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Conflict of Laws—Most Significant Relationship Rule

Tort choice of law problems are traditionally resolved by reference to the *lex loci delicti*—law of the place of the wrong.¹ The place of the wrong is generally considered to be “the state where the last event necessary to make an actor liable for an alleged tort takes place.”² The rule is a product of analytical jurisprudence³ and is predicated on the notion that since the plaintiff sues to enforce a right resulting from his injury, the law of the state in which the injury occurred should govern the existence of the right and the extent of its vindication.⁴ The rule has subsisted in this country amid both praise and criticism. In recent years, its simple virtues of certainty, ease of application, and predictability, though not totally ignored,⁵ have been submerged in waves of criticism directed at the unjust results which frequently ensue from its application.⁶ Indeed, its arbitrary character and disregard for governmental interests involved in the situations it governs have provoked some courts to dodge the rule,⁷ and others to abandon it.⁸ Recent criticism has de-

¹ See, e.g. *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101 (1931); RESTATEMENT, CONFLICT OF LAWS § 378 (1934). See generally 2 BEALE, THE CONFLICT OF LAWS § 378.2 (1935); GOODRICH, CONFLICT OF LAWS § 92 (1949).

² Thus, where the plaintiff in Arkansas is injured by a rock blasted from a quarry in some other state, the law of Arkansas will govern the substantive rights and liabilities of the parties. *Cameron v. Vandergriff*, 53 Ark. 381, 13 S.W. 1092 (1890). *Accord*, RESTATEMENT, CONFLICT OF LAWS § 377 (1934). See generally 2 BEALE, *op. cit. supra* note 1, § 378.2; GOODRICH, *op. cit. supra* note 1, § 93.

³ RESTATEMENT (SECOND), CONFLICT OF LAWS, Introductory Note, Topic 1 (Tent. Draft No. 8, 1963).

⁴ *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1904); *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 120 N.E. 198 (1918). See generally GOODRICH, *op. cit. supra* note 1, § 93.

⁵ 25 ALBANY L. REV. 313, 317 (1961); Comment, 61 COLUM. L. REV. 1497, 1509, 1511 (1961); Note, 36 N.Y.U.L. REV. 723, 727, 729-30 (1961); 12 SYRACUSE L. REV. 395, 397 (1961); Comment, 15 RUTGERS L. REV. 620, 624 (1961).

⁶ Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Cook, *Tort Liability and the Conflict of Laws*, 35 COLUM. L. REV. 202 (1935); Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1923); Currie, *Conflict, Crisis, and Confusion in New York*, 1963 DUKE L.J. 1 (1963); Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951); Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4 (1944).

⁷ E.g., *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), where the New York Court of Appeals, as an

veloped the thought that perhaps a more flexible approach would serve the ends of justice to a greater degree than the wholly mechanical approach, traditionally employed by most courts.⁹

One of the more significant areas of criticism directed at the *lex loci delicti* approach involves its application to so-called multi-state torts—situations in which the alleged tortious conduct and consequent injury occur in different jurisdictions.¹⁰ In *Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co.*,¹¹ the Fourth Circuit Court of Appeals, interpreting the North Carolina

alternative ground for decision, classified as a procedural matter the limitation of damages recoverable in an action arising out of the wrongful death of a New York citizen in Massachusetts, thus permitting the application of the law of the forum rather than that of the place of the wrong. Though the New York court has subsequently retreated from this position, *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962), the constitutionality of the New York court's refusal on other grounds to apply the law of the place of the wrong has been upheld. *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962) (rehearing in banc), *reversing* 307 F.2d 131 (2d Cir. 1962), *cert. denied* 372 U.S. 912 (1963). *Cf.* *Richards v. United States*, 369 U.S. 1 (1962).

⁹ *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868 (7th Cir. 1960); *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955); *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953); *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957); *Thompson v. Thompson*, 193 A.2d 439 (N.H. 1963); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Haumschild v. Continental Casualty Co.*, 7 Wisc. 2d 130, 95 N.W.2d 814 (1959). *Cf.* *Richards v. United States*, 369 U.S. 1 (1962); *Vrooman v. Beech Aircraft Corp.*, 183 F.2d 479 (10th Cir. 1950); *Levy v. Daniels U-Drive Auto Renting Co.*, 108 Conn. 333, 143 Atl. 163 (1928).

¹⁰ The American Law Institute is presently considering a modification of the rigid rule embodied in the original Restatement in favor of a more flexible rule which provides that "The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort." RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 8, 1963). It is interesting to note that the Institute considers the state in which the injury occurs to have the most significant relationship in the majority of tort situations. RESTATEMENT (SECOND), CONFLICT OF LAWS § 379, comment *b* at 4 (Tent. Draft No. 8, 1963).

¹¹ Assume that under the law of State X, an actor is liable for damage willfully or negligently caused by fire, whereas under the law of State Y, an actor is absolutely liable for any damage caused by fire. *D* starts a fire in State X which spreads and damages the property of *P* located in State Y. Assume that *D* neither willfully nor negligently caused the damage. A court sitting in State Z, following the *lex loci delicti* approach, will apply the law of State Y in determining whether *D* must compensate *P* for his loss. Thus, whereas *D* was completely in compliance with the law of the state in which he acted, he will nevertheless have to respond in damages. The result is criticized in *Cook, Tort Liability and The Conflict of Laws*, 35 COLUM. L. REV. 202, 207 (1935).

¹² 319 F.2d 469 (4th Cir. 1963).

choice of law rule,¹² held that the existence of a cause of action resulting from defendant's alleged negligent conduct in Pennsylvania and plaintiff's consequent injury in North Carolina would be determined by reference to the law of that state having the most significant relationships with the events constituting the alleged tort and with the parties. Plaintiff, a North Carolina corporation, pursuant to loan negotiations with a third party, applied to defendant, a Pennsylvania insurance company, for a 200,000 dollar policy insuring the life of its president. The results of medical examinations conducted in North Carolina, together with other application forms filled out in North Carolina, were mailed to defendant and received at its home office in Pennsylvania by October 14, 1960. On October 20, 1960, plaintiff was notified that defendant had declined to issue a 200,000 dollar policy, but would issue a 50,000 dollar policy instead. Plaintiff accepted the offer of a 50,000 dollar policy, at the same time requesting defendant to endeavor to increase the amount of coverage on the policy. Two days later, plaintiff's president died in North Carolina. Plaintiff instituted suit in the Middle District Court of North Carolina to recover 200,000 dollars for defendant's alleged negligent delay in acting upon plaintiff's application for insurance. It was conceded in the District Court that such a cause of action was recognized in North Carolina,¹³ but not in Pennsylvania.¹⁴ The District Court concluded

¹² A federal court in a diversity suit must follow the substantive law of the state in which it sits. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1937). A state's conflict of laws rules are considered a part of its substantive law for this purpose. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

¹³ In *Fox v. Volunteer State Life Ins. Co.*, 185 N.C. 121, 116 S.E. 266 (1923), *appealed on other grounds* 186 N.C. 763, 119 S.E. 172 (1923), a cause of action was recognized for negligent failure of an insurance agent to deliver the policy to the applicant once the application had been accepted. In the *Fox* case, the Court hinted that an action might be maintained for negligent delay in acting upon the application itself. *Id.* at 124, 116 S.E. at 268 (dictum). This dictum was reiterated in *Rocky Mount Sav. & Trust Co. v. Aetna Life Ins. Co.*, 201 N.C. 552, 554-55, 160 S.E. 831, 832 (1931) (dictum); *cf. Bryant v. Occidental Life Ins. Co.*, 253 N.C. 565, 117 S.E.2d 435 (1960). There has never been a direct holding in North Carolina that a cause of action may be maintained for negligent delay in acting upon an application for life insurance. Indeed, a recent case casts doubt on the continued vitality of the *Fox* doctrine that an action may be maintained for the agent's failure to deliver the policy within a reasonable time after its issuance. *Blackman v. Liberty Life Ins. Co.*, 256 N.C. 261, 123 S.E.2d 467 (1962). For a brief discussion of this case, see *Torts, Tenth Annual Case Law Survey*, 41 N.C.L. REV. 512, 518 (1963). Thus, it is debatable whether North Carolina recognizes a cause of action for negligent delay in acting

that under the North Carolina choice of law rule, the situation would be governed by the law of the place of the tort. Applying this standard, it was reasoned that since the alleged negligence occurred in Pennsylvania, Pennsylvania was the place of the tort. Accordingly, defendant's motion for summary judgment was granted.¹⁵

The Court of Appeals conceded that the North Carolina Supreme Court had invariably followed the traditional *lex loci delicti* approach in resolving tort choice of law problems in which both conduct and injury occurred in the same jurisdiction.¹⁶ However, since the multi-state aspect of the principal case presented considerations not present in cases where both conduct and injury occur in one state,¹⁷ prior decisions in cases of the latter type were thought not to be controlling here. Unable to determine from prior decisions the rule which the North Carolina Supreme Court would probably apply if confronted with the multi-state problem,¹⁸ the Court of Ap-

upon an application for insurance. See generally Annot., 32 A.L.R.2d 487, 511 (1953).

¹⁴ *Zayc v. John Hancock Mut. Life Ins. Co.*, 338 Pa. 426, 13 A.2d 34 (1940). *Accord*, *Shipley v. Ohio Nat'l Life Ins. Co.*, 199 F.Supp. 782 (W.D. Pa. 1961), *aff'd*, 296 F.2d 728 (3rd Cir. 1961).

¹⁵ *Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co.*, 206 F. Supp. 427, 430 (M.D.N.C. 1962).

¹⁶ *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288 (1963), 41 N.C.L. REV. 843; *Doss v. Sewell*, 257 N.C. 404, 125 S.E.2d 899 (1962); *Kizer v. Bowman*, 256 N.C. 565, 124 S.E.2d 543 (1962); *Knight v. Associated Transp., Inc.*, 255 N.C. 462, 122 S.E.2d 64 (1961); *Nix v. English*, 254 N.C. 414, 119 S.E.2d 220 (1961); *McCombs v. McLean Trucking Co.*, 252 N.C. 699, 114 S.E.2d 683 (1960); *Howle v. Twin States Express, Inc.*, 237 N.C. 667, 75 S.E.2d 732 (1953); *Childress v. Johnson Motor Lines*, 235 N.C. 522, 70 S.E.2d 558 (1952); *Hill v. Carolina Freight Carriers Corp.*, 235 N.C. 705, 71 S.E.2d 133 (1952); *Jones v. Otis Elevator Co.*, 234 N.C. 512, 67 S.E.2d 492 (1951); *Jones v. Otis Elevator Co.*, 231 N.C. 285, 56 S.E.2d 684 (1949); *Morse v. Walker*, 229 N.C. 778, 51 S.E.2d 496 (1949); *Harper v. Harper*, 225 N.C. 260, 34 S.E.2d 185 (1945); *Charnock v. Taylor*, 223 N.C. 360, 26 S.E.2d 911 (1943); *Baird v. Baird*, 223 N.C. 730, 28 S.E.2d 225 (1943); *Russ v. Atlantic Coast Line R.R.*, 220 N.C. 715, 18 S.E.2d 130 (1942); *Hale v. Hale*, 219 N.C. 191, 13 S.E.2d 221 (1941); *Farfour v. Fahad*, 214 N.C. 281, 199 S.E. 521 (1938); *Rodwell v. Camel City Coach Co.*, 205 N.C. 292, 171 S.E. 100 (1933); *Wise v. Hollowell*, 205 N.C. 286, 171 S.E. 82 (1933); *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101 (1931); *Harrison v. Atlantic Coast Line R.R.*, 168 N.C. 382, 84 S.E. 519 (1915); *Harrill v. South Carolina & Georgia Extension Ry.*, 132 N.C. 655, 44 S.E. 109 (1903).

¹⁷ The *lex loci delicti* approach is generally followed indiscriminately both in situations where the conduct and injury occur in the same state and in those cases involving conduct in one state and injury in another. See note 2 *supra*; RESTATEMENT, CONFLICT OF LAWS § 377 (1934).

¹⁸ There is at least one North Carolina case and language in other North Carolina cases from which it might be concluded that the North Carolina

peals rejected the *lex loci delicti* approach, and adopted the more flexible rule. The relationship of Pennsylvania with the events and the parties was determined to be more significant than that of North Carolina, and hence the District Court's granting of summary judgment for defendant was affirmed.¹⁹

Though the rule adopted by the Court of Appeals appears meritorious in abstract form,²⁰ its application in the principal case is con-

Supreme Court would not abandon the *lex loci delicti* approach if confronted with the facts of the principal case. One of the areas in which great strides have been made away from the *lex loci delicti* approach is the area of interspousal immunity from tort liability. Several courts have departed from *lex loci delicti* in this area on the premise that the domicile of the spouses has a greater governmental interest in this question, regardless of where the conduct and injury occur. *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955); *Thompson v. Thompson*, 193 A.2d 439 (N.H. 1963); *Haumschild v. Continental Casualty Co.*, 7 Wisc. 2d 130, 95 N.W.2d 814 (1959). As recently as February 1, 1963, the North Carolina Supreme Court was urged to overrule *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101 (1931), where it was held that the capacity of a wife to sue her husband for injuries sustained in New Jersey would be dependent on the law of New Jersey, the state in which the injuries were sustained. In *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288 (1963), 41 N.C.L. Rev. 843, the court, confronted with the above cited cases, refused to overrule the *Howard* case. In so doing, the Court's adherence to *lex loci delicti* and the theory underlying the rule was reaffirmed. In view of the *Shaw* decision, coupled with the fact that the area in which it operates is fertile ground for conflict of laws revolution, it is indeed doubtful that the North Carolina Supreme Court would abandon *lex loci delicti* if confronted with the facts of the principal case. See also *Harper v. Harper*, 225 N.C. 260, 262, 34 S.E.2d 185, 187 (1945), where it is stated: "The actionable quality of the defendant's conduct in inflicting injury upon the plaintiff must be determined by the law of the place where the injury was done." (Emphasis added.) Cf. *Charnock v. Taylor*, 223 N.C. 360, 362, 26 S.E.2d 911, 913 (1943), where the Restatement version of *lex loci delicti* is quoted with approval.

¹⁹ Two cases have split on the same factual situation. *Killpack v. National Old Line Ins. Co.*, 229 F.2d 851 (10th Cir. 1956) (applying the law of the state in which the insurer's home office was located); *Mann v. Policyholders' Nat'l Life Ins. Co.*, 78 N.D. 724, 51 N.W.2d 853 (1952) (applying the law of the plaintiff's domicile).

The outcome of the litigation is somewhat ironic from the plaintiff's point of view. The plaintiff argued in the District Court that the *lex loci delicti* approach should be abandoned and the law of the state with the most significant relationships applied. The District Court did not agree, and applying the *lex loci delicti* approach, held Pennsylvania to be the place of the wrong. It seems that a good argument could have been made that plaintiff sustained its injury in North Carolina, thus requiring application of North Carolina law under *lex loci delicti*. Finally, the plaintiff persuaded the Court of Appeals to abandon *lex loci delicti*, only to have Pennsylvania selected as the state with the more significant relationships.

²⁰ It is not the purpose of this note to compare the merits and demerits of the *lex loci delicti* rule and the rule adopted in the principal case. They are thoroughly expounded in the articles cited in notes 5 & 6 *supra*.

fusing and productive of few, if any, guidelines to assist the practicing attorney in evaluation of future fact situations.²¹ Particularly perplexing is the disposition of the various factors urged in support of the plaintiff's contention that North Carolina law should have been applied. The plaintiff advanced in its favor the fact that it was domiciled and engaged in business in North Carolina, the fact that its president whose life was sought to be insured lived and died in North Carolina, and the fact that the injury, an indispensable element of the tort, occurred in North Carolina. Instead of analyzing these factors with the view of determining whether they tended to give North Carolina a more significant relationship with the events and the parties, the Court of Appeals seemed more concerned with whether these factors warranted the conclusion that the tort complained of happened in North Carolina. Granted, the fact that the tort happened in a particular state might be critical in evaluating whether that state has a more significant relationship with the events and the parties than some other state. Nevertheless, the mere statement that the factors urged by the plaintiff would not support a conclusion that the tort happened in North Carolina hardly seems dispositive of whether or not these same factors are sufficient to give North Carolina a more significant relationship with the events and the parties than Pennsylvania.²²

Four factors were enumerated as justifying the conclusion that Pennsylvania had a more significant relationship with the events and the parties than North Carolina: the application was sent to the home office in Pennsylvania; all information relative to the policy was obtained through or sent to the Pennsylvania office; an application for a policy of that size could only be acted upon at the Pennsylvania office; it was in Pennsylvania that the application was finally acted upon. In short, the events leading up to and constituting the alleged delay were determined by the Court of Appeals to be

²¹ The sole guideline furnished by the Court of Appeals is this statement: "The relative weight due particular factors will vary from case to case, and the court must judge the totality of contacts of the states concerned with the parties and the subject matter." 319 F.2d at 473.

²² The most favorable interpretation of the court of appeals' treatment is that these factors would not justify the conclusion that the *injury* occurred in North Carolina. It would seem that the plaintiff was deprived in North Wilkesboro, North Carolina, of the opportunity to obtain insurance on the life of its president. If the *injury* occurred elsewhere, then where, and why are that state's contacts not considered?

the critical factors, and the mere fact of their physical occurrence in Pennsylvania warranted the conclusion that Pennsylvania's relationship was the more significant.

Pennsylvania's selection in the principal case as the state with the more significant relationship seems to be based solely on that state's preponderance of physical contacts with the events and the parties. The opinion is totally lacking in analysis of these physical contacts in the light of possible governmental interests involved. In vivid contrast is the New York Court of Appeals' treatment in *Babcock v. Jackson*.²³ In the *Babcock* case, plaintiff and defendant, both New York residents, had embarked upon a weekend trip to Canada in defendant's automobile. While driving in the Province of Ontario, a collision, allegedly caused by defendant's negligence, resulted in injury to the plaintiff. Defendant, assuming that Ontario law applied since both conduct and injury occurred in that province, interposed the Ontario guest statute in bar of plaintiff's suit brought in New York.²⁴ The New York Supreme Court agreed with defendant's position and dismissed the action, the Appellate Division affirming. The Court of Appeals, applying a choice of law rule similar to that adopted in the principal case, reversed. The New York Court of Appeals initially outlined the relative physical contacts of both New York and Ontario, emphasizing that analysis of the contacts could only be made in light of the ultimate issue to be decided—whether a guest passenger may sue his host for injuries sus-

²³ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). The New York Court of Appeals has pioneered the revolution in the field of conflict of laws. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (refusing to apply the law of the place of the wrong with respect to the limitation of damages recoverable by reason of the wrongful death in Massachusetts of a New York citizen); *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954) (abandoning the traditional rule that the law of the place where a contract is made controls all issues as to its execution, interpretation or validity, whereas the law of the place of performance controls matters connected with performance). See also *Haag v. Barnes*, 9 N.Y.2d 554, 559-60, 175 N.E.2d 441, 444, 216 N.Y.S.2d 65, 68-69 (1961). See generally *Currie, Conflict, Crisis, and Confusion in New York*, 1963 DUKE L.J. 1 (1963).

²⁴ The Ontario guest statute, ONT. REV. STAT. c. 172, § 105(2) (1960), instead of requiring proof of gross negligence which is required by most American guest statutes, flatly precluded recovery by a guest under any conditions. The New York Court of Appeals was apparently influenced by the fact that the Ontario statute was without parallel in the United States. See *Babcock v. Jackson*, 12 N.Y.2d 473, n.13, 191 N.E.2d 279, 285 & n.13, 240 N.Y.S.2d 743, 751 & n.13 (1963).

tained during the guest-host relationship.²⁵ New York's contacts were said to stem from a guest-host relationship between New York citizens originating and intended to terminate in New York and an accident arising out of the negligent operation of an automobile licensed and undoubtedly insured in New York. On the other hand, Ontario's sole contact with the situation was the fact that the accident occurred there. The public policies of both New York and Ontario were then weighed vis-à-vis the issue involved. It was emphasized that the New York legislature had repeatedly refused to enact legislation limiting the right of a guest to recover for injuries inflicted by his host. This refusal was deemed to evidence a policy of compensation in such cases, and no reason could be found to limit the implementation of this policy to accidents occurring within the borders of New York. On the other hand, Ontario's policy as reflected in its guest statute was the prevention of fraudulent claims by passengers, in collusion with their drivers, against insurance companies. This policy was thought to be directed at such claims asserted against Ontario defendants and their insurance carriers. Reasoning from this, it was determined that Ontario could have no valid legislative interest in whether fraudulent claims were asserted by New York plaintiffs against New York defendants and their insurance carriers. Thus, having determined that New York had a greater governmental interest in the subject matter of the litigation, the Court of Appeals applied New York law in resolution of the dispute.

The difference in the approach taken by the *Babcock* court and that followed in the principal case is readily apparent. *Lowe's* seems to reflect the view that the relationship of the state having the greater total of physical contacts with the events and the parties would, a fortiori, be more significant than that of the other state. On the other hand, the *Babcock* court reached its decision by determining which government, because of its physical contacts, had a greater governmental interest in the subject matter of the litigation. This was accomplished by initially investigating the policies of each government as expressed in the conflicting laws, and then weighing the

²⁵ It was pointed out that different considerations would be involved "had the issue related to the manner in which the defendant had been driving his car at the time of the accident." *Id.* at —, 191 N.E.2d at 284, 240 N.Y.S.2d at 750-51.

interest of each in the vindication of its policy in the light of the physical contacts with the events and the parties. Concededly, in the absence of conflicting statutory pronouncement on the substantive issue in litigation, the facts of the principal case do not lend themselves as readily to such a governmental-interest analysis as did the facts of the *Babcock* case. Nevertheless, the degree of significance to be attached to each state's physical contacts might be assessed by comparing policies reflected in general laws relative to dealings between insurance companies and individuals, with a view toward determining whether either state, because of its physical contacts, would have a greater interest in the subject matter of the litigation. Investigation might reveal a Pennsylvania policy of protecting insurance companies from claims arising out of preliminary negotiations with applicants for insurance. Such a policy would certainly give Pennsylvania an interest in any dispute arising out of preliminary negotiations between a domiciliary company and an applicant for insurance. On the other hand, investigation might reveal a North Carolina policy designed to protect its citizens in their dealings with foreign insurance companies.²⁶ Since the plaintiff in the principal case was a North Carolina citizen, the existence of such a policy would also seem to give North Carolina an interest in the litigation. Especially would this be true if the defendant were licensed to do business in North Carolina, in which case North Carolina's interest in the defendant's conduct while dealing with a North Carolina applicant for insurance would seem to be paramount to that of any other state, regardless of where the conduct complained of occurred.

Perhaps, an alternate method might be employed to assess the

²⁶ Consider the following as possible evidence of such a policy: "All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof." N.C. GEN. STAT. § 58-28 (1960); "This is true although the insurance company may under its charter be allowed privileges which are contrary to the statutes in this State." *Wilson v. Supreme Conclave*, 174 N.C. 628, 94 S.E. 443 (1917); "It is unlawful for any company to make any contract of insurance upon or concerning any property or interest or lives in this State, or with any resident thereof, or for any person as insurance agent or *insurance broker* to make, *negotiate, solicit, or in any manner aid in the transaction of such insurance*, unless and except as authorized under the provisions of this chapter." N.C. GEN. STAT. § 58-29 (1960). (Emphasis added.)

significance of each state's physical contacts. This method would entail an examination into the basic purpose of the tort rule involved. If it were determined that the basic purpose of the tort rule is to deter or prevent hazardous conduct, then the state in which the conduct occurred would generally have a greater interest in the application of its law. On the other hand, if the tort rule were primarily designed for the protection of a class of persons as opposed to the prevention of hazardous conduct, then the state in which the injury was suffered would generally have a greater interest in the application of its law. Though this method of evaluating contacts is suggested by the American Law Institute, the Institute is careful to point out that this method ordinarily will be of little assistance, since most tort rules involve elements of both prevention of hazardous conduct and protection of the individual.²⁷ Nevertheless, this method would seem to be peculiarly adaptable to the facts of the principal case. The disparity of bargaining power existing between individuals and insurance companies has been recognized as justifying both judicial and legislative protection of the individual.²⁸ Though the rationale employed by those courts which recognize a cause of action for negligent delay in acting upon an application for insurance varies,²⁹ the motivating factor underlying those decisions is a desire to ameliorate "the insecure fortune of an individual pitted against the security of an actuary table."³⁰ Since the plaintiff is domiciled in North Carolina, and since the injury complained of presumably occurred there, it would seem reasonable, on this basis, to argue that

²⁷ RESTATEMENT (SECOND), CONFLICT OF LAWS § 379, comment *c* at 9 (Tent. Draft No. 8, 1963).

²⁸ See *Rocky Mount Sav. & Trust Co. v. Aetna Life Ins. Co.*, 201 N.C. 552, 160 S.E. 831 (1931).

²⁹ *Duffie v. Bankers' Life Ass'n*, 160 Iowa 19, 139 N.W. 1087 (1913) (insurance companies are affected with a public interest); *Bekken v. Equitable Life Assur. Soc'y of the United States*, 70 N.D. 122, 293 N.W. 200 (1940) (negotiations for insurance are unlike negotiations for other contracts due to disparity of bargaining power); *Boyer v. State Farmers' Mut. Hail Ins. Co.*, 86 Kan. 442, 121 Pac. 329 (1912) (Nature of risk against which insurance sought behooves prudent man to act with diligence); *Columbian Nat'l Life Ins. Co. v. Lemmons*, 96 Okla. 228, 222 Pac. 255 (1923) (implied contract between applicant and insurer that latter will act within a reasonable time); *Strand v. Bankers Life Ins. Co.*, 115 Neb. 357, 213 N.W. 349 (1927) (unreasonable delay may deprive applicant of opportunity to obtain insurance elsewhere).

³⁰ *Rocky Mount Sav. & Trust Co. v. Aetna Life Ins. Co.*, 201 N.C. 552, 160 S.E. 831, 832 (1931).

North Carolina's interest in the subject matter of litigation is greater than that of Pennsylvania.

Many authorities consider the loss of the advantages inherent in *lex loci delicti* a small price to pay for a conflict of laws rule which would permit greater recognition of governmental interests. It is hoped that if, and when, the North Carolina Supreme Court accedes to this position, the reason for abandonment of the traditional rule will not be ignored in application of the new.

WILLIAM E. SHINN, JR.

Consent Judgment—Reservation of Rights Against Third Party—Release

In a recent North Carolina case,¹ plaintiff passenger brought an action against two defendants as joint tortfeasors for injuries sustained in an automobile collision. While the action was pending the plaintiff entered into a covenant not to sue, consent judgment and satisfaction of that judgment with *A*. Both the covenant not to sue and the consent judgment reserved the rights of the plaintiff against the other defendant, *B*, a corporation. In the pending action *B* pleaded that the transactions constituted a release of one of the two joint tortfeasors and therefore barred further recovery against the defendant corporation. The jury found that the transactions constituted a covenant not to sue and awarded damages. The trial judge set aside the jury's verdict and ordered a new trial at which the transactions were concluded to be a release. The court affirmed this decision stating that the agreement, consent judgment and satisfaction extinguished the cause of action notwithstanding the intention of the parties; therefore, the plaintiff was barred from further recovery. This raises the question of whether a consent judgment should be given the same effect as a judgment after trial or whether a consent judgment should be viewed merely as a contract approved by the court, thereby allowing the court to look behind the agreement and determine whether the intention of the parties has been carried out.

When a person is injured by the negligence of joint tortfeasors, he may elect to sue them either jointly or individually.² There has

¹ *Simpson v. Plyler*, 258 N.C. 390, 128 S.E.2d 843 (1963).

² RESTATEMENT, TORTS § 882 (1939).