Other ways to solve true conflicts

1. Bernkrant v Fowler (Cal. 1961)
	1. Ps owed D (Granrud) $24K concerning purchase of Nev apt complex
	2. D allegedly made oral promise to Ps (Nev domicile) to forgive debts in his will in exchange for partial payment and refinancing of P’s debt to him
	3. Died – nothing in will
	4. Suit to compel cancellation of debt
	5. Cal statute of frauds barred oral agreements to make provision in will
	6. Nev statute of frauds would prohibit only if real property transaction
		1. But an agreement discharging an obligation secured by real property does not fall under statute
		2. So there is a contract under Nev law
	7. Which law applies?
	8. Look at this from a 1st Rest perspective
		1. If K, place of the K
		2. Anything other possibility?
			1. is it is really a testamentary disposition?
			2. of personalty?
			3. then it is the law of the domicile at time of death
			4. domiciled in Cal at death
	9. but Ct (Traynor) uses interest analysis –
		1. Does Cal have an interest?
			1. what is purpose of Cal law?
			2. protect Cal estates and beneficiaries from fraud
			3. this is a Cal estate
		2. BUT ct says we need to make sure that Cal would really be interested in a case involving multistate contacts
		3. Here a Nev K, perf in Nev, Ps (and maybe decedent) domiciled in Nev at time of K
		4. If decedent domiciled in Nev at time of K, would upset reasonable expectations of Ps to use California law
			1. like People v One 1953 Ford Victoria
				1. automobile mortgaged in TX
				2. moved to Cal by mortgagor
				3. seized in connection with drug trafficking
				4. mortgagee’s interest forfeit under Cal law
				5. Under Cal law there is a duty to investigate mortgagor (who was drug dealer)
				6. Cal law not applied, even though interested
				7. Reason was expectations of the mortgagee
				8. cannot apply Cal law simply because mortgagor moved car to Cal
			2. idea is that expectations of parties put limits (although not const’l limits?) on application of law
		5. BUT even if decedent domiciled in Cal at time of K
			1. Cal’s interest should still be limited by expectations of parties
				1. Cal would have an interest only if decedent remained in Cal
				2. And parties at the time of the contract could not be sure that that would be true
			2. Given the other contacts with Nev, the moderate and restrained interpretation still recommends Nevada law
	10. Currie claimed example of moderate and restrained interp approach is a way of identifying false conflicts
		1. If true conflict then reexamine forum’s interests in the light of the expectations of the parties
	11. How would lilienthal come out in the moderate and restrained interp approach?
		1. Limit Oreg interest on basis of expectations of Cal creditor?
		2. Maybe
2. Bernhard v Harrah’s Club
	1. Cal resid (bernhardt) sued Harrah’s Club for damages inflicted by Cal resident intoxicated at D’s establishment in Nevada
	2. Cal has liability of tavern keepers
	3. Nev does not
		1. Ct does say that there are criminal penalties under Nevada law, although that is actually questionable
	4. How would this be resolved under 1st Rest
		1. Law of place of harm – Cal
		2. but even 1st Rest would sometimes wiggle out of place of harm rule out of concern for the expectations of the parties
	5. Ct uses interest analysis
		1. Cal interests?
			1. Compensation to Cal P
			2. deterrence
		2. Nev interests
			1. protect resident tavern keepers from – by Nev lights – unfair liability
		3. true conflict
		4. appeals to Currie moderate and restrained interp and to Baxter’s comparative impairment as if they were the same
		5. Comparative impairment is not just about expectations of the parties - look at which state would be most impaired if it doesn’t get its law
			1. NOT determining the worthier interest, in the sense of deciding whether one interest is better than the other
			2. And, at least under the approach as Baxter described it, not really weighing the strengths of interests either
			3. Just determining, in an end- means way, the extent to which non-application of a jurisdiction’s law would frustrate the jurisdiction’s purposes
			4. in Bernard the ct concludes reasonable expectations not a problem with respect to application of California law to the Nevada tavern keeper because it *advertised* in California
				1. Plus Cal has strong regulatory interest
				2. So California law was applied
3. What is principle of comparative impairment?
	1. Assumption of what would happen if states engaged in negotiation
		1. In a position of rough equals
		2. No one is always going to get application of its laws in true conflicts
			1. Because there will be forum shopping
		3. so each would give up application of its laws in areas where its interests were comparatively less impaired
			1. questionable that there really would be such an agreement
			2. Courts do not seem to be thinking of such ongoing negotiations in conflicts cases
			3. But perhaps this is a statement of what courts ought to do – a view about “conflicts justice”
4. Baxter avoids weighing the strength of state interests, but California courts using the comparative impairment approach do sometime speak of the strength of state’s interests
5. The worry about weighing state’s interests is that one can never really know what the strength of the state’s interests are
6. Inter jurisdictional utility comparisons are impossible
7. This is similar to the problem with utilitarianism – interpersonal utility comparisons cannot be made
8. Consider Baxter’s hypos
	1. Resid of Mass, driving truck in CT, causes injury to CT P
	2. D broke speed limit, creates irrebuttable presumption of negl under CT law
	3. Not so under Mass law
	4. Baxter: Each state has an interest
		1. What is Ct’s interest
			1. Discourage speeding
			2. compens to P
		2. What is Mass’s interest
			1. doesn’t say but considers it a loss distrib law
	5. How to solve?
		* 1. Their loss distrib interests cancel out
			2. And CT’s regulatory interest remains so CT law applies
			3. “If the [Mass] driver causes injury to [a CT] resident while driving in [CT] at a speed in excess of the [CT] speed limit, [CT]'s per se rule should be applied. [CT] has an interest in implementing its regulatory provision, and its interest in the application of its loss-distribution rule offsets [Mass]'s corresponding loss-distribution interest.”
		1. Does that makes sense?
			1. do we know they cancel out
			2. what are their weight?
			3. perhaps Mass interest has super weight, stronger than both of Connecticut’s interests
			4. basically Baxter counts interests because can’t weigh their intensities
		2. Then moves on to case where P and D are both from Mass
			1. argues that CT’s regulatory interest will not be impaired significantly if does not apply
			2. after all Massachusettsers aren’t going to change their behavior on CT roads simply because they know the Connecticut law will not apply if they run into another person from Massachusetts
			3. so Mass law applies
			4. “The [CT] regulatory interest will not be impaired significantly if it is subordinated in the comparatively rare instances involving two nonresidents, who are residents of a state or states that reject the per se subrule. Conduct on [CT] highways will not be affected by knowledge of [Mass] residents that the [CT] per se rule will not be applied to them if the person they injure happens to be a co-citizen.”
		3. is that convincing?
			1. why not say that Mass’s loss allocating policy will also not be significantly impaired if Massachusetts laws not applied?
9. Sometime interests are given less weight under the comparative impairment approach because they are supported by antiquated laws
	1. Offshore Rental Co. v. Continental Oil Co. (Cal. 1978)
	2. P, Cal corporation, sent VP to La
	3. There VP was injured by negligence of employee of La corporation
	4. Cal law allows suits by a corporation for loss of services of employee
	5. La law does not
		1. Cal SCt assumed true conflict
		2. But Cal law was antiquated and so not given as great a weight
		3. And also expectations of the La defendant would suggest that Louisiana law would apply

1. 2nd Rest
	1. Many states follow 2nd Rest
	2. But often hard to tell whether it is really the 2nd Rest or interest analysis

There are up to three rules to look to under the second restatement

The first are specific presumptive rules

* 1. § 146. Personal Injuries

	In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.
		1. often just is the 1st Rest approach
	2. BUT then allows for departure if other state has a more significant relationship

Sometimes doesn’t have presumptions but says how it is likely to turn out

1. EG 156
	* + 1. whether conduct is a tort is usually law of state where injury occurred
			2. § 156. Tortious Character Of Conduct
			(1) The law selected by application of the rule of § 145 determines whether the actor's conduct was tortious.
			(2) The applicable law will usually be the local law of the state where the injury occurred.
				1. Intrafamily immunity
				2. § 169. Intra-Family Immunity
				(1) The law selected by application of the rule of § 145 determines whether one member of a family is immune from tort liability to another member of the family.
				(2) The applicable law will usually be the local law of the state of the parties' domicil.

The second is a master rule to determine the most significant relationship in section 6

* + 1. § 6. Choice-Of-Law Principles
		(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
		2. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
		(a) the needs of the interstate and international systems,
		(b) the relevant policies of the forum,
		(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
		(d) the protection of justified expectations,
		(e) the basic policies underlying the particular field of law,
		(f) certainty, predictability and uniformity of result, and
		(g) ease in the determination and application of the law to be applied.

The third is a rule for categories of law, which determines the contacts that might be relevant

* + - 1. section 145 torts
			2. § 145. The General Principle
			(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
			(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
			(a) the place where the injury occurred,
			(b) the place where the conduct causing the injury occurred,
			(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
			(d) the place where the relationship, if any, between the parties is centered.

sounds like Dym and Tooker v Lopez

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

1. If this is interest analysis, why is there more than just the policies of states?
	1. Section six also has methods for resolving true conflicts
	2. But they’re all jumbled together
2. Problems
	1. Categorization is still a problem insofar as there are presumptive rules and rules for general categories of laws like tort and contract
		1. Still must categorize to figure out whether these rules apply
	2. Presumptions ignored or alternatively treated as irrebuttable
	3. But the big problem is that there is no discussion in section six of the order in which issues should be addressed
		1. There really should be a determination of state interests and only if there is a true conflict should other considerations come into play

1st example of 2nd Rest - torts

* 1. Phillips v Gen Motors Corp
		1. Mont 2000
		2. 1985 Chevy (GM) pickup sold in NC
		3. Darrell Byrd bought it from NC Co in NC while he was domiciled in NC
		4. Moved to Mont
		5. Byrd Driving w/ family from home in Mont to NC
		6. Accident in Kansas
			1. tanks explode
		7. Darrell, and 2 other family members died
		8. One son lived, Samuel – now domiciled in NC
		9. Suit by guardian of son and repr of estates of the three dead
		10. Against Gen Motors
		11. Product liab
		12. Possible laws
			1. KS – more pro defendant
				1. No liability if in accordance with regulations applying to manufacture at time
				2. No liab if product is, basically, old
				3. Comparative fault
				4. Limit on damages

Comp, punitive

* + - 1. Mont more pro-plaintiff
			2. Michigan unclear
			3. NC – negl liab only