Florida Should Move Away From Lex Loci Contractus

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All litigators know choice of law issues can be complex, fact-intensive and outcome determinative. This is particularly true in cases involving subject matters where the individualized state laws are so divisive, which is the case in matters involving insurance law. Because the consequential effects of a choice of law analysis will often lead to changes in the substantive law, a savvy practitioner will examine choice of law issues first in every insurance contract dispute to anticipate what rules may govern the coverage litigation.

A contract is the legal term for an agreement between two or more persons that creates, modifies or destroys a binding relationship between the parties.[1] Contracts exist in nearly every aspect of our daily lives, from contracts that govern our employment to the contracts with our childcare and medical providers. These everyday contracts may be governed by different choice of law standards. For example, with respect to torts, Florida has always followed the “significant relationship test” in resolving conflict of law issues.[2] That test, in the Restatement (Second) of Conflict of Laws section 145, provides as follows: (1) the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in section 6; and, (2) contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; (d) the place where the relationship, if any, between the parties is centered.”[3]

In examining insurance contracts however, Florida courts have long adhered to the doctrine of lex loci contractus set forth in the Restatement (First) of Conflict of Laws which states that the law of the place of contracting determines the validity and effect of a promise with respect to: (a) the capacity to make the contract; (b) the necessary form, if any, in which the promise must be made; (c) the mutual assent or consideration, if any, required to make a promise binding; (d) any other requirements for making a promise binding; (e) fraud, illegality, or any other circumstances which make a promise void or voidable; (f) except as stated in section 358, the nature and extent of the duty for the performance of which a party becomes bound; (g) the time when and the place where the promise is by its terms to be performed; (h) the absolute or conditional character of the promise.[4]

Although once widely accepted in most jurisdictions, today lex loci contractus is considered the minority rule with only 12 states still utilizing it.[5] While the doctrine is considered to result in a more predictable outcome in situations where the place of contracting and performance are in the same state, many courts differ in its application. The disagreement as to the application can lead to incongruous results and defeats the very purpose of the doctrine — the ability to prognosticate the outcome of a particular dispute in a specific jurisdiction. The lex loci contractus doctrine has also been criticized as being too rigid, too difficult to apply,
and not adequately recognizing the policy interests of the involved states. The overarching problem in applying the doctrine remains constant — how does the court determine the place where the contract was made, in the current era of electronic communications? How does one account for the fact that in the age of electronic communications, the clarity of geographic boundaries is blurred by intangible internet border crossings? In other words, how will parties that frequently conduct negotiations electronically, determine where the contract is consummated or bound? This additional level of complexity makes an already daunting task even more challenging for most practitioners.

In Florida, the doctrine of lex loci contractus was first adopted in Sturiano v. Brooks.[6] In that case, Mrs. Sturiano brought an action against her husband’s estate alleging negligence following a car accident in which he was killed and she was injured.[7] Following a jury verdict in favor of Mrs. Sturiano, Brooks, the guardian ad litem, appealed to the fourth district.[8] The court reversed the verdict, holding that the doctrine of lex loci contractus required that New York law be applied because the insurance contract was executed in New York.[9] Under an applicable New York statute, the action was barred unless the insurance policy specifically included coverage for claims between spouses, which was absent from the Sturiano policy. Absent such a provision, no coverage would be afforded.[10] The insurance policy at issue did not allow for claims between spouses.[11] Mrs. Sturiano argued that choice of law rules should be flexible to allow courts to apply the laws which best accommodate the parties and the host jurisdiction.[12] She further argued that lex loci contractus did not address modern issues or problems in the area of conflict of laws.[13] While the court agreed the doctrine was old, it did not agree that it was outdated, stating “the very reason Mrs. Sturiano gives as support for discarding lex loci contractus, namely that we live in a migratory, transitory society, provides support for upholding that doctrine.”[14] The court also noted that parties have a right to know what the agreement they have executed provides, or more simply stated, “when parties come to an agreement, they do so with the implied acknowledgement that the laws of the jurisdiction will control absent some provision to the contrary.”[15]

The applicability of the lex loci contractus doctrine in Sturiano v. Brooks, resulted in a change in substantive law that deprived Mrs. Sturiano of benefits that would have been due had another state’s [Florida] law been applied. A choice of law analysis in any jurisdiction is often outcome driven and fact specific and this case is illustrative of how the result of that analysis can change the outcome of an entire dispute. This is a prime example of how the determination of the governing state law as a result of a choice of law analysis can take the outcome of a lawsuit from a verdict in favor of the petitioner to being completely barred. It can be a zero-sum game and for Mrs. Sturiano, it was.

In 1971, the Restatement (Second) of Conflict of Laws brought about its first major shift, adopted by several states, moving away from the lex loci contractus doctrine and toward the “significant relationships test.” This approach, enumerated in the Restatement (Second) of Conflict of Laws in section 188 is aptly titled the “Law Governing in Absence of Effective Choice by the Parties.”[16] It provides, “[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in section 6. In the absence of an effective choice of law by the parties, the contacts are to be taken into account in applying the principles of section 6 to determine the law applicable to an issue including: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract, and; (e) the
domicile, residence, nationality, place of incorporation and place of business of the parties.”[17]

The Restatement (Second) of Conflict of Laws also contains several general provisions that are considered before moving to the more specific provisions. Most often thought of as a multifactor analysis, section 187 creates a strong presumption that any choice of law provision in a contract will be effective and enforced by the court, while section 193 creates a presumption that the law of the principal place of the insured risk will govern in disputes involving fire, surety or casualty insurance contracts.[18] Similarly, section 206 presumes that any issues related to the performance of a contract will be determined by the law of the place where the contract was performed.[19] Much of the uncertainty surrounding the Restatement (Second) of Conflict of Laws is related to its general provisions, namely section 6 (general choice of law provisions) and section 188 (most significant relationship).[20] Many courts look to these provisions with decreased emphasis because other sections of the restatement call for application of a section 188 analysis. For example, section 204, Construction of Words Used in Contract, requires that in the absence of an enforceable choice of law provision and “when the meaning which the parties intended to convey by words used in a contract cannot satisfactorily be ascertained, the words will be construed in accordance with the local law of the state selected by application of the rule of section 188.”[21] Application of section 188 may lead to confusion and misuse.

While courts continue to struggle with the application of this analysis, there are some clear instances where reason has had to yield to practicality. In matters involving the application of section 193 where an insurance contract involves multistate risks, the parties must defer to the most significant relationship test of section 188 for a choice of law analysis.[22] This section has caused many challenges for litigants and is perhaps one of the reasons why the Florida Supreme Court has been hesitant to openly declare a departure from the lex loci contractus doctrine.

For nearly a century, the courts have held “that the rules of comity may not be departed from, unless in certain cases, for the purpose of necessary protection of our own citizens, or of enforcing some paramount rule of public policy.”[23] This proposition became the foundation for the “public policy exception” first recognized by the Florida Supreme Court in State Farm Mut. Auto. Insurance Co. v. Roach.[24] With respect to insurance contracts, the Florida Supreme Court sets forth the requirement that the insurer must have reasonable notice that the insured is a Florida citizen in need of protection.[25] When applying this exception, courts must “consider whether the insured notified the insurer of a permanent change of residence and whether the insured risk is or will be primarily located in Florida.”[26] The notice requirement allows an insurer to weigh the consequence of issuing the policy, provides the opportunity to withdraw from one, or for Florida licensed insurers, the option of issuing the policy and then charging an appropriate premium.[27] Florida’s public policy interest is paramount to the determination of disputes within its jurisdiction. Because of this, the public policy exception is prohibitively narrow and only displaces the insurer where there is clear notice that the insured is not merely a temporary visitor, but a permanent Florida resident. The issue presented in Roach was “whether residents of another state who reside in Florida for several months during the year (a common factor to many Florida residents), who purchased an insurance contract while in Florida, may invoke Florida’s public policy exception to the rule of lex loci contractus as an exclusionary clause in the policy.” The Florida Supreme Court rejected the significant relationships test set forth in Sturiano, before reaffirming that lex loci
contractus controls. [28] It acknowledged that while “lexi loci contractus is an inflexible rule,” its “inflexibility is necessary to ensure stability in contract arrangements.”[29] Further reasoning that to “abandon this principle and permit a party to change or modify contract terms by moving to another state would unnecessarily disrupt the stability of contract.”[30]

Although some have argued that the Florida Supreme Court’s rulings should be limited to automobile policies, or mobile risks, most courts have rejected that argument and have applied lex loci contractus in circumstances involving commercial policies covering risks in multiple states.[31] For instance, in Am. Home Assurance Co. v. Peninsula II Developers Inc., the United States District Court for the Southern District of Florida addressed how to determine where an insurance policy had been executed.[32] As part of its analysis, the court noted two schools of thought: (1) the place where an acceptance (or a binder) is received, or (2) the place from where the acceptance (or a binder) was sent.[33] Authority for both approaches was evaluated by the court in the following manner:

At least two Eleventh Circuit Court of Appeals decisions follow the first approach. For example, in Prime Insurance Synd. Inc. v. B.J. Handley Truck Inc., the Eleventh Circuit held that Alabama law applied to a policy where the insurance company (located in Illinois) took the last act necessary to execute a contract by communicating an oral binder with a company residing in Alabama because the insured received acceptance of the oral agreement in Alabama.[34] Similarly, in Indus. Chem. & Fiberglass Corp. v. The N. River Insurance Co, the Eleventh Circuit held that the last act necessary to the execution of a policy was “the receipt and acceptance of the policies by the named insured, which took place in New York.”[35]

With regard to the second approach noted in Club Caribe, additional authority under Florida law states that an acceptance is effective, and the last act to execute a contract occurs, in the location where the acceptance was made or transmitted. For example, in CNL Hotels & Resorts Inc. v. Houston Cas. Co., the court held that New York law should apply to an insurance policy when the binder was sent from New York to Florida because “[u]nder Florida law, the most compelling factor is the place of execution of the contract, not the place or places to which it was eventually mailed.”[36] This approach follows the restatement in that it confirms that a contract is made at the time an acceptance leaves the offeree’s possession.[37]

While the Restatement (Second) Conflict of Laws has done very little to move the tide in Florida away from the lex loci contractus approach, many other jurisdictions have abandoned their use of the doctrine in favor of the “significant relationships test.” This departure was thought to bring a more modern approach to contract interpretation. Unfortunately, the Eleventh Circuit rejected this approach in favor of the lex loci contractus doctrine. However, it is noteworthy that the Restatement (Second) Conflict of Laws has now fully exposed the flaws and challenges associated with the antiquated doctrine and propelled the movement away from its predecessor. With the Restatement (Third) Conflict of Laws on the horizon, practitioners and scholars alike are left wondering whether the latest version will address issues that plague complex insurance coverage disputes such as choice of law for insurance contracts involving multistate risks. It is not an understatement to say that the authors of the Restatement (Third) Conflict of Laws have the balance of outcome determinative power in their hands; may they wield it wisely.
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[5] Id.
[7] Id. at 1127.
[8] Id.
[9] Id.
[10] Id.
[12] Id.
[13] Id.
[14] Id at 1130.
[15] Id.
[17] Id.
[18] Id. at §§187, 193.
[19] Id. at §206.
[20] Id. at §6, 188.
[21] Id. at §204.
[22] Restatement (Second) of Conflict of Laws §193 (1971).
[23] Herron v. Passailaigue, 110 So. 539, 542 (Fla. 1926); see also In re Estate of Nicole Santos, 648 So. 2d 277, 281 (Fla. 4th DCA 1995) (“We agree that Florida courts may depart from the rule of comity where necessary to protect its citizens or to enforce some paramount rules of public policy.”).


[26] Id. (citing N.J. Mfrs. Insurance Co. v. Woodward, 456 So. 2d 552 (Fla. 3d DCA 1984) (Florida law not applicable where auto policy was issued and delivered to insureds while they were permanent residents of New Jersey and the insurer had notice of insured’s change in mailing address).

[27] Tenn. Farmers Mut. Insurance Co. v. Meador, 467 So. 2d 471, 472 (Fla. 5th DCA 1985) (noting that upon receiving notice of the insured’s move to a state where the insurer did not operate, the insurer sent notice of its intent not to renew the policy).

[28] Sturiano v. Brooks, 523 So. 2d 1126, 1128-29 (Fla. 1988) (expressly limiting its decision to insurance for automobiles which are a mobile risk); Roach, 945 So. 2d at 1169 (“the law of the jurisdiction where the contract was executed governs the rights and liabilities of the parties in determining an issue of insurance coverage”).

[29] Id.


[33] Id. at *7.

[34] Prime Insurance Synd., Inc. v. B.J. Handley Truck Inc., 363 F.3d 1089, 1092-93 (11th Cir. 2004).


[37] Restatement (Second) Contracts § 63 (1979) (“an acceptance made in a manner and by a medium invited by an offerer is operative and completes the manifestation of mutual assent as soon as put out of the offeree’s possession, without regard to whether it ever reaches the
offeror”); see also, Pezold Air Charters v. Phoenix, 192 F.R.D. 721 (M.D. Fla. 2000) (“An acceptance is effective when, and thus where, dispatched.”).