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Tom Schulte
Hunton Andrews Kurth LLP

Andrea DeField
Hunton Andrews Kurth LLP

Jorge Aviles
Hunton Andrews Kurth LLP

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TOM SCHULTE, ANDREA DEFIELD & JORGE AVILES*

A growing number of cases have emerged from the Eleventh Circuit struggling with the application of lex loci contractus *to choice-of-law issues in the insurance context. And while the federal courts continue to struggle, the state courts in the Eleventh Circuit have not yet offered definitive guidance on when to apply* lex loci contractus*, and when to depart from it. In light of this choice-of-law issue, which can be and often is outcome determinative, this Article offers practical guidance on how policyholders can avoid application of an unfavorable state's law to their insurance dispute, both before and after litigation commences.*

* Tom Schulte is an associate in the Miami office of Hunton Andrews Kurth LLP, where he practices commercial litigation and governmental investigations. Tom is grateful to Judge Paul C. Huck for—among so many other things—inspiring this Article in the first place.

Andrea DeField, also of the Miami office of Hunton Andrews Kurth LLP, is a partner in the firm's insurance coverage practice and co-leads the firm's cyber insurance practice.

Jorge Aviles is an associate in the Washington, D.C. office of Hunton Andrews Kurth LLP, where he practices insurance coverage litigation primarily on behalf of corporate policyholders.

INTRODUCTION

"The ordinary court, or lawyer, is quite lost when engulfed and entangled in [choice-of-law issues]."[1] When sitting in diversity jurisdiction,[2] federal district courts must employ the forum state's choice-of-law rules to determine which state's substantive law will govern the case.[3] So, ironically, the court must apply state law to determine which state's law will ultimately apply.[4] Sometimes, this leads the court to apply the forum state's substantive law, which likely does not surprise the parties.[5] But in other scenarios, the analysis can cause another state's law—one generally unrelated to the case and potentially unforeseen by the parties—to govern the substantive resolution of the parties' dispute.[6]

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[1] William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

[2] *See* 28 U.S.C. § 1332.

[3] *See, e.g.*, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 494–96 (1941); How v. Gerrits, Inc., 961 F.2d 174, 178–79 (11th Cir. 1992).

[4] *See Klaxon Co.*, 313 U.S. at 496.

[5] *See id.*

[6] *See, e.g.*, Cherokee Ins. Co., Inc. v. Sanches, 975 So. 2d 287, 293 (Ala. 2007) (applying Tennessee law, although this state was only where the contract was formed, and there were more connections with Alabama).

The latter scenario can and does arise frequently in the context of insurance law.[7] And it is more likely to arise in the Eleventh Circuit than other federal circuits because Alabama, Florida, and Georgia adhere to the choice-of-law rule of *lex loci contractus*.[8] Rather than using the substantive law of the state with the most significant relationship to the transaction and parties at issue,[9] *lex loci contractus* demands that a court apply the substantive law of the state in which the insurance policy was executed.[10] This holds true, even if the policy was executed in a state with no relationship to or interest in the policyholder, the insurer, the insured risk, the events giving rise to the loss, or any other aspect of the case.[11] This result is significant, not only because it surprises parties to learn that their policy will be interpreted by an unforeseen state's law, but also because the application of one state's substantive law over another can be outcome dispositive.[12]

In recognition of this issue, this Article analyzes how litigants in the Eleventh Circuit can be proactive in avoiding the potential surprise of *lex loci contractus*, as well as how parties can attempt to avoid application of that rule. This Article begins with an overview of *lex loci contractus* within the Eleventh Circuit, including a discussion of the growing split in Florida federal courts on how rigorously to apply *lex loci contractus*.[13] Next, the Article identifies insurance contexts where the Eleventh Circuit has not yet addressed *lex loci contractus*, but where the same uncertainties about the rule's

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[7] *See* State Farm Fla. Ins. Co. v. Hernandez, 172 So. 3d 473, 476 (Fla. Dist. Ct. App. 2015).

[8] *See* Lima Delta Co. v. Glob. RI-022 Aerospace, Inc., 789 S.E.2d 230, 235 (Ga. Ct. App. 2016); Lifestar Response of Ala., Inc. v. Admiral Ins. Co., 17 So. 3d 200, 213 (Ala. 2009); Lanoue v. Rizk, 987 So. 2d 724, 727 (Fla. Dist. Ct. App. 2008).

[9] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAW § 188(1) (1971).

[10] *See Cherokee Ins. Co.*, 975 So. 2d at 293.

[11] *See id.*

[12] *Compare State Farm Fla. Ins. Co.*, 172 So. 3d at 476 (holding that appraisal may determine the amount of a loss, as long as coverage had been admitted), *with* Lam v. Allstate Indem. Co., 755 S.E.2d 544, 546 (Ga. Ct. App. 2014) (prohibiting appraisal from determining the amount of a loss, even if coverage had been admitted).

[13] *See* discussion *infra* Part II.

applicability may arise.[14] Then, the Article illustrates how choice-of-law affects insurance disputes outside the Eleventh Circuit by comparing *lex loci contractus* to the Restatement's "most significant relationship" choice-of-law rule.[15] Finally, the Article gives practical guidance on the matter of *lex loci contractus*, offering solutions for parties to implement both before and during insurance litigation.[16]

I. *LEX LOCI CONTRACTUS* WITHIN THE ELEVENTH CIRCUIT

A. *Overview of* Lex Loci Contractus

When faced with a choice-of-law issue in a contract dispute, each of the states in the Eleventh Circuit uses the rule of *lex loci contractus*,[17] which "provides that the laws of the jurisdiction where the contract was executed govern[] interpretation of the substantive issues regarding the contract."[18] To determine where a contract was executed—sometimes referred to as where the contract was "made"—courts look to "where the last act essential to the completion of the contract was done."[19] For insurance policies, that last essential act is often the delivery of the policy;[20] thus, under *lex loci*

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[14] *See* discussion *infra* Part III.

[15] *See* discussion *infra* Part IV.

[16] *See* discussion *infra* Part V.

[17] *See* Lima Delta Co. v. Glob. RI-022 Aerospace, Inc., 789 S.E.2d 230, 235 (Ga. Ct. App. 2016); Lifestar Response of Ala., Inc. v. Admiral Ins. Co., 17 So. 3d 200, 213 (Ala. 2009); Lanoue v. Rizk, 987 So. 2d 724, 727 (Fla. Dist. Ct. App. 2008).

[18] Prime Ins. Syndicate, Inc. v. B.J. Handley Trucking, Inc., 363 F.3d 1089, 1091 n.1 (11th Cir. 2004) (quoting Lumbermens Mut. Cas. Co. v. August, 530 So. 2d 293, 295 (Fla. 1988)).

[19] Gen. Tel. Co. of Se. v. Trimm, 311 S.E.2d 460, 461 (Ga. 1984).

[20] Georgia, Florida, and Alabama all treat insurance policies as contracts. *See, e.g.*, Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC, 788 S.E.2d 542, 548 (Ga. Ct. App. 2016); EmbroidMe.com, Inc. v. Travelers Prop. Cas. Co. of Am., 845 F.3d 1099, 1105 (11th Cir. 2017) (applying Florida law); Nationwide Mut. Ins. Co. v. Hall, 643 So. 2d 551, 558 (Ala. 1994).

contractus, the law of the state where the policy is delivered may govern the substantive issues arising from the policy.[21]

B. *The Split in Florida Authorities*

Although Florida law, like Alabama and Georgia, traditionally prefers strict application of the *lex loci contractus* doctrine,[22] there exists some uncertainty as to whether *lex loci contractus* should apply in all insurance disputes. This is because several Eleventh Circuit decisions have departed from *lex loci contractus* in disputes concerning insurance of real property.[23] What results are federal district courts in Florida left to choose between honoring Florida's adherence to *lex loci contractus* as the general rule or following the Eleventh Circuit's precedent.[24] How did the courts get here?

1. THE FLORIDA SUPREME COURT IN *STURIANO*

Although it was not the first mention of *lex loci contractus*, the Florida Supreme Court's decision in *Sturiano v. Brooks* was the first to emphatically apply *lex loci contractus* to insurance policies.[25] In that case, Vito Sturiano was killed when the car he was driving struck a tree.[26] His wife, Josephine, was a passenger in the car.[27] Josephine sued Vito's estate for negligence, seeking to recover from the couple's insurer for her injuries.[28] Josephine obtained a favorable verdict at trial, but the intermediate appellate court reversed.[29] The appellate court concluded that under *lex loci contractus*, New York law controlled because the insurance policy was executed

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[21] *See, e.g.*, Cherokee Ins. Co., Inc. v. Sanches, 975 So. 2d 287, 293 (Ala. 2007); Bloch v. Berkshire Ins. Co., 585 So. 2d 1137, 1137 (Fla. Dist. Ct. App. 1991); Gen. Elec. Credit Corp. v. Home Indem. Co., 309 S.E.2d 152, 158 (Ga. Ct. App. 1983).

[22] *See* State Farm Fire & Cas. Co. v. Walker, No. 16-14043-CIV, 2017 WL 962492, at *7 (S.D. Fla. Feb. 28, 2017).

[23] *See* discussion *infra* Section II.B.2.

[24] *See* discussion *infra* Section II.B.4.

[25] Sturiano v. Brooks, 523 So. 2d 1126, 1129–30 (Fla. 1988).

[26] *Id.* at 1127.

[27] *Id.*

[28] *Id.*

[29] *Id.*

there.[30] New York law barred interspousal insurance claims, unless the policy specifically permitted such claims.[31]

On review, the Florida Supreme Court affirmed the intermediate appellate court's decision.[32] In doing so, the court rebuffed the Restatement's "most significant relationship" test, favoring *lex loci contractus* instead.[33] The court acknowledged that *lex loci contractus* was inflexible, but reasoned "this inflexibility is necessary to ensure stability in contract arrangements."[34] To illustrate its stability point, the court noted the transitory nature of the insured risk: the car.[35] Because the car was transitory, the "location of the subject matter"—one of the factors to consider under the Restatement's approach—could be in any state at any given time.[36] Thus, the applicable substantive law could change depending on where the car was when a loss occurred.[37] In contrast, *lex loci contractus* is not affected by the transitory nature of the insured risk; the state of execution remains the same throughout the term of the contract.[38] The court concluded that, unlike application of the Restatement, the certainty afforded by *lex loci contractus* would not restrict the parties' ability "to enter into valid, binding, and stable contracts."[39] Accordingly, the court held that *lex loci contractus* governed over the Restatement's approach.[40] Significantly, however, the court limited its holding to automobile insurance policies.[41]

2. THE ELEVENTH CIRCUIT IN *SHAPIRO* AND ITS PROGENY

Because the *Sturiano* court limited its holding to automobile insurance disputes, the court's enchantment with *lex loci contractus*

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30 *Id.*
31 *See Sturiano*, 523 So. 2d at 1127.
32 *Id.* at 1130.
33 *Id.* at 1129–30.
34 *Id.* at 1129.
35 *See id.* at 1129–30.
36 *See id.*
37 *See Sturiano*, 523 So. 2d at 1130.
38 *See id.* at 1129–30.
39 *Id.* at 1130.
40 *Id.*
41 *Id.*

offered limited insight into other insurance disputes.[42] As a result, two years later, in *Shapiro v. Associated International Insurance Co.*, the Eleventh Circuit was left uncertain as to whether *lex loci contractus* applied to real estate insurance disputes.[43] There, Shapiro was injured on the property of the California Club and sued the Club to recover for his injuries.[44] During the suit, the Club's primary insurer became insolvent.[45] The Club and Shapiro entered a settlement agreement whereby the Club paid $200,000 of a $950,000 settlement amount.[46] The Club then assigned Shapiro the Club's rights to pursue the remaining amount from Associated International, the Club's umbrella insurer.[47] Shapiro sued Associated International, alleging it was obligated to "drop down" and provide primary coverage after the primary insurer dissolved.[48]

Shapiro argued California law applied, which is where the Club and Associated International executed the umbrella policy.[49] The district court determined that under either California or Florida law, drop down was not required and, thus, entered judgment for Associated International.[50] On appeal, the Eleventh Circuit undertook the "difficult and unenviable task" of deciding which state's law controlled.[51] The court acknowledged that Florida law would traditionally require use of *lex loci contractus*, which would cause California substantive law to govern.[52] The court noted, however, that Florida courts had applied *lex loci contractus* to automobile insurance policies (such as in *Sturiano*) due to the transitory nature of the insured risk.[53] "Using the same reasoning," the court guessed that Florida

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[42] *Id.*; *see also* Shapiro v. Associated Int'l Ins. Co., 899 F.2d 1116, 1119 (11th Cir. 1990).

[43] *Shapiro*, 899 F.2d at 1118 ("We embark on our expedition only hoping that our interpretation of state law is accurate.").

[44] *Id.* at 1117.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1117–18.

[49] *See Shapiro*, 899 F.2d at 1118.

[50] *See id.*

[51] *Id.*

[52] *Id.* at 1119.

[53] *Id.*

courts would not apply the "old" and "archaic" rule of *lex loci contractus* to a real property insurance policy, because real property "remains stationary and immobile."[54] In other words, real property does not present the same uncertainties that a transitory insured risk does. The court found support for applying Florida law by noting: (i) the Eleventh Circuit's deference to the forum state's law in cases concerning real property; (ii) Florida's trend toward application of the Restatement; and (iii) Florida's interest in the outcome of the case, shown by its diligent regulation of insurers.[55]

After *Shapiro*, the Eleventh Circuit twice more had occasion to analyze the applicability of *lex loci contractus* to insurance disputes concerning real property. First, in *LaFarge Corp. v. Travelers Indemnity Co.*, the Eleventh Circuit affirmed the lower court's summary judgment order in favor of the insurer.[56] Citing *Shapiro*, the Eleventh Circuit concluded that because the policy covered Florida real estate, the Florida courts would follow the Restatement's most significant relationship test and apply Florida law.[57] The *LaFarge* court acknowledged that in another Eleventh Circuit case, *Fioretti v. Massachusetts General Life Insurance Co.*, it had applied *lex loci contractus* when interpreting a life insurance policy.[58] The *Fioretti* court reasoned that, unlike real property, the insured risk of a life insurance policy was transitory, like an automobile, making it appropriate to apply *lex loci contractus* under the *Sturiano* decision.[59]

Second, in *Great American E & S Insurance Co. v. Sadiki*, the Eleventh Circuit again applied Florida law to an insurance policy covering Florida real estate, despite *lex loci contractus* pointing to application of New York law.[60] The *Sadiki* court relied on *Shapiro* and *LaFarge* to reach this conclusion and noted these Eleventh Circuit precedents must be followed "absent a subsequent state court

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[54] *Id.*

[55] *See Shapiro*, 899 F.2d at 1121.

[56] LaFarge Corp. v. Travelers Indem. Co., 118 F.3d 1511, 1518 (11th Cir. 1997).

[57] *Id.* at 1515.

[58] *See* Fioretti v. Mass. Gen. Life Ins. Co., 53 F.3d 1228, 1236 (11th Cir. 1995).

[59] *See id.*

[60] Great Am. E & S Ins. Co. v. Sadiki, 170 F. App'x 632, 633–34 (11th Cir. 2006).

decision or statutory amendment which makes this Court's decision clearly wrong."[61] The court failed to find any Florida court decision rendering *Shapiro* and *LaFarge* clearly wrong, so it followed its own precedent and affirmed the district court's decision to apply Florida law.[62]

3. THE FLORIDA SUPREME COURT IN *ROACH*

Less than a year after *Sadiki*, the Florida Supreme Court issued its opinion in *State Farm Mutual Automobile Insurance Co. v. Roach*.[63] There, the court faced a similar scenario as it did in *Sturiano*: Passengers injured in a car accident sought to recover under an automobile insurance policy that was executed outside of Florida.[64] The Roaches were passengers in a car driven by Ivan Hodges, the policyholder.[65] After a two-car collision, the Roaches sued Hodges and the other car's driver, who did not have insurance.[66] The Roaches settled with Hodges and the other driver and sought uninsured motorist benefits from State Farm under Hodges's policy.[67] The trial court granted summary judgment for State Farm, finding that *lex loci contractus* required application of Indiana law—where Hodges executed the policy—which would prohibit the Roaches' recovery of uninsured motorist benefits under the policy.[68]

The intermediate appellate court reversed, holding that the public policy exception to *lex loci contractus* required application of Florida law.[69] The Florida Supreme Court, however, disagreed with

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[61] *Id.* at 634 (quoting Lee v. Frozen Food Express, Inc., 592 F.2d 271, 272 (5th Cir. 1979)). The Fifth Circuit's *Lee* decision is binding precedent on the Eleventh Circuit pursuant to Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) ("We hold that the decisions of [the Fifth Circuit], as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.").

[62] *See Sadiki*, 170 F. App'x at 634.

[63] Mut. Auto. Ins. Co. v. Roach, 945 So. 2d 1160 (Fla. 2006).

[64] *Id.* at 1161.

[65] *Id.* at 1162.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *See Roach*, 945 So. 2d at 1162.

the intermediate appellate court.[70] The court stated that Florida has "long adhered to the rule of *lex loci contractus*" when determining which state's law applies to contracts.[71] And the court had explicitly rejected the Restatement's most significant relationship approach.[72] The court re-emphasized how the inflexibility of *lex loci contractus* offers stability of contracts in an increasingly transitory world.[73] Because of this stability, the court had "never retreated from [its] adherence to [*lex loci contractus*] in determining which state's law applies in interpreting contracts."[74] In light of Florida's persistent adherence to *lex loci contractus*, as well as the narrowness of the public policy exception, the court found that Indiana law governed the parties' dispute.[75] But, while stressing Florida's adherence to *lex loci contractus*, the court neither disapproved of *Shapiro* nor stated that *lex loci contractus* applied to real estate insurance disputes.[76]

4. THE FLORIDA FEDERAL DISTRICT COURTS

After *Roach*, a split began to emerge in the Florida federal district courts. Some courts have interpreted *Roach* as evidencing Florida's undeniable commitment to *lex loci contractus* in all contract-based cases.[77] Other courts, however, have concluded that because *Roach* did not address real property insurance disputes, *Roach* did not render *Shapiro* clearly wrong, and thus, *Shapiro* remains binding

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[70] *Id.* at 1163.
[71] *Id.*
[72] *See id.*
[73] *See id.* at 1164.
[74] *Id.*
[75] *Roach*, 945 So. 2d at 1162.
[76] *Id.* at 1163.
[77] *See, e.g.*, Zurich Am. Ins. Co. v. Tavistock Rests. Grp., LLC, No. 6:20-cv-1295-PGB-EJK, 2021 WL 1536648, at *5 (M.D. Fla. Mar. 4, 2021); Pierce v. Prop. & Cas. Ins. Co. of Hartford, 303 F. Supp. 3d 1302, 1304–05 (M.D. Fla. 2017); Am. Home Assurance Co. v. Peninsula II Devs., Inc., No. 09-23691, 2010 WL 11451835, at *5–6 (S.D. Fla. Oct. 19, 2010).

precedent.[78] Ironically, a choice-of-law principle designed to foster predictability and stability has become surrounded by uncertainty.[79]

This uncertainty could spread within the Eleventh Circuit beyond the application of Florida law. As noted, each of the states in the Eleventh Circuit subscribes to *lex loci contractus* as the choice-of-law rule in contract disputes, including disputes arising from insurance policies.[80] None of the states have offered any definitive guidance on the applicability of *lex loci contractus* to real property insurance policies. Thus, if the Eleventh Circuit were to face a case like *Shapiro*, *LaFarge*, or *Sadiki* that arose in Alabama or Georgia, the court may follow its reasoning from those cases and depart from the forum state's adherence to *lex loci contractus*. Or the court could apply *lex loci contractus*, introducing uncertainty in a different way: If the court upheld a different state's *lex loci contractus* rules, would the court continue applying *Shapiro* to Florida cases, or would it depart from *Shapiro* in Florida cases when given the chance?

II. EFFECTS OF *LEX LOCI CONTRACTUS* IN ELEVENTH CIRCUIT INSURANCE LAW BROADLY

The uncertainty in the Eleventh Circuit surrounding *lex loci contractus* has created uncertainty for policyholders under several different types of policies, particularly where the policyholder utilizes

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[78] *See, e.g.*, Brar Hosp., Inc. v. MT. Hawley Ins. Co., No. 3:22-cv-9417-TKW-ZCB, 2022 WL 16961203, at *2 (N.D. Fla. Oct. 11, 2022), *appeal dismissed*, No. 22-13788 (11th Cir. Nov. 15, 2023); Commodore Plaza Condo. Ass'n, Inc. v. Evanston Ins. Co., No. 21-cv-24328, 2022 WL 3139106, at *6 (S.D. Fla. Aug. 5, 2022); Wilson v. Fed. Ins. Co., No. 5:19-cv-371-RH/MJF, 2020 WL 6122549, at *1–2 (N.D. Fla. Apr. 8, 2020).

[79] Even the Eleventh Circuit has recognized that *Shapiro* and its progeny may be null in light of *Roach*. *See* U.S. Fid. & Guar. Co. v. Liberty Surplus Ins. Corp., 550 F.3d 1031, 1035 (11th Cir. 2008) (certifying a question to the Florida Supreme Court of whether *lex loci contractus* applies to an insurance policy, made outside of Florida, that covers Florida real property). Before the Florida Supreme Court answered this question, however, the appeal was dismissed. So, the uncertainty remains.

[80] *See* Lima Delta Co. v. Glob. RI-022 Aerospace, Inc., 789 S.E.2d 230, 235 (Ga. Ct. App. 2016); Lifestar Response of Ala., Inc. v. Admiral Ins. Co., 17 So. 3d 200, 213 (Ala. 2009); Lanoue v. Rizk, 987 So. 2d 724, 727 (Fla. Dist. Ct. App. 2008).

an out-of-state insurance broker.[81] Many of these brokerage firms have a nationwide presence.[82] And there is no guarantee that the individual broker working on procuring coverage will be located in a state relevant to either the insurer or the policyholder.[83] This has important ramifications: Where the insurer (or its agent) delivers the policy binder to the policyholder's broker, the substantive law of the state in which the broker is located may be held to govern under *lex loci contractus*, regardless of where the policyholder, the insurer, or the insured risk are located.[84]

For example, in *CNL Hotels & Resorts, Inc. v. Houston Casualty Co.*, the Middle District of Florida grappled with such a situation.[85] There, the policyholder argued for application of Florida law to a coverage dispute under a Directors and Officers (D&O) liability insurance policy, while the insurer argued for application of New York law.[86] The policyholder sought coverage for two class action "securities claims" as defined by the policy.[87] The policyholder argued that by applying *lex loci contractus*, Florida law should apply because:

> Its principal place of business is here and the [] Policy was issued for delivery and actually delivered in Florida, because [the [i]nsurer] is licensed in Florida,

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[81] *See* CNL Hotels & Resorts, Inc. v. Hous. Cas. Co., 505 F. Supp. 2d 1317, 1317 (M.D. Fla. 2007).

[82] For example, Hub International, one of the largest insurance brokers in the country, has locations in almost every U.S. state, including Alabama, Florida, and Georgia. *See US Offices*, HUB INT'L, https://www.hubinternational.com/offices/us/ (last visited Sept. 27, 2023).

[83] *See CNL Hotels & Resorts, Inc.*, 505 F. Supp. 2d at 1317.

[84] Indeed, this was the situation underlying the court's decision in *Commodore Plaza*. *See* Commodore Plaza Condo. Ass'n, Inc. v. Evanston Ins. Co., No. 21-cv-24328, 2022 WL 3139106, at *6 (S.D. Fla. Aug. 5, 2022) (noting that although the policyholder was a Florida company insuring Florida real property, and the insurer was an Illinois company, the policyholder's broker received the coverage binder in Georgia). Both parties agreed that because of this fact, Georgia law would apply if the court followed *lex loci contractus*. *Id.* at *3.

[85] *CNL Hotels & Resorts, Inc.*, 505 F. Supp. 2d at 1320–21.

[86] *Id.* at 1319–20.

[87] *Id.* at 1318.

> because the [] Policy contains riders specific to Florida law, and because taxes were paid in connection with [the Policy] in this state.[88]

Notwithstanding the policyholder's apparent understanding that Florida law would apply to interpretation and operation of the policy, as well as the policyholder's principal place of business being in Florida, the court stated that "[n]one of these facts are relevant to the question of where the [] Policy was executed, or where the last act necessary to complete it occurred."[89] The court considered that coverage was effective under the policy when the policyholder's insurance broker issued the binder, and that binder was issued from the broker's New York office.[90] The court also noted that the insurer's representative signed the policy in New York and delivered it to the broker at the broker's New York address.[91] In determining that New York law applied to the insurance coverage dispute, the Court explained that "[u]nder Florida law, the important factor is the place of execution of the contract, not the place or places to which it was (eventually) mailed."[92] Thus, the fact that a Florida-based policyholder used a New York broker proved to be outcome determinative on the choice of law issue.[93]

III. THE RESTATEMENT'S APPROACH

Not everyone follows *lex loci contractus*; in fact, the states that do are in the minority.[94] And while the states that follow *lex loci*

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88 *Id.*

89 *Id.*

90 *Id.* at 1321.

91 *CNL Hotels & Resorts, Inc.*, 505 F. Supp. 2d at 1321.

92 *Id.*

93 *See id.*

94 Christine Renella, *Florida Should Move Away From Lex Loci Contractus*, LAW360 (July 7, 2017, 2:26 PM), https://www.law360.com/articles/941983/florida-should-move-away-from-lex-loci-contractus (citing RESTATEMENT (FIRST) OF CONFLICT OF LAW § 332 (1934)).

contractus do so because it purportedly offers certainty to the contracting parties,[95] other states have concluded the opposite, finding that the Restatement's "most significant relationship" test fulfills the parties' expectations, because the parties would expect application of the law of the state with the most significant contacts and not merely where the contract happened to be executed.[96] New York, for example, abandoned *lex loci contractus* due to "the flaws in the mechanical application" of the rule.[97] In its place, New York adopted what it calls the "center of gravity" or "grouping of contacts" test, which mirrors the Restatement's most significant relationship test.[98] Under New York's test, the law of the state with the "most significant relationship to the transaction and the parties" governs insurance disputes.[99] This choice-of-law approach generally dictates that a contract of liability insurance be governed by the law of "the state which the parties understood to be the principal location of the insured risk . . . unless with respect to the particular issue, some other state has a more significant relationship . . . to the transaction and the parties."[100] And when the insurance policy covers risks in multiple states, the law of the policyholder's domicile should be applied.[101] That is because the policyholder's domicile is a fact known to the parties at the time of contracting, and application

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[95] *See* James River Ins. Co. v. Fortress Sys., LLC, No. 11-60588-CIV, 2012 WL 760773, at *6 (S.D. Fla. Mar. 8, 2012); Cunningham v. Feinberg, 107 A.3d 1194, 1211 n.23 (Md. 2015) ("We are satisfied currently with the level of simplicity, predictability, and uniformity provided by [lex loci contractus].").

[96] *See* Baffin Land Corp. v. Monticello Motor Inn, Inc., 425 P.2d 623, 627 (Wash. 1967) ("The [most significant relationship test] we approve here also gives much more emphasis to the desires and expectations of the parties . . . [because] it is most likely that the parties would expect the law of the state with the most significant contacts to be applied.").

[97] Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 642 N.E.2d 1065, 1068 (N.Y. 1994).

[98] *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971)).

[99] *Id.*

[100] Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp., 36 A.D.3d 17, 21–22 (N.Y. App. Div. 2006), *aff'd*, 9 N.Y.3d 930, 930 (N.Y. 2007) (citation omitted); *see also* Jimenez v. Monadnock Constr., Inc., 109 A.D.3d 514, 517 (N.Y. App. Div. 2013) (citations omitted).

[101] *Certain Underwriters at Lloyd's, London*, 36 A.D.3d at 24.

of the law of that state is most likely to conform to their "expectations."[102]

IV. PRACTICAL ADVICE

Surprisingly, choice of law is often overlooked by policyholders in procuring insurance policies, despite the issue sometimes being outcome determinative.[103] Fortunately, there is an easy solution—policyholders, particularly commercial policyholders with market power, can demand that their policies contain an express choice of law provision, so that all parties are certain on the applicable law at the contract formation stage.[104] If policyholders are unable to obtain such an express provision in their policy, either on the declarations page or by endorsements, policyholders should take care to ensure that they utilize a local broker. If using a nationwide broker, policyholders should at least ensure that the policy is delivered to a local broker's office, so as to ensure that the "last act" occurs in the state for which they intend local law to apply.

For litigants who find themselves facing the application of unfavorable state law by virtue of *lex loci contractus*, there remains the lifeline of the public policy exception. Each state in the Eleventh Circuit acknowledges a public policy exception to the general rule of *lex loci contractus*.[105] While each state's exception has different iterations and nuances, the same factors are relevant when persuading a court to apply the law of the forum, despite *lex loci contractus*

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[102] *Id.*

[103] *See* Dan A. Bailey, *Choice of Law Provisions: The Value of Certainty and Consistency*, BAILEY CAVALIERI, http://baileycav.com/site/assets/files/1458/choice_of_law_provisions.pdf (last visited Feb. 20, 2024).

[104] *Id.*

[105] *See, e.g.*, Commodore Plaza Condo. Ass'n, Inc. v. Evanston Ins. Co., No. 21-cv-24328, 2022 WL 3139106, at *7 (S.D. Fla. Aug. 5, 2022) (citing Gillen v. United Servs. Auto. Ass'n, 300 So. 2d 3, 6–7 (Fla. 1974)); Cherokee Ins. Co., Inc. v. Sanches, 975 So. 2d 287, 294 (Ala. 2007) (citing Stovall v. Universal Constr. Co., 893 So. 2d 1090, 1102 (Ala. 2004)); Shorewood Packaging Corp. v. Com. Union Ins. Co., 865 F. Supp. 1577, 1582 n.6 (N.D. Ga. 1994) (citing Karimi v. Crowley, 324 S.E.2d 583, 584 (Ga. Ct. App. 1984)).

pointing to a different state's law.[106] Those factors include the citizenship of the parties, the location of the insured risk, whether the insurer is aware of the location of the insured risk, the relationship the forum state has to the insurance policy at issue, and the extent to which the statutory law of the forum state evidences a clear preference for or against the result that would be obtained if the non-forum state's law applied.[107] The public policy exception is a particularly valuable tool for policyholders who sue in their home forum, hoping to take advantage of that forum's likely familiar law instead of the potentially unfamiliar law that would apply under *lex loci contractus*.

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[106] *See generally* JAMES MURRAY & KIMBERLY SOU, CHOICE OF LAW STANDARDS: RE: INSURANCE COVERAGE 7–27 (2016) (where each state's public policy exceptions are detailed).

[107] *See, e.g.*, *Gillen*, 300 So. 2d at 6–7; Shapiro v. Associated Int'l Ins. Co., 899 F.2d 1116, 1120 (11th Cir. 1990).