January 1990

Conflict of Laws Resolution in Employment Contracts: The West Virginia Approach

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CONFLICT OF LAWS RESOLUTION IN EMPLOYMENT CONTRACTS: THE WEST VIRGINIA APPROACH

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There is no topic in the conflict of laws in regard to which there is greater uncertainty than that of contract.¹

I. INTRODUCTION

Conflict of laws issues arise when more than one jurisdiction is connected, in the legal sense, with the transaction or occurrence which is the subject of litigation. Such cases require resolution of the conflict of laws issues to identify the rules of decision to be applied to the adjudication on the merits. Each state has its own conflict rules that determine the extent to which the laws of other jurisdictions will be given effect in cases brought before its courts.

Conflict of laws analysis serves to fix the substantive rights of parties, but the law of the forum state governs all remedial and procedural questions. However, the distinction between substance and procedure differs from state to state, and alone provides considerable potential for confusion in the adjudication of cases involving conflict of laws issues. For this reason, the conscientious practitioner must investigate local rules of substance and procedure, as well as the rules governing conflict of laws resolution, when litigating in an unfamiliar forum.

The complexity and confusion inherent to all conflict of laws problems may be significantly exacerbated when a contract is the subject of dispute. By virtue of the nature of contracts, it is possible for several jurisdictions to be legally connected to the contractual

3. 4A Michie's Jur., supra note 2; Restatement, supra note 2, § 2.
4. 4A Michie's Jur., supra note 2; Restatement, supra note 2.
6. Leflar, supra note 5, §§ 58, 60-69. Although an extensive discourse on the substantive-procedural distinction is beyond the scope of the present discussion, it may prove helpful to the reader to be made cognizant of the various issues on which the distinction may become blurred:
Numerous rules of local law give rise to the substance-procedure problem of characterization. Rules concerning sufficiency of evidence to sustain a jury verdict, the necessity for jury trial, joinder or misjoinder of parties, statutes of limitation, measure of damages, the statute of frauds, the parol evidence rule, rules as to burden of proof, conditions to the maintenance of actions, the allowance of off-sets and counterclaims, and various other rules, are all of a sort that might be characterized either way.
Id. at 106.
relationship. A single contract may give rise to several legal questions, each of which might be controlled by the law of a different state:

- capacity of the parties to contract, possible illegality of provisions in the contract, the effect of illegality of a single provision on the contract as a whole, interpretation of the contract, what acts will constitute performance, or breach, what measure of damages will be allowed for non-performance, what procedural rules must be followed in instituting and maintaining an action on the contract—all these questions and more may be presented in a suit on one contract, and it is possible that the same state’s laws should not be controlling on every question.

A single employment contract may also present multiple conflict of laws issues. An employment contract may be negotiated in one or several places, be executed in another location, and require performance in yet another place or number of places. Consequently, a dispute involving such a contract would require a choice of the laws of the several jurisdictions in which the series of transactions occurred.

At least two societal factors may contribute to an increase in the frequency with which employment contract disputes will involve conflict of laws issues. One factor is the increasing mobility of the work force. The second factor, inextricably related to the first, is the growing number of employers whose businesses are of an interstate or international character.

Additionally, recent developments in employment law may also contribute to a rise in the number of cases requiring conflict of laws resolution. In particular, the expanding willingness of the courts to find enforceable contracts in non-traditional documents and employer representations can be anticipated to result in a significant increase in the frequency of issues requiring conflict of laws resolution.

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7. Id. at 229.
8. The West Virginia Supreme Court of Appeals first adopted a more liberal view of employment contracts in Cook v. Heck’s, Inc., 342 S.E.2d 453 (W. Va. 1986). In Cook, the Court held that the provisions of an employee handbook may form the basis of a unilateral contract that alters the at-will nature of employment. Id. at 454. In a later case, the Court indicated its willingness to subject an employer’s oral representations to the rule laid down in Cook. Collins v. Elkay Mining Co., 371 S.E.2d 46 (W. Va. 1988). In Collins, a terminated employee predicated his breach of contract claim on alleged oral representations of the employer, as well as company publications. Id. The West Virginia Supreme Court reversed the circuit court’s dismissal of the claim, and remanded the case “to permit the plaintiff to proceed on the contract claim in whatever manner he may believe proper . . . .” Id. at 52 (emphasis added).
increase in the amount of employment contract litigation. A predictable consequence of this increase in litigation is a corresponding rise in the number of cases in which conflict of laws issues will be confronted. Consequently, familiarity with conflict of laws analysis may become increasingly necessary to the successful practice of employment law.

This article will attempt to disentangle the web of West Virginia conflict law as it relates to employment contract disputes. By tracing the various rules that have evolved in this area, this discussion will focus on the policies and circumstances that may trigger the operation of any one of the rules in preference to the others. Second, this article will critically analyze the holdings of two recent West Virginia cases which addressed conflict issues in the context of employment contracts. Finally, a cogent statement of the best rule will be proposed.

II. DEVELOPMENT OF CONTRACT CONFLICT LAW

The myriad of potential legal questions that could arise from a single contract presents an imposing list of possible conflict of laws issues. Fortunately, this unmanageable array may be pragmatically conceptualized as representative of only two broad categories: (1) matters bearing on the making of a contract; and (2) matters bearing on the performance of a contract. In fact, as the following discussion will reveal, choice of law decisions frequently depend upon the characterization of disputed issues in reference to these two categories. Consequently, this section will first explore some of the considerations inherent to this characterization.

The second goal of this section is to present the variety of rules that have emerged from the development of contract conflict law, as well as the exceptions thereto. It will become apparent that a

9. See, e.g., E. Robins, Unfair Dismissal; Emerging Issues in the Use of Arbitration as a Dispute Resolution Alternative for the Nonunion Workforce, XII FORDHAM URB. L. J. 437 (1983-84) (noting the substantial increase in employment litigation resulting from recent doctrinal changes, and suggesting arbitration as a means of relieving the burden on the courts).


11. See, e.g., the list suggested by LEFLAR, supra note 6 and accompanying text.
single jurisdiction may adopt all of the rules coextensively, such that they may be used as alternative means of analysis. Such coexistence of rules is necessary because, in any given case, circumstances which invoke an exception to the preferred rule may provide the very situation that signals the operation of one of the others. This discussion will survey the three most prevalent conflict rules, which are those based upon (1) the intent of the parties; (2) the most significant relationship theory; and (3) the "lex loci," or law of the place. Finally, this section will discuss the application of state conflict of laws rules to cases adjudicated in federal courts.

A. Primary Considerations of Conflict of Laws Analysis

1. Issues Inherent to the Making of a Contract

One of the first considerations in contract litigation is whether a contract was indeed made. It is generally agreed that a contract is made at the time and place where the final act necessary to create a legal obligation is done. Typically, a contract is made at the time and place from which the acceptance of an offer is tendered.

However, the mere acceptance of an offer may not be sufficient to create a binding obligation. The execution of a contract also must satisfy the requirements of formal validity. Formal validity refers to the necessary compliance with the forms and ceremonies prescribed by law upon entering into contracts. If the law of a state makes certain forms and ceremonies essential to the validity of contracts sought to be executed there, no contract is ever made by transactions lacking in those formal requirements. Consequently, such law, sometimes called the lex loci celebrationis, necessarily gov-

15. Id.
erns the inchoate execution of any contract.\textsuperscript{16} Therefore, the initial inquiry on all contract conflict of laws questions must be whether or not a contract was made, according to the lex loci celebrationis.\textsuperscript{17}

Assuming that the formal validity of a contract can be established, conflict of laws analysis may present other questions relevant to the making of the contract. These questions typically focus on the validity, construction, and interpretation of the contract.\textsuperscript{18}

A validity question arises when a contract provision is invalid under the law of one of the states related to the transaction, but enforceable under the law of another state related to the transaction.\textsuperscript{19} The intent of the parties can be ascertained with respect to the provision, but one state would refuse to give effect to that intent. In such cases, the enforceability of the provision in question depends on which law is chosen by the forum to govern the validity of the contract.\textsuperscript{20} A problem of construction arises when the intention of the parties is not known and cannot be ascertained.\textsuperscript{21} This requires the court to decide the proper construction of the contractual provision in question. When the states related to the contract would attribute different constructions to the provision, the resolution of a contract dispute may depend entirely upon the law chosen to govern issues of construction.

Interpretation involves the process of discovering and giving effect to the actual intention of the parties, which most states will enforce if valid.\textsuperscript{22} Because only the intention of the parties is at issue, interpretation per se does not present a conflict of laws prob-

\begin{enumerate}
\item[17.] 4A Michies Jur., supra note 2, § 21.
\item[18.] Hereinafter, simply "validity," as "formal validity" will be expressly employed where such is intended.
\item[19.] Weintraub, supra note 5, § 7.2.
\item[20.] Id.
\item[21.] Id.
\item[22.] Id.
\end{enumerate}
CONFLICTS OF LAW

lem. However, conflict of laws problems can arise concerning the
rules governing the determination of the intention of the parties,
such as the admissibility of evidence.

2. Issues Inherent to the Performance of a Contract

The issues relating to the performance of a contract are difficult
to delineate by concise categorization. Performance certainly en-
compasses such considerations as the acceptable mode of perform-
ance, but may also include questions of what constitutes termination,
breach, rescission, repudiation, default, and excuse for non-perform-
ance. Additionally, the measure of damages for breach is consid-
ered by a majority of jurisdictions to be an issue of performance.
The majority rule is premised on the theory that the award of dam-
ages is a legal substitute for the performance due under the con-
tract.

The distinction between matters bearing on the making of a con-
tract and the performance of a contract can become obscured. For
example, the existence of a breach may depend on the construction
given to the contractual terms. In any event, the importance of
characterizing such issues will vary, depending on the particular con-
flict of laws rule employed by the court.

B. Rules for Resolving Conflict of Laws Issues

1. Intent of the Parties

Aside from formal validity, "it is said that the true test for the
determination of the proper law of a contract is the intent of the

23. Id.
24. Id.
26. Annotation, Conflict of Laws as to Elements and Measure of Damages Recoverable for Breach of Contract, 50 A.L.R.2d 227, § 7 (1956); Leflar, supra note 5, § 129.
A minority of jurisdictions view the measure of damages as remedial, and thus subject to the
laws of the forum. Leflar, supra note 5, § 129.
27. Id.
28. Annotation, supra note 25.
parties and this intent, whether express or implied, will always be
given effect except under exceptional circumstances . . . ."29 The
concept that the parties may intend to contract with respect to the
laws of a particular place, and that their intent should be given
effect, sometimes is called the "party autonomy" theory.30 This the-
ory was espoused early in our judicial history by Chief Justice Mar-
shall, who hailed as a tenet of universal law "the principle 'that in
every forum a contract is governed by the law with a view to which
it was made . . . .'"31

The parties to a contract may expressly indicate their intent by
inclusion of a choice of law provision in the contract.32 Where no
express indication of intent appears, some courts will apply the pre-
sumed intent of the parties to the resolution of the conflict of laws
issue.33 As the analysis of these two rules of intent differ signifi-
cantly, each will be considered in turn.


A choice of law provision, or clause, as the name implies, is a
provision included in a contract by which the parties expressly stip-
ulate that the contract is to be governed by the law of a particular
place. As such, a choice of law provision designates the lex loci
solutionis, meaning the law of the place of solution.34 In other words,
the lex loci solutionis is the law in reference to which the parties
entered the contract and intended the contract to be governed.35

One question frequently encountered in regard to choice of law
provisions is whether, and under what circumstances, such clauses

29. 4A Mich.es Jur., supra note 2, § 22. See also Annotation, Validity and Effect of Stip-
ulation in Contract to Effect that It Shall be Governed by the Law of a Particular State Which is
Neither Place Where Contract is Made Nor Place Where It is to Be Performed, 16 A.L.R.4th 967
(1982).
30. Weintraub, supra note 5, § 7.3C.
32. Weintraub, supra note 5, § 7.3C.
33. LeFlar, supra note 5, § 123.
34. Davidson v. Browning, 73 W. Va. 276, 80 S.E. 363 (1913); 4A Mich.es Jur., supra note
2, § 22.
should be given effect. Section 187(2) of the Restatement (Second) of Conflict of Laws (1971) explicitly addresses the applicability of choice of law provisions:

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
(a) the chosen state has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties' choice, or
(b) application of the law of the chosen state would be contrary to a fundamental public policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

This section supports the general premise that choice of law provisions should be deemed valid, except under "exceptional circumstances."

Judicial acceptance of the validity of choice of law provisions may be intuitively pleasing for several reasons. From the standpoint of the parties, giving effect to choice of law clauses would promote the predictability of transactions. On the side of judicial efficiency, one might argue that the acceptance of choice of law provisions could enable courts to avoid the cumbersome analysis frequently encountered in conflict of laws problems.

37. RESTATEMENT, supra note 2, section 187. Section 188 of the Second Restatement, cited in the text of section 187, addresses the most significant relationship theory of conflict of laws resolution. This theory will be considered later in this discussion. The citation does illustrate a point made previously in this discussion; that is, that the various rules are often applied as alternatives of one another.
38. Annotation, supra note 28 and accompanying text. The section articulates those circumstances that will be deemed "exceptional."
39. This has been deemed particularly important in business transactions. See, e.g., Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974).
40. Arguably, a court cannot avoid such analysis even if the parties have included a choice of law provision in their contract. This conclusion is suggested by a close reading of subsection (2)(b), of section 187 of the Second Restatement. Subsection (2)(b) provides that the choice of law of the parties will not be applied if it would violate a public policy of the state whose laws would be chosen to govern under § 188 in the absence of a choice of law provision. That is, if the chosen law would contravene a public policy of the state with the most significant relationship to the transaction, it should not be applied. Of course, in order to determine if such a policy would be violated, the court would have to determine which state has the most significant relationship. Consequently, the court is not able, with the benefit of a choice of law provision, to avoid altogether the analysis which is often deemed so confusing.
Despite the intuitive appeal of choice of law provisions, their acceptance, as well as the underlying intent theory itself, has been widely criticized.41 Professor Lorenzen, one of this century's leading conflict scholars, voiced the typical rejection of the theory:

So far as it applies to the validity of contract, the intention theory does not admit of a theoretic defense. The validity or invalidity of a legal transaction should result from fixed rules of law which are binding upon the parties. Allowing the parties to choose their law in this regard involves a delegation of sovereign power to private individuals. ... This is true though they may be restricted in their choice to the law of the states with which the contract has a substantial connection.42

Professor Cook, another noted commentator, counters the position taken by Lorenzen with the observation that if the parties, by including a choice of law provision in their contract, do in fact "legislate," they do so only for themselves; they do not seek to do so for others.43

The suggestion that choice of law provisions allow private legislating has not been the only criticism of the party autonomy theory. A more recent critic, Russell Weintraub, suggests that an obvious difficulty with reliance on choice of law clauses is that the parties may inadvertently choose a jurisdiction whose laws will partially or completely invalidate the contract.44 Comment (e) to section 187 of the Second Restatement of Conflicts notes that such a stipulation should be disregarded as obvious error, and the proper law chosen by other means. This logical exception, suggests Weintraub, reveals the basic weakness of the rule: "When fully translated, section 187 means that the parties' choice of law will be given effect if it selects the validating law, but not if it selects the invalidating law."45 This observation suggests that choice of law provisions are little more than surplusage, because the validating law will be applied whether or not it is the law chosen by the parties. In other words, "[a] choice

41. See, e.g., J. Beale, What Law Governs the Validity of a Contract, 23 Harv. L. Rev. 260 (1909); E. G. Lorenzen, Validity and Effects of Contracts in the Conflict of Laws, 30 Yale L. J. 655 (1921); Weintraub, supra note 5, § 7.3C.
42. Lorenzen, supra note 41, at 658.
44. Weintraub, supra note 5, § 7.2.
45. Id. at 373-74.
of law clause, if it selects the validating law, simply says of the other contract terms, 'and we really mean it!' 46

Unfortunately, with respect to the inclusion in a contract of a choice of law provision, both parties may not "really mean it." Ordinarily, parties do not express their intent through choice of law provisions. Such provisions are most likely to appear in contracts prepared by large commercial parties. 47 Choice of law clauses in such contracts will usually reflect nothing more than the law most favorable to the interests of the party preparing the document. 48 The problem with these choice of law provisions is that they lack the feature of fair bargaining that is central to the party autonomy theory. Accordingly, choice of law provisions that are contained in adhesion contracts, prepared by the more powerful party for its own advantage, should be disregarded as an expression of the actual intent of both parties. 49

The foregoing criticisms notwithstanding, a majority of jurisdictions at least pay lip service to the validity of law provisions. 50 West Virginia fits squarely within the majority. The effectiveness of a choice of law provision was addressed by the West Virginia Supreme Court of Appeals for the first time in General Electric Co. v. Keyser. 51 The court, relying on section 187 of the Second Restatement of Conflicts, concluded that choice of law clauses are not void per se, and will be enforced, subject to the exceptions articulated in the Restatement. 52 One of the articulated exceptions arises

46. Id. at 374.
47. LEFLAR, supra note 5, § 123.
48. Id.
49. See comment (b) to section 187 of the RESTATAMENT (SECOND) OF CONFLICT OF LAWS (1971) which states that, when deciding whether to give effect to a choice of law provision, one factor the forum court should consider is whether the clause is contained in an adhesion contract.
50. LEFLAR, supra note 5, § 123.
51. 166 W. Va. 456, 275 S.E.2d 289 (1981). However, in Kolendo v. Jarrell, Inc., 489 F. Supp. 983 (S.D.W. Va. 1980), decided one year previously by a federal district court applying West Virginia law, it was concluded that West Virginia would enforce choice of law provisions, unless the selected jurisdiction bore little or no relationship to the contract. The decision of the West Virginia Supreme Court in General Electric confirms the Kolendo court's conclusion of what the West Virginia court would do if a choice of law provision came before it.
52. 166 W. Va. at 462, 275 S.E.2d at 293. The Court also noted that W. VA. CODE § 46-1-105(2) sanctions the use of choice of law provisions in commercial transactions. Id. at 461 n.2, 275 S.E.2d at 292 n.2.
when the jurisdiction chosen bears no substantial relationship to the parties or the transaction. Because the court found that the jurisdiction chosen in *General Electric*—New York—had no relationship to the contract, it declined to enforce the choice of law provision.

Since *General Electric*, the West Virginia Supreme Court has thrice addressed choice of law provisions in contract actions. Those occasions provided the court with the opportunity to reiterate the rule adopted in *General Electric*. Consequently, it appears well settled that in West Virginia, choice of law provisions will be enforced, unless either the jurisdiction chosen has no substantial relationship to the transaction, or the law chosen would violate the public policy of the state whose laws would apply absent such a clause.

b. Implied or Presumed Intent

Even when a contract is silent with respect to the parties' intended choice of law, their intent nonetheless may be presumed and given effect. The origin of this concept in Anglo-American law can be traced to dictum by Lord Mansfield in the early case of *Robinson v. Bland*:

The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed. *Huberi Praelectiones, lib. 1 tit. 3 pa. 34* is clear and distinct: "*Veruntamen, etc. locus in quo contractus, etc. potius considerand, etc. se obligavit.*"

The basic theory of the presumed intent rule, as stated by the United States Supreme Court in the classic case of *Pritchard v. Norton*, is that "[t]he parties cannot be presumed to have contemplated

54. *General Electric*, 166 W. Va. at 465, 275 S.E.2d at 294. The only relationship that New York had to the contract was that General Electric is incorporated under the laws of the State of New York. The Court found this relationship to be too insubstantial to give effect to the provision choosing New York law.
57. *Id*.
a law which would defeat their engagements." When, as in Pritchard, the contract at issue would be valid under the law of one of the related states, but invalid under the law of the other, it is presumed that the parties intended the contract to be governed by the validating law.

The theory of presumed intent is subject to the same criticisms as the express intent theory discussed in the previous subsection. Additionally, Weintraub suggests that the doctrine is based on a circumlocution of logic which simply means, "apply the law that will validate the contract."

Although no West Virginia cases have expressly adopted the presumed intent doctrine to resolve a conflict of laws issue, at least two cases consider presumed intent in connection with other rules. On both occasions, the West Virginia Supreme Court noted that the lex loci rules follow from the presumed intent of the parties. In effect, the court credited presumed intent with providing the rationale for the choice of law rule articulated in both cases, but not as a rule to be used in its own right to resolve the conflict of laws problem.

2. Most Significant Relationship

A second, relatively new, approach to conflict of laws resolution is the most significant relationship rule. The premise of this rule is that, in the absence of an effective choice of law by the parties, the law of the place with the most significant relationship to the matter in dispute should govern. This approach, which is also called

59. Id. at 137.
60. Id.
61. Weintraub, supra note 5, § 7.3B at 368.
63. See infra n.77 and accompanying text.
64. In re Fox’s Estate, 131 W. Va. 429, 48 S.E.2d 1 (1948); Kentucky Distillers, Inc. v. Foloway, 124 W. Va. 72, 19 S.E.2d 94 (1942).

The law of the state with the most significant relationship is said to govern in the absence of an effective choice of law by the parties. When is a choice of law provision “effective”? According to section 187(2)(b) of the Second Restatement, such a provision is effective when it does not violate a public policy of the state with the most significant relationship!
the "center of gravity" or "grouping of contacts" theory,\textsuperscript{66} is the subject of section 188 of the Restatement (Second) of Conflict of Laws (1971). Section 188 states that:

(1) The 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 § 6.\textsuperscript{67}

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
(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. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.\textsuperscript{68}

In his treatise, Professor Leflar praised the most significant relationship theory for providing a rule which focuses on a matter which can actually decide which law governs, as opposed to the "old multiplicity of rules" which focus on facts whose effect is accidental.\textsuperscript{69} Leflar offered this praise in spite of his observation that "[t]here is no fixed guide to courts or parties for ascertaining what state has the closest total relationship to the contract."\textsuperscript{70} Of course, Leflar's comments predated the publication of the Restatement (Sec-

\textsuperscript{66} LEFLAR, supra note 5, § 125.
\textsuperscript{67} Section 6(2) identifies the factors relevant to the choice of applicable law as
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of these states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

\textsuperscript{68} RESTATEMENT, supra note 2, § 6(2).
\textsuperscript{69} LEFLAR, supra note 5, § 188 (1971).
\textsuperscript{70} Id.
ond) of Conflict of Laws (1971), which ostensibly provide the guidance Leflar found wanting.

Interestingly, it is these very guidelines, or rather, the use made of them, which has led to the most severe criticism of the most significant relationship theory. The main thesis of this criticism is that section 188 of the Second Restatement may extend an invitation to replace critical, functional analysis with mere contact-counting. According to Weintraub, "[i]t is the complete antithesis of functional analysis to list any contacts as ‘significant’ a priori, without first knowing the domestic law of the state having that contact and the policies underlying that domestic law." When the most significant relationship rule degenerates into contact-counting, other aberrations are also fostered. The most notable of these is "contact building."

The most significant relationship theory was considered, but not applied by the West Virginia Supreme Court of Appeals in General Electric Co. v. Keyser. A survey of other contract conflict of laws cases reveals that the West Virginia Supreme Court has frequently relied on the most significant relationship theory, or a variant of the theory, to determine exceptions to other conflict rules. However, the court has not applied this rule as often as the other rules of resolution. Consequently, the status of this rule in West Virginia

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71. Weintraub, supra note 5, § 7.3D. Weintraub speculates that this may be especially true for the "judge or lawyer, not expert in conflicts theory and working under time pressures that prevent scrutiny of the Second Restatement in all its detailed commentary on the black letter. . . ." Id. 72. Id. 73. Id. at 380. Contact building may be best described as the practice whereby parties, in anticipation of possible litigation, engage in conduct intended to artificially increase the number of contacts with a favorable jurisdiction. 74. 166 W. Va. 456, 275 S.E.2d 289 (1981). However, as discussed previously, the Court did consider the most significant relationship theory in the context of exceptions to the effectiveness of choice of law provisions. Understanding this distinction is necessary to comprehend the analysis of General Electric. The Court used the most significant relationship theory to determine that the choice of law provision was ineffective, but not to determine which law should be applied. It so happens, however, that in this case, the most significant relationship theory would have rendered the same result. 75. Lee v. Saliga, 373 S.E.2d 345 (W. Va. 1988); Lee Enterprises v. Twentieth Century-Fox, 303 S.E.2d 702 (W. Va. 1983). 76. New v. TAC & C Energy, Inc., 355 S.E.2d 629 (W. Va. 1987), where the Court invoked the "more significant relationship" exception to the designated conflict rule and then applied the law
appears to be limited; it provides a last resort where the more preferred rules fail.

3. The Lex Loci Rule—The Law of the Place

The final rule to be considered in this section is the lex loci, or law of the place, rule. This rule represents an attempt to fix the rights of the parties based upon the determination of where specific acts occurred. Under this rule, contract disputes are governed by the lex loci contractus, or law of the place of contract.

Considering the relative infrequency with which the West Virginia Supreme Court of Appeals has confronted conflict of laws issues, it borders on exaggeration to claim a "traditional" rule of resolution. This disclaimer notwithstanding, the traditional favorite in West Virginia contract conflict law is the lex loci contractus rule. Consequently, the conflict of laws analysis most frequently employed in West Virginia contract disputes has focused on the determination of the place of making and performance of the contract.

Perhaps the most concise form of the lex loci contractus rule is that the law of the place in which the contract is made and performed governs its validity, construction and operation. This rule is generally subject to two qualifications: (1) that the parties have not made a choice of law provision in the contract; and (2) that

of the state considered to have the most significant relationship to the adjudication of the case.

See also Oakes v. Oxygen Therapy Services, 363 S.E.2d 130 (W. Va. 1987) (where the Court applied the most significant relationship rule for torts, found in section 145(1) of the Restatement (Second) of Conflict of Laws (1971), to determine the rule of decision for the case).

77. The conceptual basis for this rule can be found in the notions of territorial sovereignty and that the right in a cause of action is vested by a place. These notions were prevalent at the time of the first Restatement of Conflict of Laws, and were espoused by such noted justices as Holmes, Hand and Cardozo. Interview with James McLaughlin, Professor of Law at West Virginia University (Sept. 16, 1989).

78. Id.; Annotation, supra note 66.

79. The Court itself admitted this infrequency in General Electric, 166 W. Va. at 460, 275 S.E.2d 292.

80. Saliga, 373 S.E.2d at 351.

the law identified by the analysis under the rule does not violate West Virginia public policy.\textsuperscript{82}

Unfortunately, the most simple form of the lex loci contractus rule is limited in application to those situations where the contract is both made and performed in the same jurisdiction.\textsuperscript{83} When a contract is made in one state, but to be performed in another, a variant of the basic rule must be applied. Under this variation of the lex loci contractus rule, the law chosen to govern a contract that was made and performed in different states would depend on whether the disputed issue was one related to the making of the contract or to the performance of the contract. The rule emerged that matters bearing on the making of a contract, its nature, validity and construction, are governed by the law of the place where the contract was made, but that matters bearing on the performance of a contract are governed by the law of the place in which the contract was to be performed.\textsuperscript{84} It is apparent that under this rule, a contract action in which issues of both validity or construction and performance are disputed could require the court to apply the laws of more than one state in order to render a final decision.

This dual application of laws was considered by the West Virginia Supreme Court in \textit{Boyd v. Pancake Realty Co.}\textsuperscript{85} In \textit{Boyd}, a contract made in West Virginia required the defendant to render performance in Ohio.\textsuperscript{86} The court concluded that because the contract was made in West Virginia, its nature, construction and validity must be determined by West Virginia law.\textsuperscript{87} However, the court held that because the defendant's acts of performance were to be rendered in Ohio, the law of Ohio must be applied to determine issues regarding those acts.\textsuperscript{88}

\textsuperscript{82} \textit{Saliga}, 373 S.E.2d at 351; State v. Hall & White Co., 91 W. Va. 648, 114 S.E. 250 (1922); Wick v. Dawson, 42 W. Va. 43, 24 S.E. 587 (1896).
\textsuperscript{83} \textit{New}, 355 S.E.2d at 630.
\textsuperscript{85} 131 W. Va. 150, 46 S.E.2d 633 (1948).
\textsuperscript{86} \textit{Id.} at 152-53, 46 S.E.2d at 634-35.
\textsuperscript{87} \textit{Id.} at 156, 46 S.E.2d at 636.
\textsuperscript{88} \textit{Id.} at 156, 46 S.E.2d at 636-37. The defendant's performance was to be rendered in Ohio,
The rule articulated in *Boyd* was later applied to the conflict of laws problem presented in *Tow v. Miners Memorial Hosp. Ass'n, Inc.*, a case before the United States Court of Appeals for the Fourth Circuit. The *Tow* case not only illustrates the analysis utilized in articulating the rule of *Boyd*, but provides an example of the operation of the rule in the context of an employment contract dispute as well.

The plaintiff in *Tow* was hired by a hospital owned by the defendant corporation. The contract had been negotiated and executed while the plaintiff was living in New York. In response to the plaintiff’s inquiry, the defendant supplied information about the position which stated: “Your employment will not be terminated except by mutual consent or for just cause.” The plaintiff, having reviewed the information, telephoned the defendant from New York and accepted the position. On the day of the acceptance, the defendant sent the plaintiff a formal confirmation letter which did not refer to the issue of tenure, but stated that a formal appointment letter would be forthcoming. The formal appointment letter, received by the plaintiff in New York, did not reiterate the tenure statement contained in the original information, but stated that the plaintiff’s employment was “to remain in effect as long as you render satisfactory service.” The plaintiff signed three copies of this letter and returned them by mail to the defendant. The plaintiff subsequently moved to Man, West Virginia, where he assumed his duties at the defendant’s hospital. When he was discharged eleven months later, the plaintiff brought a breach of contract action, alleging that he had been discharged without cause. The district court granted the

and the Court applied the law of Ohio only to determine those acts. The plaintiff’s performance, however, was rendered in West Virginia. The language of the Court’s opinion suggests that had the plaintiff’s performance been in dispute, the law of West Virginia would have been dispositive, even if the contract had not also been made there. *Id.* Consequently, a broad reading of *Boyd* also suggests the rule to be applied when performance is rendered in more than one place: The law of the place in which the specific acts complained of occurred (or should have occurred if non-performance is alleged) will govern the determination of those acts.

89. 305 F.2d 73 (4th Cir. 1962).
90. *Id.* at 74.
91. *Id.*
defendant’s motion for summary judgment and the plaintiff appealed.92

The Fourth Circuit Court of Appeals affirmed the ruling of the lower court.93 The court first noted that West Virginia conflict law must be applied to resolve the conflict of laws problem.94 The court then stated that under West Virginia conflict law, the substantive law of New York controlled the making of the contract, as well as its nature, construction and validity, because the contract was made binding in New York.95 Because the performance of the contract was rendered in West Virginia, however, the court held that the performance was governed by the substantive law of West Virginia.96 Applying this analysis, the court found that the formal appointment letter, signed by the plaintiff, constituted the fully integrated contract of the parties under New York law. Therefore, the terms of the contract clearly allowed termination for unsatisfactory service. Turning then to West Virginia law to determine performance by the parties, the court found that when one contracts to perform services to the satisfaction of another, such other is the sole judge of the quality of work done, and has the absolute right to accept or reject it.97 Therefore, the court held that the defendant’s termination of the plaintiff did not constitute a breach of the contract.98

III. Employment Contracts: The Rules of New and Jones

In two recent cases, New v. TAC & C Energy, Inc.99 and Jones v. Tri-County Growers,100 the West Virginia Supreme Court of Appeals specifically addressed the conflict of laws issue in the context of employment contracts. While one might hope that New and Jones

92. Id.
93. Id.
94. Id. at 75, where the court cites Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941), in support of its conclusion that West Virginia conflict law must be applied. The principle of Klaxon will be more fully discussed in the next section of this article.
95. Id.
96. Id.
98. Id.
100. 366 S.E.2d 726 (W. Va. 1988).
would articulate clear and consistent standards for conflict analysis, one would be hoping for too much. A critical perusal of *New* and *Jones* reveals an inter-decisional inconsistency which plunges the articulated conflict rules into conflict with one another.

The dissonance of these two cases lends confusion to the already murky area of conflict law, and could create even greater uncertainty in the resolution of conflict problems. In this section, the decisions of these two cases will be analyzed and compared in order to propose the best statement of the current West Virginia rule.

A. *New v. TAC & C Energy, Inc.: The Second Restatement Position*

In *New v. TAC & C Energy, Inc.*, the West Virginia Supreme Court of Appeals first addressed the conflict of laws question in relation to an employment contract. The plaintiffs, a husband and wife, were West Virginia residents who were hired by the defendant, a West Virginia corporation, to work at a mining operation in Kentucky. The plaintiffs alleged that at the time they were laid off by the defendant, they were owed certain wages and benefits pursuant to the terms of their employment. Accordingly, the plaintiffs brought suit alleging a violation of W. Va. Code § 21-5-4(e) (1985), which provides for recovery of overdue wages. The Circuit Court of Mingo County granted summary judgment to the defendant on the

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101. 355 S.E.2d 629 (W. Va. 1987). The opinion does not specify the exact nature of the contract between the parties. The Court at one point refers to the "employment agreement," *Id.* at 630, and later to the "contract," *Id.* at 630-31, but it is impossible to determine whether the contracts were traditional documents, or contracts implied under the rule adopted in *Cook v. Heck's, Inc.*, 342 S.E.2d 453 (W. Va. 1986). Another possibility is that the Court uses "contract" in the broad sense to refer to the agreement to render services in return for wages, not to imply an alteration in the at-will nature of the relationship.

102. The relevant portion of section 21-5-4(e) states:

If a person, firm or corporation fails to pay an employee wages as required under this section, such person, firm or corporation shall, in addition to the amount due, be liable to the employee for liquidated damages in the amount of wages at his regular rate for each day the employer is in default, until he is paid in full, without rendering any services therefore: Provided, however, that he shall cease to draw such wages thirty days after such default.

grounds that it lacked jurisdiction over a wage dispute arising in Kentucky.  

On appeal, the Supreme Court reversed the ruling of the lower court. The court characterized the case as a contract dispute, and the question presented on appeal as one of conflict of laws. The facts relevant to the conflict of laws question, according to the court, were that the employment contract was made in West Virginia, but that the performance was rendered in both West Virginia and Kentucky.

The court stated that it had not previously addressed a conflict of laws question in the context of an employment contract, and noted the paucity of West Virginia cases from which it could seek guidance. The court cited In re Fox’s Estate as the “closest case.” The plaintiffs in Fox claimed to have cared for an ailing relative prior to her death in reliance on the relative’s promise to provide for them in her will. Upon discovering that the promise had not been kept, the plaintiffs brought suit against the decedent’s estate to recover the value of their services. Both the decedent’s promise and the plaintiffs’ services were rendered in West Virginia. Consequently, in Fox the court, using the lex loci contractus rule, identified West Virginia law as the rule of decision.

Referring to the rule stated in Fox, the New court stated that

The above case makes clear that if the contract [i.e., the News’] had been made and performed totally in West Virginia, there would be no question about which law to apply . . . . Because the test set out in Fox’s Estate does not address the situation where the performance and contracting are not in the same state, we are left with no clear provision of law governing this situation.

103. New, 355 S.E.2d at 630.
104. 131 W. Va. 429, 48 S.E.2d 1 (1948). Syllabus point 2, quoted by the New Court, states: “The laws of the state where a contract is made and to be performed determine the substantive rights of the parties to such contract . . . .”
105. Id.
106. New, 355 S.E.2d at 630-31. The Court failed to find the rule of Boyd v. Pancake Realty Co., 131 W. Va. 150, 45 S.E.2d 633 (1948), which was decided the same year as Fox’s Estate. The rule of Boyd was adopted by the Fourth Circuit Court of Appeals in Tow v. Miners Memorial Hosp. Ass’n, Inc., 305 F.2d 73 (4th Cir. 1962).
Upon concluding that it was without precedential guidance, the court adopted the rule articulated in the Restatement (Second) of Conflict of Laws § 196 (1971). That section provides that:

> [t]he validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract provides that the services, or a major portion of the services, be rendered, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Having adopted this rule, the court applied West Virginia law to the dispute. The court chose West Virginia law after finding that West Virginia had a more significant relationship to the contract than did Kentucky. This conclusion was predicated on the grounds that both the plaintiffs and the defendant were residents of West Virginia, the plaintiffs were only in Kentucky for the duration of the job, the contract was made in West Virginia, and the contract was performed in this state by the defendants.

The rule adopted by the court in New is commendable for the ease of analysis it affords in the resolution of conflict of laws problems. Its concise directives are well adapted to promote the principles of certainty and predictability set forth in § 6(f) of the Second Restatement. Its full potential cannot be realized, however, if the exceptions to its application, most notably the more significant relationship exception, are read to give license to judicial overreaching. Such is the flaw of New.

The New court's attempt to identify the state with the more significant relationship to the contract issue before it is archetypical of the contact-counting decried by Weintraub in his criticism of the most significant relationship rule. The court in New merely allowed the enumeration of contacts to tip the scales of analysis without regard to the weight due to each of those contacts.

107. Id.
109. Id. at 631.
110. RESTATEMENT, supra note 2, § 188 (1971).
111. WEINTRAUB, supra note 5, § 3.2B.
The plaintiffs in *New* brought suit to recover wages alleged to have been due for work performed at the defendant's mine. This was the *only* issue in the case. Therefore, the contacts relevant to this issue are certainly entitled to more weight in balance of significance than are contacts with other factors in the contract.

The Restatement (Second) of Conflict of Laws § 196 states that the law of the place where the services are to be rendered should govern unless, "*with respect to the particular issue, some other state has a more significant relationship*" (emphasis added).\(^{112}\) This statement is similar to that in section 188 of the Second Restatement, which articulates the most significant relationship rule.*\(^{113}\) Section 188 states that "*[t]he rights and duties . . . 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 . . . *"* (emphasis added).\(^{114}\) The unambiguous intent of section 188 was to prevent the most significant relationship rule from deteriorating into a test of sheer numbers. It is a rule of quality, not just quantity.

Applying the most significant relationship rule to the facts of *New*,\(^ {115}\) it becomes apparent that Kentucky, not West Virginia, had the more significant relationship to the disputed issue. The work which entitled the plaintiffs to wages due was performed entirely in Kentucky.\(^ {116}\) The plaintiffs' paychecks were delivered to the mine site in Kentucky.\(^ {117}\) Additionally, based upon these considerations, it seems clear that Kentucky had the most significant relationship to the particular issue of the case, that is, the wage dispute.

In its analysis of the facts, the *New* court stated that "administrative matters necessary to the employer's performance were per-

\(^{112}\) *Restatement, supra* note 2, § 196.

\(^{113}\) *Restatement, supra* note 2, § 188.

\(^{114}\) *Id.*

\(^{115}\) The "more significant relationship" exception of section 196 should not be confused with the "most significant relationship" rule of section 188. Section 196 does not require that the most significant relationship rule be satisfied before the exception be invoked; the exception only requires that another state have a *more* significant relationship. Nonetheless, the considerations for determining the most significant relationship under section 188 are much the same as those used to determine if another state has a *more* significant relationship under section 196.

\(^{116}\) *New v. TAC & C Energy, Inc.*, 355 S.E.2d at 630.

\(^{117}\) *Id.*
formed in West Virginia. . . ."118 However, this fact is of less importance to the analysis because the specific act of nonperformance complained of, payment of wages, was to have been performed in Kentucky. The work done by the plaintiffs gave rise, in a sense, to a legal debt under their employment agreements. When a contract specifies that a debt be paid to a specific party, at a specific place, by a specific date, the place of performance of the contract is the place where the payment is to be made.119 The place from which the payment is dispatched is immaterial to the performance of the contract. Accordingly, the defendant's act of non-performance of wages occurred in Kentucky, not West Virginia. The fact that West Virginia was the point of origin of these paychecks is irrelevant to the issue of non-performance.120

The court also stated that the plaintiffs were residents of West Virginia who were "only in Kentucky for the duration of the job."121 The "duration of the job," at least in the case of Mr. New, was over two years. The passage of two years seems more than sufficient for the plaintiffs to have established residency in Kentucky.122 In any event, they were apparently living in Kentucky at, and prior to, the time that their cause of action arose. Their previous or subsequent residency in West Virginia, therefore, seems to be less significant to the disputed issue. In sum, the analysis by the court in New seems to be predicated heavily upon the number of West Virginia contacts, and not the nature of those contacts with respect to the disputed issue.

The most promising aspect of the decision in New is the court's adoption of the Second Restatement rule for employment contract conflict of laws resolution. The court's use of that rule, however, is

118. Id.
120. It would be interesting to discover where the defendant paid other benefits, such as unemployment or workers compensation, on behalf of the plaintiffs. Were these paid to the state of Kentucky or West Virginia?
121. New, 355 S.E.2d at 631.
122. This is assuming that the plaintiffs lived in Kentucky during their employment there. It may, of course, be possible that the couple lived in West Virginia and commuted to their jobs at the Kentucky mine. The expression "in Kentucky for the duration of the job," however, does not lend itself to the latter interpretation.
discouraging. In fact, the theme of New may be characterized as: "Right Rule—Wrong Result."

B. Jones v. Tri-County Growers: Deja Vu?

In Jones v. Tri-County Growers,123 the West Virginia Supreme Court of Appeals was confronted again with a conflict of laws problem arising from the litigation of an employment contract.124 The plaintiffs in Jones were Jamaican nationals who were hired to pick fruit in the Eastern Panhandle of West Virginia. The defendant orchardists procured the workforce through the provisions of a master contract executed in Jamaica with an agent of the Jamaican government. Individual contracts were subsequently executed with the workers hired.125

The master contract in Jones included provisions for certain withholding and deductions to be taken from the workers' paychecks. These included: deductions by the defendants for transportation advancements and five dollars per diem for meals, a three percent withholding to be paid to the Jamaican government for insurance premiums, and a twenty-three percent withholding to be paid to the agent of the Jamaican government for certain expenses.126 None of the workers executed wage withholding or assignment authorizations.127

The plaintiffs brought suit to enforce the restrictions placed on wage assignments under W. Va. Code § 21-5-3 (1979), and to recover damages.128 The Circuit Court of Berkeley County dismissed the action, holding that the master contract was substantially in compliance with the statutory scheme, and the plaintiffs appealed.129 On appeal, the defendants argued that because the contract was executed in Jamaica, the law of Jamaica should govern the action.130

123. 366 S.E.2d 726 (W. Va. 1988).
124. Id.
125. Id.
126. Id.
127. Id.
128. Id.
129. Id.
130. Id.
Contrary to the contention of the defendants, the Supreme Court of West Virginia noted that the case involved performance of a contract and that "[m]atters bearing on the performance of a contract are governed by the law of the place in which the contract is to be performed."\textsuperscript{131} Having thus stated the applicable choice of laws rule, the \textit{Jones} court then explained that

\begin{quote}
[a]lthough it is clear that contracts are governed by the law of the jurisdiction where the contract is made, performance in another state that violates that state's public policy does not become lawful simply because it arises under a contract made elsewhere. When matters of public policy are involved, such as authorized wage withholdings, the law of the state where the contract is to be performed governs.\textsuperscript{132}
\end{quote}

Therefore, the court held that West Virginia law, not the law of Jamaica, would determine the enforceability of the wage withholding provisions.\textsuperscript{133}

The quoted statement from \textit{Jones} seems to suggest that only when a public policy is at issue would the law of the place of performance govern matters of performance. In fact, a careful analysis of the \textit{Jones} opinion in its entirety reveals that the court, in the statement above, was actually referring to what law would govern the validity of the wage withholding provisions of the employment contract.

The court in \textit{Jones} chose the lex loci contractus rule as the proper rule for resolving the conflict of laws issue. The lex loci rule provides that the making of a contract, its nature, validity and construction, is governed by the law of the place where the contract was made, but that matters bearing on the performance of a contract are governed by the law of the place of performance.

The \textit{Jones} court was confronted with wage withholding provisions which were presumably valid under the law of Jamaica, where the contract was made. Performance pursuant to these provisions, however, was required of the defendants in West Virginia. This was not a question of what acts would constitute performance under the withholding provisions; the desired mode of performance was clear. Rather,
it was a question of whether the unambiguous withholding provisions, valid where made, were nonetheless ineffective to create enforceable performance obligations in West Virginia. The *Jones* court concluded that if the wage withholdings were violative of West Virginia public policy, the provisions would be unenforceable, or invalid, here. Viewed in this light, the issue in *Jones* was not one of performance per se (although the court did characterize the issue as one of performance), but of the validity of the contract in the place of performance. Consequently, the public policy exception articulated in *Jones* refers only to a discrete category of cases where the law of the place where the contract was made will not govern the validity of the contractual terms. This exception is consistent with the traditional notions of conflict of laws principles.

C. Can *New* and *Jones* Be Reconciled?

Once this rather arduous analysis of *Jones* is completed, the question becomes: "Why did the *Jones* court do what it did?" The decision of the same court in *New* only eleven months earlier, had completely superseded the traditional rule articulated in *Jones* with the rule found in section 196 of the Restatement (Second) of Conflict of Laws (1971). The *New* court had adopted the Second Restatement rule on the premise that it had "no clear provision of law governing" the conflict of laws question before it. The *Jones* court, on the other hand, found that the traditional law of conflicts provided adequate guidance, and reached its conclusion without so much as a reference to its previous holding in *New*.

The Restatement rule adopted in *New* provides that both the validity and the obligations created by contracts for the rendition of services are to be determined by the law of the place where the services are to be rendered. Had the court in *Jones* only followed its own decision in *New*, the painful path to the outcome in *Jones*, though

134. *Id.*
arriving at the same destination, would have been eased immeasurably.

The problem presented by the Jones opinion, however, is that it creates considerable doubt regarding the proper rule of analysis for employment contract conflict of laws analysis. Is the "traditional," lex loci, rule a dead letter insofar as actions on employment contracts are concerned? The opinion in New would provide an answer in the affirmative. The Jones opinion would compel a contrary response. Until the West Virginia Supreme Court of Appeals again addresses a conflict of laws problem in an employment contract, the correct answer cannot be ascertained.

IV. CONCLUSION

The state of the law for the resolution of conflict of laws in West Virginia, at least with respect to employment contracts, remains mired in confusion. It seems clear that contracting parties can undertake to protect themselves against this unpredictability through the use of choice of law provisions, so long as those clauses can pass muster under the substantial relationship scrutiny. Unfortunately, the typical employment contract is unlikely to contain such provisions. This is especially true of those contracts implied from the unilateral promises contained in employment handbooks or other employer representations.

When employment contracts are devoid of choice of law provisions, the rule that will be applied to resolve a conflict of laws problem that may arise in litigation is unclear. Since 1987, the West Virginia Supreme Court has both adopted a new rule and reiterated the old. The Second Restatement of Conflicts, section 196 rule, being concise in format and amenable to consistent application, should be the preferred rule in this jurisdiction. However, the court's dedication to this rule is questionable. For the time being, it is impossible to know if conflict of laws resolution in employment contract litigation will follow the New rule, or keep up with the Jones.

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