland court would apply *lex loci contractus* to this case to determine whether New York or New Jersey law was applicable.¹⁶⁵ The court also stated, however, that if suit was brought in New York or New Jersey, "the irony would be supreme" because those states would apply the substantive law of Maryland as the state with the most substantial relationships to the proceedings.¹⁶⁶ Thus, the *Travelers* court concluded *renvoi* should be employed to avoid this false conflict.¹⁶⁷

The *Travelers* court speculated that the Court of Appeals of Maryland would use *renvoi* to avoid applying disfavored foreign law when the state whose substantive law was chosen through *lex loci contractus* would itself choose Maryland substantive law.¹⁶⁸ Prior to

159. See Barish, *supra* note 142, at 1067-68. Some courts have rejected *renvoi*, but stated that application of the doctrine would not have affected the substantive law of the case. See, e.g., *Hawley v. Beech Aircraft Corp.*, 625 F.2d 991, 994 (10th Cir. 1980); *Rutherford v. Gray Line, Inc.*, 615 F.2d 944, 947 (2d Cir. 1980); *Patch v. Stanley Works (Stanley Chemical Co.)*, 448 F.2d 483, 491-92 (2d Cir. 1971).

160. 718 F. Supp. 1252 (D. Md. 1989).

161. See *id.* at 1252.

162. See *id.*

163. See *id.* at 1253.

164. See *id.*

165. See *id.* at 1253-54. The *Travelers* court tacitly found that *renvoi* and the public policy exception to *lex loci contractus* were identical. See *id.* (stating that when considering "issues of important public policy," Maryland decisional law permitting forum to determine if state referenced by *lex loci contractus* would refer to Maryland substantive law constitutes use of *renvoi* to remedy false conflict); see also *supra* note 109 (explaining false conflicts).

166. *Travelers*, 718 F. Supp. at 1254 n.3.

167. See *id.* at 1254; see also *supra* note 165.

168. See *Travelers*, 718 F. Supp. at 1253-54; see also *supra* notes 109, 153.

the *American Motorists* decision, Maryland relied upon the public-policy exception to *lex loci contractus* where the law of another state was considered repugnant.¹⁶⁹ As a result, uncertainty existed as to the status of *renvoi* in Maryland.¹⁷⁰ The *Travelers* court stated that the Court of Appeals of Maryland ought to consider the extent of Maryland's public policy on the duty of insurers' coverage of pollution clean-up costs,¹⁷¹ and suggested that Maryland contemplate the adoption of *renvoi* to avoid overuse of the public-policy exception.¹⁷²

c. *The Approach of the Second Restatement*

The Second Restatement advocates the use of *renvoi*, that is the forum's application of another state's conflict-of-laws principles in two situations: (1) when the objective of the forum's conflict-of-laws principle at issue is that the outcome of the litigation be the same as if the suit had been brought in another jurisdiction; and (2) when the forum state has no significant relationship to the subject of the litigation, and the courts of all involved states are in agreement as to which state's substantive law should apply to the case.¹⁷³ Although

169. See *Bethlehem Steel Co. v. G.C. Zarnas & Co.*, 304 Md. 183, 188-91, 498 A.2d 605, 607-08 (1985).

170. Despite the *Travelers* court suggestions, the Court of Appeals of Maryland did not speak to the role of *renvoi* in Maryland law until it decided *American Motorists Insurance Co. v. ARTRA Group, Inc.* See generally *American Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 569, 659 A.2d 1295, 1299 (1995) (stating that the court was adopting for the first time "a limited form of *renvoi*").

171. See *Travelers*, 718 F. Supp. at 1255.

172. See *id.* Generally, public policy is furthered by support of, rather than exception to, *lex loci contractus* because of the predictability of the rule. See *id.* For the forum not to apply its substantive law as a matter of public policy to matters which "directly affect" its human and natural resources would appear as an "unseemly derogation" of the forum's sovereign power. *Id.*; see also *supra* note 153 (discussing use of *renvoi* as a means for the forum to uphold its public policy while showing deference to the laws of another jurisdiction).

173. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971); SCOLES & HAY, *supra* note 93, § 3.13. When the objective of the forum's choice-of-law principles is uniformity of result, the court will apply another state's choice-of-law principles "subject to considerations of practicability and feasibility." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8(2) (1971). If the forum determines that the choice-of-law rules of another state are unclear, and that the forum consequently cannot achieve a result consistent with the objective of that state's conflict-of-laws rules, it will decline to apply that state's conflicts rule. See *id.* § 8(2) cmt. j. Similarly, if the forum believes it cannot determine with any level of certainty how the courts of another state would decide a conflict-of-laws issue, the forum will decline to apply that state's conflict of laws. See *id.* Section 8(3) states that when the forum has no "substantial relationship" to the litigation and all interested jurisdictions would agree on

the Second Restatement's use of *renvoi* may promote uniformity of outcome, a primary objective of any conflict-of-laws doctrine, American courts have generally been reluctant to adopt any application of the *renvoi* doctrine.¹⁷⁴ The Court of Appeals of Maryland ad-

which substantive law would apply (false conflict), the forum should apply this local law. *See id.* § 8(3); *see also* Forsyth v. Cessna Aircraft Co., 520 F.2d 608, 611-12 (9th Cir. 1975) (holding that where there was no true conflict between the laws of states with interests in tort action or with laws of neutral forum in which suit was brought, forum may apply its own substantive law); *cf.* Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C. Cir. 1965) (holding that Brazilian law applied to claim of Maryland resident brought in federal court in the District of Columbia for wrongful death occurring in Brazilian air crash due to alleged negligence of Brazilian airline, because Maryland statutory and case law disclosed disinterest in application of Maryland law to case and interest of District of Columbia in having its substantive law applied to litigation was even less significant than that of Maryland); United States v. Neal, 443 F. Supp. 1307, 1313-15 (D. Neb. 1978) (holding that where federal tort claim arose in state following Second Restatement and was valid under that state's law but invalid under internal law of state with most significant relationships, applying law of state where claim arose was proper under conflicts rules of both states). *But see* Pfau v. Trent Aluminum Co., 263 A.2d 129, 137 (N.J. 1970) (holding that the application of another state's choice-of-law rule "would frustrate the very goals of governmental-interest analysis"); Haumschild v. Continental Cas. Co., 95 N.W.2d 814, 820 (Wis. 1959) (expressly rejecting *renvoi* because of circularity).

174. *See* SCOLES & HAY, *supra* note 93, § 3.14. The use of *renvoi* has been rejected by courts in the following states: Delaware, Illinois, Indiana, New Hampshire, New Jersey, New York, and Wisconsin. *See, e.g.,* Folk v. York-Shipley, 239 A.2d 236, 239-40 (Del. 1968) (rejecting *renvoi* on grounds that it contradicted Delaware's adherence to applying only substantive law of place of wrong and that "general rule" of choice of law is that forum only applies substantive law of another state); Aurora Nat'l Bank v. Anderson, 268 N.E.2d 552, 555 (Ill. App. Ct. 1971) (citing Haumschild v. Continental Cas. Co., 95 N.W.2d 814 (Wis. 1959) as persuasive authority for rejection of *renvoi*); Maroon v. State, 411 N.E.2d 404, 413 (Ind. App. 1980) (rejecting *renvoi* as an "ancient, disfavored doctrine"); Clark v. Clark, 222 A.2d 205, 209 (N.H. 1966) (rejecting *renvoi* as a "manipulative technique" used to justify choice of law); Breslin v. Liberty Mut. Ins. Co., 341 A.2d 342, 347 (N.J. Super. Ct. App. Div. 1975) (rejecting *renvoi* despite its endorsement under section 8 of the Second Restatement, on grounds of its "circular process"), *aff'd*, 354 A.2d 635 (N.J. 1976); Lewandowski v. National Grange Mut. Ins. Co., 374 A.2d 489, 494 (N.J. Super. Ct. Law Div. 1977) (rejecting *renvoi* in favor of applying only substantive law of referenced state); *In re* Damato's Estate, 206 A.2d 171, 175-76 (N.J. Super. Ct. App. Div. 1965) (rejecting *renvoi* on grounds of circuitry and inconsistency with common-law choice-of-laws principles); Rescildo v. R.H. Macy's, 594 N.Y.S.2d 139, 140, 142 (N.Y. App. Div. 1992) (rejecting *renvoi* because of circuitry and because it encourages forum shopping); Wyatt v. Fulrath, 239 N.Y.S.2d 486, 493 (N.Y. Sup. Ct. 1963) (rejecting *renvoi* as neither followed in New York nor accepted generally by American courts), *aff'd as modified*, 211 N.E.2d 637 (N.Y. 1965); Conklin v. Horner, 157 N.W.2d 579, 587 (Wis. 1968) (rejecting *renvoi* as incorrectly displacing forum's choice-

dressed this controversial legal theory for the first time in *American Motorists Insurance Co. v. ARTRA Group, Inc.*¹⁷⁵

III. THE INSTANT CASE

A. *Factual Background*

The contamination at issue in *American Motorists* occurred at a paint manufacturing facility located on Hollins Ferry Road in southwestern Baltimore City (Site).¹⁷⁶ The Site was constructed in the mid-1940s and began operations in 1946 under the control of one of ARTRA's predecessor companies.¹⁷⁷ ARTRA and its predecessors used the Site for production and distribution of paints and similar chemical products.¹⁷⁸

of-law principles); *see also* *Milkovitch v. Saari*, 203 N.W.2d 408, 415 (Minn. 1973) (reiterating that *renvoi* has been criticized as "manipulative technique").

Renvoi has also been recently rejected by several federal courts. *See, e.g.*, *Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 920 (10th Cir. 1993) (rejecting *renvoi* as inappropriate for application in circumstances other than those described in sections 8(2) & (3) of the Second Restatement), *cert. denied*, 510 U.S. 112 (1994); *In re the Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978*, 954 F.2d 1279, 1336 (7th Cir. 1992) (describing *renvoi* as "spectre" resulting in an "infinite loop"); *Eastern Stainless Corp. v. American Protection Ins. Co.*, 829 F. Supp. 797, 800 (D. Md. 1993) (declining to apply *renvoi* to insured's claim of bad-faith failure of insurer to pay insurance claim and stating that Maryland applies *renvoi* only in "exceptional situations" such as when "important public policy" is at issue); *Hobbs v. Firestone Tire & Rubber Co.*, 195 F. Supp. 56, 61-64 (N.D. Ind. 1956) (rejecting *renvoi* for circuitry, inconsistency with prevailing choice-of-laws doctrines, and general lack of acceptance by American courts); *Nixon v. Allstate Ins. Co.*, 818 F. Supp. 215, 216 (S.D. Ohio 1992) (holding that court may employ *renvoi* "once" and look to whole law of Kentucky, where actions leading to tort claim occurred, and because Kentucky follows most significant relationships test, internal law of Ohio, where plaintiffs resided and insurance contract at issue was formed, must be applied without further reference), *appeal dismissed*, 991 F.2d 796 (6th Cir. 1993); *see also* EUGENE F. SCOLES ET. AL., *CONFLICT OF LAWS*, §§ 3.13 n.4 (2d ed. 1992 & Supp. 1994).

175. *American Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 659 A.2d 1295 (1995). Prior to *American Motorists*, the United States District Court for the District of Maryland had suggested the use of *renvoi* when *lex loci contractus* yielded a result inconsistent with the state's public policy. *See Travelers Indem. Co. v. Allied-Signal, Inc.*, 718 F. Supp. 1252 (D. Md. 1989).

176. *See American Motorists*, 338 Md. at 563-64, 659 A.2d at 1296-97.

177. *See ARTRA Group, Inc. v. American Motorists Ins. Co.*, 100 Md. App. 728, 731, 642 A.2d 896, 897 (1994), *rev'd*, 338 Md. 560, 659 A.2d 1295 (1995).

178. *See American Motorists*, 338 Md. at 563, 590, 659 A.2d at 1296, 1310. The Site was operated by the Baltimore Paint and Color Works from 1946 to 1960. *See ARTRA Group*, 100 Md. App. at 731, 642 A.2d at 897. In 1960, the Site

In 1980, the Site was sold to the Sherwin-Williams Company (Sherwin-Williams).¹⁷⁹ After the sale, Sherwin-Williams determined that the soil and groundwater at the Site were heavily contaminated with hazardous and toxic wastes.¹⁸⁰ Sherwin-Williams was required by state law to remedy this contamination.¹⁸¹ Sherwin-Williams alleged that ARTRA and its predecessors had “negligently, illegally, and improperly” stored thousands of drums of hazardous and toxic chemicals at the Site, and that hazardous materials were leaking from the drums and contaminating the soil and groundwater.¹⁸² Over fifty underground storage tanks, many of which were leaking hazardous substances such as gasoline, diesel fuel, and volatile organic spirits, were also on the premises at the time of the sale to Sherwin-Williams.¹⁸³ Sherwin-Williams further alleged that during normal plant operations over a several year period, ARTRA and its predecessors: (1) “improperly and negligently” overfilled the underground storage tanks, causing hazardous materials to spill and contaminate the soil and groundwater; and (2) discharged hazardous and toxic substances into the storm drains at the Site, also causing soil and groundwater contamination.¹⁸⁴

B. *The Underlying Action*

In December 1991, Sherwin-Williams filed suit against ARTRA and other prior owners of the Site in the United States District Court

was purchased by the Baltimore Paint and Chemical Corporation. *See id.* In 1975, the Baltimore Paint and Chemical Corporation became part of ELT, Inc. *See American Motorists*, 338 Md. at 564 n.1, 659 A.2d at 1297 n.1. ELT, Inc., formerly known as El-Tronics, Inc., changed its name to Dutch Boy, Inc. in 1977. *See Standard & Poor's Corporate Descriptions Plus News Library*, Aug. 23, 1996, available in WESTLAW, USFUB file. Dutch Boy, Inc. changed its name to ARTRA Group, Inc. in 1981. *See ARTRA Group*, 100 Md. App. at 731, 642 A.2d at 897.

179. *See American Motorists*, 338 Md. at 563-64, 659 A.2d at 1296.

180. *See id.* at 564, 590-91, 659 A.2d at 1297, 1310.

181. *See id.* at 564, 659 A.2d at 1297. The owner or operator of a site containing hazardous waste is responsible for the pollution regardless of negligence or fault. *See MD. CODE ANN., ENVIR. § 7-201(x)(1)-(2)* (1996). The state may seek injunctive relief against a responsible party to prevent a threatened release of pollution, or require that the responsible party remedy the contamination. *See id.* § 7-222(a)(2)(iii). The state may also remedy the contamination itself using funding from the Hazardous Substance Control Fund and then order the responsible party to reimburse the state for the cost of the remedial actions. *See id.* §§ 7-220, 7-221(a)-(b), 7-222(a)(2)(iii). *See also supra* note 40 and accompanying text for a discussion of the Comprehensive Environmental Response and Liability Act (CERCLA).

182. *See American Motorists*, 338 Md. at 590, 659 A.2d at 1310.

183. *See id.*

184. *See id.* at 590-91, 659 A.2d at 1310.

for the District of Maryland, asserting claims for cost recovery, compensatory damages, and declaratory relief relating to damages Sherwin-Williams allegedly incurred as a result of the contamination at the Site.¹⁸⁵ After receiving the complaint of the underlying action, ARTRA requested that American Motorists, which had issued nine yearly comprehensive general liability (CGL) policies to ARTRA, defend and indemnify ARTRA in the underlying action.¹⁸⁶ The insurance policies were delivered to and executed by ARTRA in Illinois, the state where both American Motorists and ARTRA maintained headquarters.¹⁸⁷

American Motorists refused to defend or indemnify ARTRA, citing the pollution exclusion clause contained in each policy which precluded coverage for damages resulting from the discharge of pollution unless the release of pollutants was sudden and accidental.¹⁸⁸

C. *The Case in the Court of Appeals of Maryland*

1. Conflict of Laws

After granting certiorari,¹⁸⁹ the Court of Appeals of Maryland reversed the court of special appeals,¹⁹⁰ holding that Maryland law

185. See *ARTRA Group*, 110 Md. App. at 732-33, 642 A.2d at 899.

186. See *American Motorists*, 338 Md. at 564, 659 A.2d at 1297.

187. See *id.*

188. See *id.* at 565, 659 A.2d at 1297. The pollution exclusion clause contained in the CGL policies issued by American Motorists to ARTRA is reproduced and discussed *supra* notes 30-42 and accompanying text.

189. See *ARTRA Group*, 100 Md. App. at 728, 642 A.2d at 896.

190. See *American Motorists*, 338 Md. at 582, 659 A.2d at 1306. ARTRA argued at trial that the insurance policy must be interpreted under Illinois law, under which the pollution exclusion exception had been held to be ambiguous, because of Maryland's adherence to *lex loci contractus*. See *id.* at 565, 659 A.2d at 1297; see also *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1220 (Ill. 1992) (holding pollution exclusion exception ambiguous under Illinois law). See generally cases cited *supra* notes 21, 45-54. American Motorists claimed that the trial court should apply *renvoi* and look to both the substantive law and conflicts principles of Illinois. See *American Motorists*, 338 Md. at 566, 659 A.2d at 1297. American Motorists asserted that Illinois would apply Maryland law as the law of the state with the most significant relationships to the litigation. See *id.* at 566, 659 A.2d at 1297-98 (discussing *Bentz v. Mutual Fire, Marine & Inland Ins. Co.*, 38 Md. App. 524, 537-39, 575 A.2d 795, 801-03 (1990) (holding pollution exclusion exception unambiguous under Maryland law)). The trial court concluded that although the place of contracting was Illinois, Maryland's strong public policy on environmental issues mandated the application of Maryland law to the dispute. See *American Motorists*, 338 Md. at 566-67, 659 A.2d at 1298. The trial court ultimately held that the pollution exclusion exception was unambiguous, that there was no potentiality of cov-

applied to the policies.¹⁹¹ The court of appeals stated that Maryland would adopt a limited form of the *renvoi* doctrine and apply its own substantive law where the choice-of-law principles of the state where a contract was formed would not apply its own law but would specify the application of Maryland law.¹⁹² The court of appeals also reversed the intermediate appellate court on the issue of the applicability of the insurance policies, stating that under Maryland law American Motorists had no duty to defend or indemnify ARTRA.¹⁹³

The basis of the court of appeals's holding on the issue of *renvoi* was that, although there was no strong Maryland public policy on the issue *sub judice*, it was absurd for Maryland courts to apply the substantive law of another state when that state's courts would themselves apply Maryland law.¹⁹⁴ The court noted that *lex loci contractus* is applied in the interest of "simplicity, predictability, and

erage, and consequently, no duty to defend. *See id.* (citing *Bentz*, 83 Md. App. at 537-38, 575 A.2d at 801-02).

The Court of Special Appeals of Maryland reversed the trial court. *See ARTRA Group, Inc. v. American Motorists Ins. Co.*, 100 Md. App. 728, 735, 742, 642 A.2d 896, 899, 903 (1994), *rev'd*, 338 Md. 560, 659 A.2d 1295 (1995). The *ARTRA Group* court rejected American Motorists's argument that Maryland followed *renvoi* and stated that *lex loci contractus* was still the contractual choice-of-law doctrine of the state. *See id.* at 736-37, 642 A.2d at 900-01. The court of special appeals further held that although Maryland has a strong public policy in protecting its resources and citizens from pollution, that policy did not extend to determining liability for the costs of pollution, an issue which the court stated was controlled by the insurance contract. *See id.* at 738-39, 642 A.2d at 901. While not stating that Maryland law was inapplicable to the case, the court of special appeals found that the trial judge and American Motorists had confused *renvoi* with the public policy exception to *lex loci contractus*. *See id.* at 737, 642 A.2d at 901; *see also supra* note 165. *But cf.* *Travelers Indem. Co. v. Allied-Signal, Inc.*, 718 F. Supp. 1252, 1253-54 (D. Md. 1989) (implying that *renvoi* and the public policy exception to *lex loci contractus* may be identical). The court stated that where the state in which the contract was made would apply the law of the forum because of the forum's strong public policy regarding the issue, the forum is properly adhering to *lex loci contractus* by applying its own law. *See ARTRA Group*, 100 Md. App. at 737, 642 A.2d at 901.

The court of special appeals also alluded to the "microanalysis" characterization of the contamination by stating that "at least some" of the pollution releases at the Site might have occurred under circumstances that could be considered "sudden and accidental" irrespective of whether Illinois or Maryland law applied to the policy. *Id.* at 739-40, 642 A.2d at 902.

191. *See American Motorists*, 338 Md. at 581, 659 A.2d at 1305.

192. *See id.* at 579, 659 A.2d at 1304.

193. *See id.* at 593-94, 659 A.2d at 1311-12.

194. *See id.* at 578-79, 659 A.2d at 1304. The court stated that the adoption of a limited form of *renvoi* "allow[s] Maryland courts to avoid the irony of applying" another state's law when that state would itself apply Maryland law. *Id.* The court stated that "[i]t is axiomatic that Maryland law is Maryland law." *Id.* at 578, 659 A.2d at 1303.

uniformity.”¹⁹⁵ In other words, it promotes an easily determinable outcome which will not vary depending upon which jurisdiction litigates the claim.¹⁹⁶ However, when the use of *lex loci contractus* would lead to differences in the result of the litigation depending on which forum was chosen, the doctrine should not be followed, and Maryland law should be applied instead.¹⁹⁷

The court of appeals based this principle on its belief that it is preferable for Maryland courts to apply Maryland substantive law in lieu of the law of another jurisdiction when it represents the “best of available alternatives.”¹⁹⁸ Principles of comity, however, may weigh in favor of the application of the substantive law of another state if there is a compelling reason, such as another state’s significant interest in an issue being litigated in a Maryland court.¹⁹⁹ If the state where the contract is made, however, would itself apply Maryland law, it cannot be said that the foreign state’s significant interests are harmed by Maryland’s decision to apply its own law to the case.²⁰⁰ The court thus held that where the courts of the situs of contracting would apply Maryland law, Maryland should apply its own law because this practice will reduce incentives for forum shopping and promote consistency of outcome.²⁰¹

The court of appeals acknowledged the potential problem of an endless cycle inherent in the logic of the *renvoi* doctrine,²⁰² but stated that the limited form adopted by the court would not lead to that result.²⁰³ The court addressed three commonly advanced reasons for rejection of *renvoi*: (1) *renvoi* is simply a “manipulative device” to allow courts to explain the application of foreign law; (2) state sovereignty precludes applying the choice-of-law rules of another jurisdiction; and (3) the circularity of reasoning in *renvoi* will do nothing but obfuscate the already murky choice-of-law doctrine.²⁰⁴ The *American Motorists* court noted that legal scholars have rejected these contentions because the first two objections fail to recognize that consistency of decisions between jurisdictions is a primary goal of conflict of laws, and the third objection overlooks the fact that there may be no real conflict resulting in circularity because the

195. See *id.* at 578, 659 A.2d at 1304.

196. See *id.*

197. See *id.* at 577, 659 A.2d at 1303.

198. See *id.* at 578, 659 A.2d at 1303.

199. See *id.* at 578, 659 A.2d at 1304.

200. See *id.* at 579, 659 A.2d at 1304.

201. See *id.* at 577-78, 659 A.2d at 1303.

202. See *id.* at 574, 659 A.2d at 1302; see *supra* notes 150-59 (discussing problems with the *renvoi* doctrine and solutions thereto).

203. See *American Motorists*, 338 Md. at 574, 659 A.2d at 1302.

204. See *id.* (citing SCOLES & HAY, *supra* note 93, § 3.13).

referenced jurisdiction may itself apply the law of the forum.²⁰⁵ The problem of circularity can itself be avoided by: (1) the application of the law of the jurisdiction with the most significant contacts; or (2) "for ease of application and to prevent forum shopping," the substantive law of the forum.²⁰⁶ In *American Motorists* there was no real conflict of law because Maryland was the jurisdiction with the most significant contacts to the litigation, and the court of appeals believed that an Illinois court would have applied Maryland law.²⁰⁷ Therefore, the court of appeals concluded that Maryland should apply its own substantive law.²⁰⁸

In reversing the decision below, the *American Motorists* court cited with approval *Travelers Indemnity Co. v. Allied-Signal, Inc.*,²⁰⁹ in which the United States District Court for the District of Maryland suggested that Maryland courts consider the use of *renvoi*.²¹⁰ The court of appeals stated that the goals of consistency and prevention of forum shopping merit the application of *renvoi* as suggested in *Travelers* when the state of contract formation would itself apply Maryland law.²¹¹

The court of appeals rejected the argument that because ARTRA reasonably expected Maryland, adhering to *lex loci contractus*, to apply Illinois substantive law to the case, it was unfair for the court of appeals to do otherwise.²¹² The *American Motorists* court described this claim as "unpersuasive" because if the action had been filed in Illinois, the court would have applied the law of Maryland as the state with the most significant relationship to the litigation.²¹³

Although the court of appeals stated that its holding was not an abandonment of the *lex loci contractus* doctrine, the court noted that there was "growing support" for the adoption of the approach of section 188 of the Second Restatement in lieu of the traditional doctrine.²¹⁴ The support for the approach of the Second Restatement,

205. See *id.* at 575, 659 A.2d at 1302 (citing SCOLLS & HAY, *supra* note 93, § 3.13); see also *supra* notes 153-59 (discussing solutions to problems with *renvoi*).

206. *American Motorists*, 338 Md. at 575-76, 659 A.2d at 1302.

207. See *id.* at 575-77, 659 A.2d at 1302-03; see also *supra* note 158.

208. See *American Motorists*, 338 Md. at 575-76, 659 A.2d at 1302-03.

209. 718 F. Supp. 1252 (D. Md. 1989).

210. See *American Motorists*, 338 Md. at 575-76, 659 A.2d at 1302 (citing *Travelers Indem.*, 718 F. Supp. at 1254). See also *supra* notes 153-72 for a discussion of *Travelers Indem.*

211. See *American Motorists*, 338 Md. at 575-79, 659 A.2d at 1302-04; see *supra* note 159.

212. See *American Motorists*, 338 Md. at 577-78, 659 A.2d at 1303.

213. See *id.* The court cites this assumption — that Illinois law would be followed by Maryland courts, but presumably not by Illinois courts — as an example of the type of forum shopping to be eliminated by Maryland's adoption of *renvoi*. See *id.*

214. See *id.* at 579-80, 659 A.2d at 1304-05.

the court of appeals noted, is attributable to modern business practices, such as electronic commerce.²¹⁵ These practices have reduced the significance of the place where a contract was completed and increased the likelihood that adherence to the traditional *lex loci contractus* doctrine will lead to an arbitrary result.²¹⁶

The *American Motorists* court noted that Maryland had already recognized some exceptions to *lex loci contractus*.²¹⁷ The court also noted that if other jurisdictions continue to abandon *lex loci contractus* for the most significant relationships test, Maryland courts may, in the future, do the same.²¹⁸

2. The Insurance Issue

The Court of Special Appeals of Maryland held that the allegations in the Sherwin-Williams complaint gave rise to a potentiality of coverage regardless of whether Illinois or Maryland law was applied.²¹⁹ The court of appeals reversed and held that: (1) Maryland law was applicable; and (2) the Sherwin-Williams complaint was insufficient to give rise to a potentiality of coverage.²²⁰ Maryland's high court rejected the lower court's "microanalysis" approach because such an analysis would permit the exception to nullify the entire exclusion clause.²²¹

The *American Motorists* court cited other state and federal cases,²²² as well as the court's decision in *Bentz*²²³ under which

215. *See id.* at 580, 659 A.2d at 1305; *see also supra* note 105.

216. *See supra* note 215.

217. *See American Motorists*, 338 Md. at 580, 659 A.2d at 1305; *see also supra* note 105.

218. *See American Motorists*, 338 Md. at 581, 659 A.2d at 1305. With this decision, the court recognized the "limited *renvoi* exception" as well as the public policy exception and the contractual choice of law described in section 187 of the Second Restatement. *See id.* *See also supra* note 102 for a discussion of the latter exceptions.

219. *See ARTRA Group, Inc. v. American Motorists Ins. Co.*, 100 Md. App. 728, 740, 642 A.2d 896, 902 (1994), *rev'd*, 338 Md. 560, 659 A.2d 1295 (1995).

220. *See American Motorists*, 338 Md. at 581, 592-94, 659 A.2d at 1305, 1311-12.

221. *See id.* at 586, 659 A.2d at 1308.

222. *See, e.g., Smith v. Hughes Aircraft Co.*, 22 F.3d 1432, 1437-38 (9th Cir. 1993) (holding "sudden and accidental" exception contains element of "temporal brevity" and rejecting microanalysis theory); *Bureau of Engraving, Inc. v. Federal Ins. Co.*, 5 F.3d 1175, 1177-78 (8th Cir. 1993) (affirming trial court's finding that coverage was precluded for damage caused by releases of contaminants from barrels leaking over 10 year period and rejecting "discharge-by-discharge" theory); *Ray Indus., Inc. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 768-69 (6th Cir. 1992) (refusing to adopt microanalysis approach and holding that routine releases of pollution are not "sudden"); *A. Johnson & Co. v. Aetna Cas. & Sur. Co.*, 933 F.2d 66, 75 (1st Cir. 1991) (declining to adopt

continuous releases of pollution during normal operations were deemed not to be "sudden and accidental."²²⁴ The court noted that the term

microanalysis approach and holding that contamination through continuous release of waste produced by insured over two-year period was not "sudden and accidental"); *United States Fidelity & Guar. Co. v. Star Fire Coals, Inc.*, 856 F.2d 31, 34-35 (6th Cir. 1988) (holding that "sudden" implies temporal aspect and that discharge of pollutants on a continuous basis over several-year period as part of insured's normal operation was not "sudden"); *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30, 33-34 (1st Cir. 1984) (finding that "sudden and accidental" was not ambiguous and no coverage for damage resulting from pollution produced in normal business practices); *Anaconda Minerals v. Stoller Chem.*, 773 F. Supp. 1498, 1507 (D. Utah 1991) (stating that "intentional and routine discharges" of contaminants are not sudden and accidental), *aff'd*, 990 F.2d 1175 (10th Cir. 1993); *United States Fidelity & Guar. Co. v. Morrison Grain Co.*, 734 F. Supp. 437, 446-47 (D. Kan. 1990) (stating that "[t]o divorce 'sudden' of its temporal component would eviscerate it of any independent meaning or force" and holding that exception clause applies only if release of pollutants is "brief or short" as well as "unexpected" or "unanticipated"); *American Motorists Ins. Co. v. General Host Corp.*, 667 F. Supp. 1423, 1429 (D. Kan. 1987) (holding coverage was precluded for "continuous and repeated exposures" to pollution), *aff'd*, 946 F.2d 1482 (10th Cir. 1991), *vacated on other grounds*, 946 F.2d 1489 (10th Cir. 1991); *Borden, Inc. v. Affiliated FM Ins. Co.*, 682 F. Supp. 927, 930 (S.D. Ohio 1987) (finding "sudden" unambiguous and holding that coverage was precluded when pollutants were released on regular basis over six year period), *aff'd*, 865 F.2d 1267 (6th Cir. 1989); *Fischer & Porter Co. v. Liberty Mut. Ins. Co.*, 656 F. Supp. 132, 140 (E.D. Pa. 1986) (citing *Techalloy Co. v. Reliance Ins. Co.*, 487 A.2d 820 (Pa. Super. Ct. 1984) (holding that contamination resulting from "continuous dumping of toxic chemicals . . . is not sudden, even if . . . the spillage was accidental or the resulting damage unexpected")); *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 841 (Cal. Ct. App. 1993) (finding that "sudden" contains temporal element of quickness and that gradual release of pollutants was not sudden); *Truck Ins. Exchange v. Pozzuoli*, 21 Cal. Rptr. 2d 650, 652 (Cal. Ct. App. 1993) (holding continuous pollution not "sudden"); *Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc.*, 555 N.E.2d 568, 572 (Mass. 1990) (holding that "sudden" has a temporal meaning of abruptness and that gradual releases of pollution were not "sudden"); *Landauer, Inc. v. Liberty Mut. Ins. Co.*, 628 N.E.2d 1300, 1302-03 (Mass. App. Ct. 1994) (citing *Liberty Mut. Ins. Co. v. SCV Services, Inc.*, 588 N.E.2d 1346, 1349 (Mass. 1992)) (rejecting microanalysis approach and holding that "sudden" has a temporal element of abruptness); *Sylvester Bros. Dev. Co. v. Great Centennial Ins. Co.*, 503 N.W.2d 793, 796-97 (Minn. Ct. App. 1993) (stating that "sudden" implies temporal aspect of "abruptness" and holding that pollution of groundwater occurring "over two decades cannot reasonably be considered 'sudden'"); *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 597 N.E.2d 1096, 1103 (Ohio 1992) (holding that use of term "'sudden' readily indicates" that the exception is not applicable to releases of pollution occurring over protracted period of time).

223. See *Bentz v. Mutual Fire, Marine, & Inland Ins. Co.*, 83 Md. App. 524, 537-38, 575 A.2d 795, 801-02 (1990).

224. See *American Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 586-93, 659 A.2d at 1295, 1308-11 (1995).

“sudden and accidental” was neither inherently ambiguous nor ambiguous in the context of the exception clause and that “sudden” necessarily implied a temporal element which must be construed as “abrupt” or “instantaneous.”²²⁵ As such, the allegations of pollution at the Site, which occurred over a number of years and through normal operations, could not be considered “sudden and accidental.”²²⁶

The court of special appeals had stated that American Motorists’s duty to defend ARTRA could not be determined before trial because the allegations in the Sherwin-Williams action may have given rise to such a duty, and, therefore, the trial judge’s granting of summary judgment to American Motorists on the declaratory judgment was erroneous.²²⁷ The court of appeals held, however, that since the “sudden and accidental” exception applied only to releases of pollution which occurred instantaneously, the allegations in the Sherwin-Williams complaint, asserting that the polluting events occurred over a period of many years, were insufficient to raise a potentiality of coverage.²²⁸ The court of appeals reinstated the trial court’s grant of summary judgment for American Motorists and held that it had no duty to defend or indemnify ARTRA against the Sherwin-Williams action.²²⁹

In a dissenting opinion criticizing the majority’s adoption of *renvoi*, Judge Raker recited the often-quoted humorous verse of “The Chorus of Conflict of Laws,”²³⁰ skewering both the confusion

225. See *id.* at 583-84, 659 A.2d at 1306 (citing *Bentz*, 83 Md. App. at 537-38, 540, 575 A.2d at 801-03).

226. See *id.* at 592-93, 659 A.2d at 1311.

227. See *ARTRA Group, Inc. v. American Motorists Ins. Co.*, 100 Md. App. 728, 740-01, 642 A.2d 896, 902 (1994), *rev’d*, 338 Md. 560, 659 A.2d 1295 (1995); see also *American Motorists*, 338 Md. at 583-84, 659 A.2d at 1306 (discussing *Bentz*, 83 Md. App. at 540, 575 A.2d at 803).

228. See *American Motorists*, 338 Md. at 593-94, 659 A.2d at 1311-12.

229. See *id.* at 594, 659 A.2d at 1311-12.

230. The text of the Chorus of Conflicts of Laws reads:

CONFLICT OF LAWS with its peppery seasoning,
Of pliable, scarcely reliable reasoning,
Dealing with weird and impossible things,
Such as marriage and domicil, bastards and kings,
All about courts without jurisdiction,
Handing out misery, pain and affliction,
Making defendant, for reasons confusing,
Unfounded, ill-grounded, but always amusing,
Liable one place but not in another
Son of his father, but not of his mother,
Married in Sweden, but only a lover in
Pious dominions of Great Britain’s sovereign.
Blithely upsetting all we’ve been taught,
Rendering futile our methods of thought,
Till Reason, tottering down from her throne,
And Common Sense, sitting, neglected, alone,

inherent in conflict of laws and the uncertainty of outcome that exists under the policy-oriented approach of the Second Restate-

Cry out despairingly, "Why do you hate us?
Give us once more our legitimate status."
Ah, Students, bewildered, don't grasp at such straws,
But join in the chorus of Conflict of Laws.

Chorus

Beale, Beale, wonderful Beale,
Not even in verse can we tell how we feel,
When our efforts so strenuous,
To over-throw,
Your reasoning tenuous,
Simply won't go.
For the law is a system of
Wheels within wheels
Invented by Sayres and Thayers and Beales
With each little whee
So exactly adjusted,
That if it goes haywire
The whole thing is busted.
So Hail to Profanity,
Goodbye to Sanity,
Lost if you stop to consider or pause.
On with the frantic, romantic, pedantic,
Effusive, abusive, illusive, conclusive,
Evasive, persuasive Conflict of Laws

THURMAN ARNOLD, *FAIR FIGHTS AND FOUL: A DISSENTING LAWYER'S LIFE*, 21-22 (1965) (footnotes omitted).

Second Verse:

If Arnold thought reason had gone from its throne
Clear back in '14, O now how he'd groan
For Babcock and Jackson had a terrible row
And seeds of new policy surely did sow.
The seeds were from plants nursed in academia's groves
And from '20 to '60 grew in great droves;
But, once out of the classroom and into the courts
The profuse little seedlings grew into sports.
Though the new growth was reason supplanting mere rites
When growing in Academe's neat little sites;
In real rows the neat rows fit nothing quite right,
And we often get darkness instead of new light.
But if light be our metaphor, mixed as it is,
Old light was dimmer and fuzzy as fizz;
Nothing it showed but shadow to fools
Who mistake simple outlines for the sureness of rules.
Now New light makes "sense" always the goal
And explores each case nuance with the Restated tools
So, Lawyers, relax, break up the old straws,
And join in the chorus of Conflict of Laws.

McLaughlin, *supra* note 109, at 108 n.65; see also *supra* note 97.

ment.²³¹ The dissent chastised the majority as merely adding uncertainty to Maryland's conflict-of-laws rules by eroding the traditional rule of *lex loci contractus*.²³² Judge Raker regarded the adoption of *renvoi* as an absurd qualification of the consistency and predictability of *lex loci contractus*.²³³ In addition, Judge Raker argued that it could not be determined with certainty whether an Illinois court would have found that Illinois had the most significant contacts to the litigation and applied its own law.²³⁴ The dissenting judge condemned the majority opinion explaining that its holding was contrary to the stated objectives of Maryland's conflict-of-laws doctrine of achieving certainty, predictability, and consistency.²³⁵

IV. ANALYSIS

A. Conflict of Laws

1. Effect on Maryland Law

The *American Motorists* decision evidences a continuing erosion of Maryland's adherence to the *lex loci contractus* doctrine. Originally, Maryland recognized only one exception to *lex loci contractus* — the public policy exception.²³⁶ A second exception was recognized in *Kronovet v. Lipchin*.²³⁷ There, the Court of Appeals of Maryland adopted section 188 of the Second Restatement and recognized that parties to a contract could specify which jurisdiction's law would govern the contract.²³⁸ A third exception to *lex loci contractus* has now been established: when a Maryland court believes that the state whose law would govern the contract under *lex loci contractus* would

231. See *American Motorists*, 338 Md. at 594-96, 659 A.2d at 1312-13 (Raker, J., dissenting).

232. See *id.* at 596-97, 659 A.2d at 1313 (Raker, J., dissenting).

233. See *id.* (Raker, J., dissenting).

234. See *id.* at 597, 659 A.2d at 1313 (Raker, J., dissenting). The dissent cited a number of decisions in which the law of a state other than the one in which the insured risk was located was held to control an insurance policy dispute. See *id.* at 597 n.2, 659 A.2d at 1313 n.2 (Raker, J., dissenting); see also, e.g., *Potomac Elec. Power Co. v. California Union Ins. Co.*, 777 F. Supp. 968, 972-73 (D.D.C. 1991) (holding that state of location of headquarters of insured, rather than state where environmental damage occurred, was state with most significant contacts).

235. See *American Motorists*, 338 Md. at 597, 659 A.2d at 1313.

236. See *supra* note 102.

237. 288 Md. 30, 415 A.2d 1096 (1980).

238. See *id.* at 46, 415 A.2d at 1105-06.

itself apply Maryland law to the case, the court may apply Maryland law.²³⁹

While the court of appeals stated that it does not yet intend to abandon *lex loci contractus*,²⁴⁰ the *American Motorists* holding is tantamount to the court of appeals constructive adoption of the approach of section 188 of the Second Restatement, but only for the promotion of Maryland law over other states' law.²⁴¹ If a contractual conflict-of-laws issue comes before a Maryland court involving a contract made in a state which has adopted section 188 of the Second Restatement, but with interests in Maryland, the court may find that Maryland has the most significant contacts with the litigation, and then use *renvoi* to justify applying Maryland law in lieu of the other state's law.²⁴²

On the other hand, if there is a conflict-of-laws problem where the place of contracting is Maryland but there are substantial interests in other states which would justify the application of another state's law, Maryland courts will still apply Maryland law under the doctrine of *lex loci contractus*.²⁴³ In short, under the *American Motorists*

239. See *American Motorists*, 338 Md. at 573, 659 A.2d at 1301.

240. See *id.* at 573, 659 A.2d at 1301.

241. See *id.* at 572-73, 659 A.2d at 1301 (discussing application of Restatement's test). The court's stated position is that the application of a "limited *renvoi* exception" will allow for the application of Maryland law when the state where a contract was formed would presumably apply Maryland substantive law as the law of the state with the most significant relationships to the litigation. See *id.* However, the court of appeals did not indicate that the converse was true: if Maryland was the *lex loci contractus* but another state had the most significant relationship, a Maryland court would still be bound to apply the law of Maryland as the place where the contract was made. See *infra* note 243 and accompanying text; see also *infra* text accompanying note 246.

242. A less openly biased approach than that discussed *supra* note 241 would be for a Maryland court to always find that Maryland has the most significant relationships to the contract. Before this could be done, however, Maryland would have to adopt section 188 of the Second Restatement. Another possibility would be for Maryland to take the approach of Leflar's "choice-influencing" considerations, discussed *supra* note 110 and determine that Maryland has the better rule of law. These approaches, however, have the drawback of destroying the inherent predictability and simplicity of *lex loci contractus*.

243. See *American Motorists*, 338 Md. at 578-80, 659 A.2d at 1303-05. The court stated that Maryland should utilize the limited *renvoi* exception to apply the substantive law of Maryland to contracts formed in other states when Maryland has the most significant relationship to the contract issue being litigated and the place of contracting would apply Maryland law (under section 188 of the Second Restatement) to the contract in lieu of that state's own law. See *id.* at 579, 659 A.2d at 1304. The court continued, however, that its holding was "not a total jettisoning of *lex loci contractus*." *Id.* If Maryland is the place of contracting but some other state has the most significant relationship to the contract issue presented, a Maryland court that applies Maryland law to the contract will be acting within the limits of *American Motorists* because Maryland still follows *lex loci contractus*. See *supra* note 241.

holding, Maryland courts have the best of both worlds: applying Maryland law when the place of contracting is Maryland, even though other states may have a more significant interest in the litigation and also applying Maryland law when the place of contracting is another state, but a Maryland court believes Maryland has a more significant interest in the litigation. This approach defeats the comity purpose of conflict of laws by creating a situation under which it is almost certain that Maryland courts will apply Maryland law to the prejudice of other states.²⁴⁴

Moreover, in *American Motorists*, as Judge Raker pointed out, Illinois may have determined that Illinois, not Maryland, had the most significant contacts to the litigation.²⁴⁵ Only two of the five "contacts" described in section 188 of the Second Restatement weighed in favor of the determination that Maryland had the most significant contacts in this case.²⁴⁶ The place of contracting was Illinois, the policies were countersigned in Illinois, and both *American Motorists* and ARTRA have their headquarters located in Illinois.²⁴⁷

Although the contaminated site in this litigation was located in Maryland, ARTRA also operates facilities in other states.²⁴⁸ To be

244. See *supra* note 94. Comity is the doctrine under which courts recognize the validity of rights created by the laws of another jurisdiction. See *supra* note 99. A forum may decline to recognize rights granted by the laws of another state because the laws of the foreign jurisdiction are inconsistent with the forum's stated public policy or because the parties have agreed in advance as to which jurisdiction's law will govern their contract. See *generally supra* notes 93-99. If Maryland courts, however, consistently refuse without plausible explanation to recognize rights created under the laws of another jurisdiction, it may antagonize other states (and countries) and encourage them to do the same. Were this situation to occur, it may have a detrimental effect on Maryland citizens and corporations doing interstate or international business. See *generally supra* notes 93-99.

245. See *American Motorists*, 338 Md. at 597, 659 A.2d at 131 (Raker, J., dissenting).

246. See *supra* note 109. Because this facility is located in Maryland, the factors of the place of performance and the location of the subject matter weigh in favor of application of Maryland law. See *American Motorists*, 338 Md. at 564, 659 A.2d at 1296-97 (discussing location of facility in Maryland).

247. See *American Motorists*, 338 Md. at 564, 659 A.2d at 1296-97. It has been held that the state where an insured's headquarters are located may constitute the state with the most significant contacts to the litigation. See *Potomac Elec. Power Co. v. California Union Ins. Co.*, 777 F. Supp. 968, 972-73 (D.D.C. 1991) (holding that the state where the insured's headquarters are located, rather than the state where environmental damage occurred, was the state with most significant contacts to the dispute).

248. ARTRA Group, Inc. is a diversified industrial corporation engaged in the manufacture of products such as paper and plastic packaging, foil, paper bags, costume jewelry and novelties, as well as the operation of women's accessory and specialty stores. ARTRA currently operates facilities in Georgia, Illinois,

sure, section 193 of the Second Restatement asserts that the law of the state in which the insured risk is located will normally govern insurance contracts.²⁴⁹ The contact of the two companies with Illinois is quite strong, however, and it would not be unreasonable for an Illinois judge to find that Illinois had the most significant contacts with this litigation.²⁵⁰

2. Alternative Courses of Action

A more equitable alternative would have been for Maryland to simply adopt sections 188 and 193 of the Second Restatement and abandon *lex loci contractus*. The approach of the Second Restatement has been criticized for being less certain than *lex loci contractus*.²⁵¹ More predictability and fairness would exist, however, if a Maryland court determined that Maryland had more significant contacts to an issue of litigation than in this situation, where a Maryland court determined that an Illinois court would think that Maryland had more significant contacts with the litigation than did Illinois.²⁵² One

Kansas, Minnesota, New Jersey, New York, and Rhode Island. *Standard & Poor's Corporate Descriptions Plus News*, Jan. 15, 1996, available in NEXIS, COMPANY Library, US PUB File.

249. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 (1971); see also *supra* note 115.

250. See *supra* notes 247-48; see also *Sandfer Oil & Gas, Inc. v. AIG Oil Rig of Texas, Inc.*, 846 F.2d 319, 324 (5th Cir. 1988) (holding the location of insured risk less important when location of risk is scattered throughout two or more states); *Gould, Inc. v. Continental Cas. Co.*, 822 F. Supp. 1172, 1176 (E.D. Pa. 1993) (holding that Illinois had a more significant relationship to the claim than Pennsylvania even though the lawsuit was brought to recover the costs of cleanup at a Pennsylvania site because of the following Illinois contacts: (1) place of performance of insurance policy "unless the policy explicitly provides otherwise, is where the premiums are received"; (2) policies were negotiated and entered into in Illinois by parties domiciled or headquartered in Illinois; and (3) the insurance coverage was for facilities located in several states, including Pennsylvania).

251. See 16 AM. JUR. 2D *Conflict of Laws* § 83 (1979).

252. See, e.g., *Gould*, 822 F. Supp. at 1176. While the *Gould* court considered the fact that the insured risk was located in several states, the *American Motorists* court did not address this issue. It appears that ARTRA has facilities in other states which might have been covered by this insurance policy. See *supra* note 248. Furthermore, the *Gould* court held that Pennsylvania, the site of the risk, no longer had a strong interest in the litigation because the pollution had already been cleaned up. See *Gould*, 822 F. Supp. at 1176. In addition, as the *Potomac Electric* court stated, the argument for applying the law of the state where the contamination occurred would have been stronger if it had concerned the insurer's liability for cleaning up the contamination rather than simply whether the insurer was liable for costs incurred by the insured in cleaning up the polluted site, which had already been remedied. See *Potomac Elec. Power*

state's court, in attempting to speak for another, may look at the issues differently and may not consider all of the relevant interests which the other state would consider.²⁵³ In this case, the court of appeals has no rational basis to speak for Illinois's choice-of-law determination.²⁵⁴ The court of appeals's decision could be considered an affront to the courts of Illinois.

The reasoning of a "limited *renvoi* exception" is sure to vex the courts of other states and may lead them to ignore Maryland's significant interest in those states. It would be better for Maryland to change its law so that a Maryland court would determine which law should be applied by considering the significance of Maryland's contacts with the litigation, rather than the lack of significance of another state's contacts. Forum shopping would be reduced by Maryland's adoption of the policy-oriented approach of the Second Restatement. Fairness would be promoted by considering which state has the most significant contacts as opposed to arbitrarily choosing the law of the state where the contract was created or applying a self-centered analysis of another state's interests.²⁵⁵

Co. v. California Union Ins. Co., 777 F. Supp. 968, 972 n.10 (D.D.C. 1991). Because the pollution at the Site had been remedied by Sherwin-Williams, this case presented a similar situation to that in *Gould and Potomac Electric. American Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 564, 659 A.2d 1295, 1297 (1995). It has also been held that the jurisdiction where the insured's headquarters and principal place of business are located is the jurisdiction which has the most significant relationship to the litigation. See *Potomac Elec.*, 777 F. Supp. at 972-73. Furthermore, as the *ARTRA Group* court stated, Maryland's strong public policy did not apply to who paid for the clean-up; it only required that *somebody* pay for it. See *ARTRA Group, Inc. v. American Motorists Ins. Co.*, 100 Md. App. 728, 739, 642 A.2d 896, 901. The court of appeals in *American Motorists* did not indicate that this conclusion was erroneous. See generally *American Motorists*, 338 Md. at 573 n.3, 659 A.2d at 1301 n.3 (stating that reference to Illinois law under *lex loci contractus* would not violate Maryland public policy).

253. See *supra* note 252. For example, other states have also considered the drafting history of insurance policy language in the construction of policies. See, e.g., *Morton Int'l Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 831, 855-73 (N.J. 1993), *cert. denied*, 510 U.S. 112 (1994) (holding that construction of insurance policy in manner inconsistent with its representation to regulators violated state's strong public policy in favor of "requiring regulation of the insurance business in the public interest"); cf. *Lumbermens Mut. Cas. Co. v. Belleville Indus.*, 555 N.E.2d 568, 573 (Mass. 1990) (explicitly declining to consider drafting history in construction of insurance policy).

254. See *supra* note 253.

255. See *supra* note 244. As stated by the *American Motorists* court, the application of *lex loci contractus* has a tendency to lead to arbitrary and impractical results. See *American Motorists*, 338 Md. at 580, 659 A.2d at 1305. If Maryland were to adopt the principles of section 188 of the Second Restatement, fairness in assessing the relative interests of the jurisdictions involved would theoretically be increased, possibly at the expense of certainty and predictability. See 16

The other alternative would have been for the court of appeals to follow *lex loci contractus* and apply Illinois law as the law of the state where the contract was made. While the court may not have been pleased with American Motorists being responsible for defending ARTRA, an alleged long term polluter,²⁵⁶ consistency would have been enhanced and forum shopping minimized.²⁵⁷

3. Not an Equitable Decision

The court of appeals stated that ARTRA's assertion — that it expected Illinois law to control the dispute under Maryland's doctrine

AM. JUR. 2D *Conflict of Laws* § 83 (1979). On the other hand, the *American Motorists* holding arguably promotes certainty and predictability, but not fairness, because the law applied under the "limited *renvoi* exception" will almost invariably be the law of Maryland.

256. See *American Motorists*, 338 Md. at 590-93, 659 A.2d at 1310-11.

257. See *id.* at 597, 659 A.2d at 1313 (Raker, J., dissenting). It is the court of appeals's halfway approach that promotes forum shopping and reduces consistency. If the court fully adopted section 188 of the Second Restatement, future defendants in other states, such as ARTRA, would know that Maryland follows the Second Restatement's approach and could predict that Maryland might determine that it has the most significant relationships to the litigation, and thus apply Maryland law. If Maryland remained a *lex loci contractus* state, out-of-state contract litigation defendants could predict that Maryland would apply the law of the place of contracting. Under *American Motorists*, an out-of-state contract litigant cannot predict whether Maryland will decide to apply the law of the place of contracting, or if Maryland would determine that the state of contracting would not apply its own law and apply Maryland law instead. Furthermore, the approach of section 188 of the Second Restatement is subjective, reducing certainty and predictability of outcome. See 16 AM. JUR. 2D *Conflict of Laws* § 83 (1979). As a result, there may be a difference between which jurisdiction the court of another state actually decides has the most significant relationship to the litigation and which jurisdiction a Maryland court, while assuming the role of that foreign court, would decide has the most significant relationship to the litigation. See *supra* notes 252-54. As the *American Motorists* court admitted, there is an inherent preference to apply one's own substantive law. See *American Motorists*, 338 Md. at 578, 659 A.2d at 1303-04.

Far from preventing forum shopping, this decision appears to have been the result of it and to have rewarded the plaintiff for doing so. American Motorists did not file this action in Illinois court because an Illinois court would have likely found Illinois to have the most significant relationships to the litigation. See *id.* at 597, 659 A.2d at 1312; see also *supra* note 250. Illinois law was definitely less favorable to American Motorists, while the Court of Appeals of Maryland had not yet spoken on the insurance issue. See *supra* notes 82-92. In addition, the court of special appeals had previously construed the "sudden and accidental" exception in favor of the insurers. See *supra* notes 82-92. By filing in Maryland and arguing for the adoption of *renvoi*, American Motorists had some chance of prevailing in court. Furthermore, the current trend has been towards a narrow judicial interpretation of the pollution exclusion. See *supra* note 39. As such, American Motorists had a much better chance of winning this suit in Maryland than in Illinois.

of *lex loci contractus* — is the type of forum shopping that the *American Motorists* court wished to eliminate.²⁵⁸ This decision is inequitable because it did not, and will not, protect parties' expectations of which law will govern their contract disputes. Under Maryland's doctrine of *lex loci contractus*, ARTRA's belief that Illinois law would control the dispute was a reasonable belief.²⁵⁹ *American Motorists* had no binding authority to support its contention that Maryland law should control this case, only the prediction of a federal judge that Maryland courts might adopt *renvoi*.²⁶⁰

In adopting a limited form of *renvoi*, but not the approach of the Second Restatement, the court of appeals has gone halfway towards an interest-balancing approach.²⁶¹ Under the present law, Maryland's interests are protected, but other states' interests are not. If a contract is made outside of Maryland, but Maryland has more significant interests, Maryland courts will apply Maryland law under the *renvoi* doctrine.²⁶² If another state, however, has more significant interests than Maryland, but the contract was made in Maryland, Maryland courts will ignore that state's significant interests and apply Maryland law under *lex loci contractus*.²⁶³ The decision is inequitable because only Maryland interests are protected — there is no consid-

258. See *American Motorists*, 338 Md. at 577-88, 659 A.2d at 1303.

259. Given the court of special appeals's conclusion that there was no strong public policy at issue here, and the lack of an effective contractual choice of law by the parties, Maryland law would have held that the law of Illinois, as the state where the contract was made, would govern. See *ARTRA Group, Inc. v. American Motorists Ins. Co.*, 100 Md. App. 728, 739, 642 A.2d 896, 901 (1994), *rev'd*, 338 Md. 560, 659 A.2d 1295 (1995); see also *Kramer v. Bally's Park Place, Inc.*, 311 Md. 387, 390, 535 A.2d 466, 467 (1988) (applying *lex loci contractus*).

260. See *Travelers Indem. Co. v. Allied-Signal, Inc.*, 718 F. Supp. 1252, 1253-54 (D. Md. 1989) (holding that Maryland may look to law of state referenced by *lex loci contractus* to ascertain whether that state would refer to Maryland substantive law). But see *Eastern Stainless Corp. v. American Protection Ins. Co.*, 829 F. Supp. 797, 800-01 (D. Md. 1983) (stating that Maryland would apply *renvoi* only in "exceptional situations" such as when "important public policy" was at issue).

261. See *American Motorists*, 338 Md. at 579, 659 A.2d at 1304. The limited *renvoi* approach balances the interests of Maryland against that of other involved states only in cases where the contract at issue was formed outside of Maryland. See *id.* If the contract was formed outside of Maryland, and Maryland determines that the state of contracting would apply Maryland law, Maryland law will be applied. See *id.* However if a contract was formed in Maryland, but another state has the most significant relationship to the contract, Maryland law will be applied. See *id.*; see also *supra* notes 250 & 252.

262. See *supra* note 243. This could be viewed as the use of *renvoi* as a "manipulative device." See *supra* notes 153, 159, 160, 167, 204 and accompanying text.

263. See *supra* note 261.

eration of other states' interests.²⁶⁴ In order to promote fairness and consistency, the court of appeals should clarify its position either by adopting an interest-analysis approach such as that of Section 188 of the Second Restatement, or by returning to *lex loci contractus* in all cases except where the parties have chosen the governing law in their contract, or where Maryland's strong public policy precludes the protection of an out-of-state interest.

4. Promotion of Forum Shopping

American Motorists commenced this action in Maryland²⁶⁵ because Illinois law, following the *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*²⁶⁶ decision, was clearly unfavorable to American Motorists.²⁶⁷ Maryland law, on the other hand, favored the interests of American Motorists.²⁶⁸ In reality, American Motorists, rather than ARTRA, engaged in forum shopping, and the outcome of this decision rewarded American Motorists for doing so.²⁶⁹

Forum shopping is further promoted by this decision because plaintiffs who have contractual interests in both Maryland and another state, and know that the other state's law is unfavorable, will now be encouraged to file their actions in Maryland. If the contract was made in Maryland, Maryland will apply its own law under *lex loci contractus*.²⁷⁰ If the contract was executed elsewhere, the plaintiff may be able to persuade a Maryland court that Maryland's contacts are significant enough that Maryland should still apply its own law.²⁷¹ This decision will, therefore, actually lead to increased, rather than decreased, forum shopping.

5. Maryland Courts Freedom to Apply Maryland Law Protects Plaintiffs

Presuming that Maryland courts would rather apply Maryland law than the law of another state, the *American Motorists* decision

264. See *supra* note 243. If a contract is formed in Maryland, but some other jurisdiction has a more significant relationship with it, the *American Motorists* court would consider that other jurisdiction's interest to be irrelevant and would apply Maryland law as the *lex loci contractus*.

265. See *American Motorists*, 338 Md. at 563, 659 A.2d at 1296.

266. 607 N.E.2d 1204 (Ill. 1992), modified 670 N.E.2d 740 (Ill. 1996).

267. See *supra* notes 44, 257.

268. See, e.g., *Bentz v. Mutual Fire, Marine & Inland Ins. Co.*, 38 Md. App. 524, 537-39, 575 A.2d 795, 801-03 (1990); see also *supra* notes 190, 257.

269. See *supra* note 257.

270. See *supra* note 257.

271. See *supra* note 257; see also *American Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 579, 659 A.2d 1295, 1304 (1995).

will certainly aid Maryland courts. The court of special appeals's conclusion that Maryland has no strong public policy concerning who is liable for the costs of an environmental cleanup as long as somebody pays for it makes sense.²⁷² As stated above, however, this decision in effect gives Maryland courts another "escape" from applying the law of another state if they do not wish to do so.²⁷³

This decision favors plaintiffs, such as American Motorists, who find Maryland law more favorable to them than the law of another state. Although a contract may have been made in another state, the plaintiff who can demonstrate that Maryland has significant contacts to the litigation may be able to persuade a Maryland court to follow the *American Motorists* holding and apply Maryland law to the case, rather than the law of the state where the contract was made.²⁷⁴ The converse, however, is not true; when a contract is made in a state outside of Maryland, but Maryland has significant contacts with the litigation, the defendant will not be able to avoid unfavorable Maryland substantive law by claiming that Maryland follows *lex loci contractus*.²⁷⁵

Litigants on either side of a contractual conflict-of-laws dispute to which Maryland law is favorable would be well-advised to make the most of their Maryland contacts and, in so doing, may be able to persuade a Maryland court to reject *lex loci contractus* in favor of Maryland law and *renvoi*.

B. *The Insurance Issue*

1. Maryland Takes the Insurers' Position

The decision of the Court of Appeals of Maryland in *American Motorists* brings Maryland into line with the large number of federal and state courts that have held that the terms "sudden and accidental" in the pollution exclusion clause are unambiguous.²⁷⁶ The court held that coverage of damage caused by pollution is precluded unless the release is quick or instantaneous, as well as unintended and

272. See *ARTRA Group, Inc. v. American Motorists Ins. Co.*, 100 Md. App. 728, 739, 642 A.2d 896, 901 (1994), *rev'd*, 338 Md. 560, 659 A.2d 1295 (1995); see also *supra* note 252.

273. See *supra* notes 244, 255, 257, 261.

274. See *supra* note 257; see also *American Motorists*, 338 Md. at 579, 659 A.2d at 1304.

275. See *supra* note 257.

276. See *supra* note 55. See generally *American Motorists*, 338 Md. at 586-92, 659 A.2d at 1308-11.

unexpected.²⁷⁷ In light of this decision, there will certainly be no incentive for polluting policyholders to have their suits heard in Maryland, although insurance companies such as American Motorists will be encouraged to file suits involving this issue in Maryland.

2. The Debate Over "Sudden" Rages On

From a layman's point of view, sudden can mean either a quick or instantaneous event, such as "a sudden flash of lightning," or an unexpected but not instantaneous event, such as "suddenly it's spring."²⁷⁸ It has been suggested that an interpretation of "sudden" as "unintended and unexpected" is more in keeping with the regulatory goals of insurance, as the ostensible purpose of environmental insurance is to protect the insured against liability for damages resulting from unintended and unexpected events.²⁷⁹ An interpretation of "sudden" as "of short duration" or "instantaneous" results in random coverage based on the fortuitous circumstances under which the insured discovers the pollution release.²⁸⁰ If the release is discovered and corrected before a significant amount of time has passed,

277. See *American Motorists*, 338 Md. at 586, 659 A.2d at 1308 (quoting *American Motorists Ins. Co. v. General Host Corp.*, 667 F. Supp. 1423, 1429 (D. Kan. 1987) (declining to adhere to the plain language of a comprehensive general liability insurance policy which excluded coverage for pollution unless discharge was sudden and accidental)); see also *Bentz v. Mutual Fire, Marine & Inland Ins. Co.*, 83 Md. App. 524, 537, 575 A.2d 795, 801-02 (1990) (agreeing with the analysis in *General Host*, 667 F. Supp. at 1429).

278. One dictionary defines "sudden" as: (1) (a) happening or coming unexpectedly; not foreseen or prepared for; (b) sharp or abrupt (a "sudden" turn in the road); or (2) done, coming, or taking place quickly or abruptly; hasty. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1422 (David B. Guralnik, ed., 2d ed. 1980). For example, in keeping with this definition, a person whose illness worsens could be said to "have taken a 'sudden' turn for the worse," although the worsening of the illness is not instantaneous and may take days or weeks. See *Ballard & Manus*, *supra* note 29, at 619-20; see also *Morton Int'l, Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 831, 871 (N.J. 1993) (quoting *Ballard & Manus*, *supra* note 29, at 615-16), *cert. denied*, 510 U.S. 112 (1994); *supra* note 39. In addition, as noted above, in the commonly-used expression "a 'sudden' turn in the road," the word "sudden" has no temporal meaning whatsoever. As such, an ordinary person could conclude that "sudden" does not necessarily mean "quick" or "abrupt," and could mean "unexpected" and unforeseen or "unintended." See generally *Ballard & Manus*, *supra* note 29, at 614 (listing various dictionary definitions of "sudden").

279. See *supra* note 42. "[A] business purchases CGL coverage largely to protect against *unexpected and unknown* losses which may threaten its financial survival." *Ballard & Manus*, *supra* note 29, at 621 (emphasis added).

280. See *supra* note 42. "[A]n insured typically would not expect liability coverage to depend on the duration of an occurrence." *Ballard & Manus*, *supra* note 29, at 621 (emphasis omitted).

the release would be considered sudden, but if the insured does not discover the pollution discharge until enough time passes that it could be considered gradual, coverage will not be provided.²⁸¹

In light of these considerations, although it appears that a nebulous temporal aspect surrounds the meaning of "sudden," it is most consistent with the purpose of the insurance policy to construe "sudden" as only "unintended and unexpected."²⁸²

3. What Did the Insurers Really Intend "Sudden" to Mean?

While the logic of the court of appeals in determining that "sudden" implied an event of a temporal nature is debatable, the insurance industry was unclear, and possibly misleading, in its representations to state insurance regulators of its purpose in drafting this clause.²⁸³ When seeking approval of the clause and its "sudden and accidental" exception in 1970, the insurers stated by memorandum that the purpose of the clause was to preclude coverage for damages caused by environmental contamination when the damage was intentional and expected.²⁸⁴ The Supreme Court of New Jersey, in considering the "drafting history" of the policy language, concluded that the insurers' assertions that "sudden" in the context of the exception must be interpreted as implying events of a temporal nature, were tantamount to misrepresentation by the insurance industry to the regulators, and therefore represented an unreasonable construction of the scope of coverage.²⁸⁵

Clearly, there are difficult considerations on both sides of this issue. While the insurance industry may have been negligent or misleading in its representation of the intended scope of coverage of this clause, evidence of the insurer's intent in drafting the pollution clause has been rejected as immaterial by one court because it was

281. See *supra* note 42. "[A]n insured would not logically believe that its protection hinged on an accident's duration, because such coverage would provide whimsical protection instead of the business security sought by the CGL purchaser." Ballard & Manus, *supra* note 29, at 622.

282. See *supra* note 42. "An interpretation of 'sudden and accidental' that provides protection against abrupt, unexpected pollution events, and excludes from coverage pollution events which the insured expects or intends, is consistent with a reasonable insured's business goals in purchasing CGL insurance." Ballard & Manus, *supra* note 29, at 621; see also *supra* notes 34, 36, 68 (discussing insurers' representations to regulators that the language was designed to preclude liability only when the pollution was intended or expected).

283. See *supra* note 68.

284. See *supra* note 68.

285. See *Morton Int'l, Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 831, 847-48, 854-55, 862, 870-71 (N.J. 1993), *cert. denied*, 510 U.S. 112 (1994); see also *supra* note 68.

not considered by the insured in purchasing the policy.²⁸⁶ Because the terms of insurance contracts are normally non-negotiable, the argument rejecting the evidence of drafting intent appears flawed.²⁸⁷

4. The "Microanalysis" Approach—Properly Rejected

The suggestion by the court of special appeals that "at least some" of the discharges might be "sudden and accidental"²⁸⁸ was properly rejected by the court of appeals.²⁸⁹ This approach of re-characterization of long-term gradual polluting practices as discrete, "sudden" events is irrational and has been soundly rejected.²⁹⁰

5. Were the Allegations Too Extreme for the Polluter to Escape Liability?

In light of allegations of the existence of numerous barrels of hazardous materials and dozens of underground tanks filled with toxic substances,²⁹¹ it is difficult to believe that ARTRA's plant officials did not expect these drums and tanks to eventually leak and

286. See *supra* note 68.

287. Far from being irrelevant because it was not considered by the policyholder before purchasing the policy, the drafting history should be considered critical because the policy language is non-negotiable, and the insurer is often in a superior bargaining position. See *supra* notes 50, 283-86 and accompanying text. The only protection the policyholder normally receives from unfair, poorly-written, or misleading policy language is review of the policy forms by insurance regulators. See *Morton*, 629 A.2d at 872-73 (holding it unfair to construe a pollution-exclusion clause in manner inconsistent with insurers' representation to state regulators and that such representations would violate state's "strong public policy" of regulation for protection of the public interest, "and would reward the industry for its misrepresentation and nondisclosure to state regulatory authorities").

288. See *ARTRA Group, Inc. v. American Motorists Ins. Co.*, 100 Md. App. 728, 742, 642 A.2d 896, 903 (1994), *rev'd*, 338 Md. 560, 659 A.2d 1295 (1995).

289. See *American Motorist Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 593-94, 659 A.2d 1295, 1311-12 (1995). The microanalysis approach appears not to have received the support of any jurisdictions which have considered it. See *supra* notes 71-73. In addition, the microanalysis theory itself does not address the underlying question of whether "sudden" contains a temporal element. See *supra* note 42. Because under the microanalysis theory, "sudden" does not mean "unintended" or "unexpected," the microanalysis theory does not promote the goals of liability insurance and does not provide insureds the extent of coverage which is provided by a definition of "sudden" as "unintended" and "unexpected." See *supra* note 42.

290. See *supra* notes 71-73.

291. See *American Motorists*, 338 Md. at 590-91, 659 A.2d at 1310. The complaint alleged that when the underground storage tanks at the Site overflowed, hazardous waste simply poured out onto the ground, and that other waste was improperly discharged into storm drains.

cause contamination. Perhaps the court believed that the scope of the pollution and the allegations of careless dumping, were simply too egregious to allow ARTRA to escape liability for its acts.

Federal, state, and local environmental regulations have placed the burden of remedying environmental contamination primarily on the polluters.²⁹² The increasing general awareness of the great magnitude of environmental damage that has occurred from practices such as ARTRA's abandonment of barrels of toxic wastes signals a need to reallocate the burden of environmental cleanup costs. This reallocation may be accomplished through legislation, rather than through the courts. It is quite possible that the general public may be required to pay the majority of the costs of cleaning up contaminated waste sites in this country through increased taxes because neither manufacturers nor insurers, alone or together, can shoulder the expense.

Unless this occurs, however, the decision of whether insurers or insureds must pay for environmental cleanups will be determined in the courts through the interpretation of insurance contracts. In considering the apparent intent of the insurers in adopting this language, as well as the apparent ambiguity in "sudden," the reasonable construction of the pollution exception would be that coverage is precluded only when the pollution release that causes the damages was intended and expected.²⁹³ American Motorists would therefore have a duty to defend ARTRA. If the allegations of the releases of pollutants are correct, however, indemnity coverage should be precluded only for those damages occurring from pollution which was not unexpected or unintended.²⁹⁴

6. The Insureds' Attorney Should Emphasize Insurer's Intent, as Well as Temporality of Pollution Releases

Policyholders involved in litigation with their insurance companies over this issue should bring the drafting history of the clause to

292. See Ballard & Manus, *supra* note 29, at 611-12.

293. See *supra* notes 34-36, 42, 68, 279, 282.

294. At least some of the allegations involved the intentional dumping of hazardous waste. See *American Motorists*, 338 Md. at 564, 659 A.2d at 1297. The Sherwin-Williams complaint alleged that hazardous and toxic waste were spilled "as a result of regular operations of the plant," and that materials were discharged (apparently intentionally) into the storm drain system. *ARTRA Group, Inc. v. American Motorists Ins. Co.*, 100 Md. App. 728, 740, 642 A.2d 896, 902 (1994), *rev'd*, 338 Md. 560, 659 A.2d 1295 (1995). "In addition to alleging that ARTRA and its predecessors negligently and illegally stored . . . [hazardous waste] on the site . . . Sherwin-Williams's complaint alleged, *inter alia*, that spills of hazardous substances occurred as a result of regular operations of the plant . . ." *Id.* Damages resulting from any intentional or expected releases of pollutants would not be covered under any construction of the pollution exclusion clause. See *supra* notes 36, 42, 279.

the attention of the court. Although the *Lumbermens Mutual Casualty Co. v. Belleville Industrial, Inc.*²⁹⁵ court rejected the evidence of drafting history as immaterial to the case because it did not influence the policyholder's decision to purchase the policy,²⁹⁶ drafting history does serve as strong evidence that the proper construction of the exception is to preclude coverage only when the pollution release is intended or expected.²⁹⁷

Policyholders should determine if the pollution release could reasonably be viewed as instantaneous or short-lived and, if so, emphasize that fact to the court.²⁹⁸ Insurers, in turn, should ascertain the temporality of the pollution release and emphasize that pollution releases which occur gradually and during the normal course of business are not sudden and accidental.²⁹⁹

7. The Alternative: Allow Coverage

If the court of appeals had held that under Maryland law coverage was precluded only for intended and expected releases of pollution, American Motorists would have lost the declaratory judgment action and been required to defend ARTRA in the Sherwin-Williams action.³⁰⁰ If that had been the case, the choice-of-law issue would have been moot because in *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*³⁰¹ it was determined, under Illinois law, that coverage was provided for damages resulting from unintended and unexpected releases of pollution.³⁰² This position is arguably more in keeping with the insurers' expressed intent in adopting the policy language, and therefore more equitable. The drafting history aside, however, the majority of recent holdings support the insurer's position.³⁰³

295. 555 N.E.2d 568 (Mass. 1990).

296. See *supra* note 68.

297. See *supra* notes 42, 68, 279-82, 287.

298. See *American Motorists*, 338 Md. at 586-93, 659 A.2d at 1308-11.

299. See *id.*

300. See *ARTRA Group, Inc. v. American Motorists Ins. Co.*, 100 Md. App. 728, 740-41, 642 A.2d 896, 902 (1994), *rev'd*, 338 Md. 560, 659 A.2d 1295 (1995). Although the court of special appeals implied that some of the pollution at the Site was intentional, it held that American Motorists was still required to defend ARTRA on the potentiality-of-coverage rule because "at least some" of the contamination was not expected or intended. *Id.* See *supra* notes 22, 27-28 (discussing potentiality of coverage).

301. 607 N.E.2d 1204 (Ill. 1992).

302. See *id.* at 1220-22.

303. See *supra* notes 39, 42, 55, 68.

V. CONCLUSION

Rather than harmonizing Maryland's obsolescent contractual choice-of-law doctrine with modern and enlightened approaches, the *American Motorists* court has simply added confusion to this legal morass.³⁰⁴ Maryland's adoption of a "limited *renvoi* exception" to its stated doctrine of *lex loci contractus* is, at best, a halfway step towards adoption of the interest analysis approach of the Second Restatement.³⁰⁵ In this case, however, going halfway is not better than not going at all because this position is prejudicial to the interests of parties from other states in Maryland litigation.³⁰⁶ To balance the goals of consistency, predictability, uniformity, and most importantly, fairness in resolving legal conflicts, the court of appeals must either fully adopt the approach of the Second Restatement or return to the well-established doctrine of *lex loci contractus*.³⁰⁷

In addition, although the *American Motorists* court swayed with the prevailing wind in determining that an insurer has no duty under a CGL policy to pay the costs of cleaning up an insured's pollution, the court did not address the historical development of the insurance policy, an issue of key importance in this ongoing battle between insurers and insured.³⁰⁸ The court of appeals held that insurance coverage is precluded except for damages resulting from instantaneous or short-lived, and unintended and unexpected releases of pollution.³⁰⁹ Although the holding is consistent with the decisions of a significant number of other states,³¹⁰ it fails to address the role of the insurers' intent in drafting the policy language.³¹¹ Additionally, the temporal component of "sudden" is difficult to conclusively establish.³¹² Despite the apparent negligence of the policyholder in carelessly disposing of toxic wastes,³¹³ the interpretation of the policy which is most consistent with the reasonable expectations of the insured is that coverage should be precluded only where the release of the pollution is merely unintended and unexpected rather than abrupt or instantaneous as well as unintended and unexpected.³¹⁴ Hopefully, the court of appeals will revisit this issue and determine the role of

304. See *supra* notes 93, 95-174, 184, 236-75.

305. See *supra* notes 261-64 and accompanying text.

306. See *supra* notes 272-75 and accompanying text.

307. See *supra* notes 251-57 and accompanying text.

308. See *supra* notes 33, 34, 36, 42 and accompanying text.

309. See *supra* notes 225-29 and accompanying text.

310. See *supra* note 55.

311. See *supra* notes 33, 34, 36, 42, 68 and accompanying text.

312. See *supra* notes 44-69, 278-82 and accompanying text.

313. See *supra* note 294.

314. See *supra* notes 33, 34, 36, 42, 68, 282 and accompanying text.

the insurers' intent and the reasonable expectations of policy holders in interpreting this language.

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