

# A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases

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## I. SCOPE

I return to the field in defense of interest analysis.<sup>1</sup> It is ironic that I should be regarded as a champion of that cause. Brainerd Currie's most charitable characterization of my work would doubtless be heresy. I have spent a good deal of time attempting to articulate forum-neutral solutions to two problems—the true conflict and the unprovided-for case—that he would resolve by application of forum law.<sup>2</sup> Furthermore, identification of the policies underlying domestic laws is not the Alpha and Omega of conflicts analysis. Giving effect to transjurisdictional policies, including the purposes of choice of law, is equally important. Currie and I agree only on the following points: the policies represented by domestic rules can be useful guides in resolving choice-of-law problems; and the conflict of laws should join the mainstream of legal reasoning. It is these propositions that this article will defend; the exposition of Currie's viewpoints will be left to his own superbly crafted articles.<sup>3</sup> This article will first respond to the most common criticisms of basing conflicts decisions on policies underlying domestic rules. It will then suggest how this form of analysis can be applied to products liability cases.<sup>4</sup>

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1. On two previous occasions I have discussed a narrower range of criticisms of interest analysis. See Weintraub, *Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning*, 35 MERCER L. REV. 629 (1984); Weintraub, *John P. Frank's Criticisms of Recent Developments in the Conflict of Laws*, 47 TEX. L. REV. 977 (1969).

2. See Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 261 (1958) [hereinafter cited as Currie, *Married Women's Contracts*] (true conflict); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 229 (1958) [hereinafter cited as Currie, *Survival of Actions*] (unprovided-for case); but cf. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.3 (true conflict), § 6.23 (unprovided-for case) (2d ed. 1980).

3. Most of them are collected in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

Professor Currie never claimed to have invented interest analysis. For one of the best known of the earlier formulations of interest analysis in this century, see Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1216–17, 1223–24 (1946). Professor Currie acknowledges Professor Freund's influence in Currie, *Married Women's Contracts*, *supra* note 2, at 235 n.18. The concept that the territorial reach of a statute should be determined by the purposes underlying it has been traced back at least as far as the writings of Guy de Coquille in the sixteenth century. See Juenger, *A Page of History*, 35 MERCER L. REV. 419, 432–33 (1984).

4. One thing should be clear from the outset: There are warts on interest analysis, just as there are flaws in any method of resolving legal disputes. The question is always whether, in the light of costs and benefits, one approach is preferable to another. As much data as possible should be examined in making that judgment, but the answer is likely to be highly subjective, based on tenets of legal and social philosophy that transcend any particular point being debated.

## II. CRITICISMS OF INTEREST ANALYSIS

A. *Difficulty of Determining What Policies Underlie a Rule*

Many critics of interest analysis contend that it is difficult or impossible to determine the policies underlying a particular domestic rule.<sup>5</sup> The rule may result from the compromise of competing purposes or may embody no discernible policy at all.<sup>6</sup> Moreover, states do not have interests in litigation between private parties.<sup>7</sup>

The objection that it is difficult to determine the purposes of a rule is the most surprising criticism. There is nothing new or remarkable about the proposition that legal rules have purposes which can be identified. Even in purely local cases, an intelligent decision to apply a rule in a marginal situation (one that does not clearly fall within or without the scope of a rule) depends upon knowing the reasons for the rule. These reasons are not always easy to identify, and sometimes there will be disagreement over them. However, before a rule is applied, the purposes of the rule should be discerned.

When choice-of-law analysis focuses on the reasons underlying putatively conflicting domestic rules, it simply mirrors the form of intelligent analysis employed in all fields of law. Cardozo observed that, under the territorial rules of his day, the conflict of laws was "one of the most baffling subjects of legal science" in which "fundamental conceptions have been developed to their uttermost conclusions by the organon of logic."<sup>8</sup> He indicated his discomfort with the state of conflicts thinking: "[W]hen I view the [conflict of laws] as a whole, I find logic to have been more remorseless here, more blind to final causes, than it has been in other fields. Very likely it has been too remorseless."<sup>9</sup> Cardozo's use of the phrase "too remorseless" indicates that he believed conflicts analysis had departed from the flexible policy-oriented approach that wise judges used in other areas. Cardozo illustrates the desirable method of adjudication by using the law of negligence. His remarks are fully applicable to choice of law:

Back of the answers is a measurement of interests, a balancing of values, an appeal to the experience and sentiments and moral and economic judgments of the community, the group, the trade. Of course, some of these valuations become standardized with the lapse of years, and thus instantaneous, or, as it were, intuitive. . . . On the other hand, a judgment even so obvious as this yields quickly to the pressure of new facts with new social implications. . . . We are balancing and compromising and adjusting every moment that we judge.<sup>10</sup>

The argument is sometimes made that even if determining the purposes underlying domestic rules is feasible in interstate conflicts, it is not practicable in

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5. See, e.g., Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 33 (1984).

6. *Id.*

7. *Id.* at 36.

8. B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 67 (1928), cited in Juenger, *supra* note 5, at 1 n.1.

9. B. CARDOZO, *supra* note 8, at 68.

10. *Id.* at 75.

international conflicts because the judge of one country is not likely to understand the purposes of the laws of a nation with an entirely different legal system.<sup>11</sup> The difficulty of finding the policies represented by foreign rules is overstated. Familiarity with other legal systems grows apace. Furthermore, judges have the assistance of counsel who have the time and incentive to make the necessary inquiries and to obtain expert assistance.<sup>12</sup> The greatest flaw in the argument distinguishing international cases from interstate conflicts is that the argument is not for territorial choice of law, but for forum law. The court should not apply foreign law if it does not understand the purposes of that law. Wooden application of misunderstood foreign law is far more likely to result in injustice than the application of forum law.

As for objection to the term "state interests," it refers to the purposes underlying a law of that state. It is probably a needlessly confusing term. I prefer "functional analysis" to "interest analysis."

### B. *The Territorial Reach of Policies Is Not Self-Evident*

Another criticism of interest analysis is that even if the purposes of a rule can be discovered, the rule's geographical reach is not apparent. There still must be a territorial connecting factor.<sup>13</sup> The fault with this criticism is that the purposes underlying a rule reveal the social consequences that the rule is designed either to foster or to avoid. Lawyers and judges can determine whether, in the light of a state's contacts with the parties or with the transaction, those consequences will be experienced there if its law is not applied.

If one woke up in the morning with a blank mind, set out to discover the world, and turned to the conflict of laws, he or she would probably create a territorial system; any other method is counter-intuitive. It is easy to conclude that each jurisdiction's law *ought* to apply only to events within it. When pressed for an explanation of the system, one would say, "If a state or nation cannot determine the rules that apply to events that take place within its borders, social consequences would occur there that the state or nation had designed its law to prevent." Once that is said, however, the whole system would crumble. A little reflection would reveal that application of situs law would sometimes cause social consequences elsewhere, while failure to apply *lex loci* would have no local effects. There are few "nevers" in any rational system of jurisprudence, but there is one candidate: if personal injury is caused by unintentional conduct and the place of injury has no other contacts with the parties, applying the law of the place of injury never will advance the purpose of its rule that denies or limits recovery.

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11. See Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CALIF. L. REV. 1599, 1613 (1966).

12. See *id.* at 1622-23.

13. See Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393 (1980); Juenger, *supra* note 5, at 35-36.

### C. Uncertainty of Result

Another argument against interest analysis is that a functional analysis, resting on the shifting sands of policy, can lead to chaos.<sup>14</sup> Territorially oriented choice-of-law rules, on the other hand, have the virtue of certainty. A famous series of New York decisions dealing with the application of the "guest" statutes of other jurisdictions, which limit a guest passenger's right to recover against a host driver, illustrates the confusion that can occur when functional analysis is misunderstood.<sup>15</sup> In desperation, the New York Court of Appeals adopted three rules that would thereafter apply to guest statute cases.<sup>16</sup> Rule three, the catchall provision, is a thinly disguised version of the old place-of-wrong rule. If this can occur in New York, which led the judicial revolt against territorial choice-of-law rules, it can, and probably will, happen anywhere.

The New York experience is not a necessary concomitant of adopting a functional conflicts analysis. It is the inevitable result of both misunderstanding and misapplying policy analysis. In the strangest of the New York line of cases, *Dym v. Gordon*,<sup>17</sup> the court applied a Colorado guest statute to deny recovery to a New York guest suing a New York host although New York law would have made the host liable for negligence. In order to work this magic, the New York Court of Appeals had to violate the central teaching of functional analysis. It invented a purpose underlying the Colorado statute that had never before been stated—the preservation of the host's liability insurance proceeds for compensation of occupants of automobiles with which the host collides.<sup>18</sup>

There are certain desirable attributes of any legal system. The characteristics most pertinent to the present discussion are predictability of results, just results, and accessibility. These three characteristics are related, and there is likely to be tension between them. Predictability is necessary to plan transactions and, when disputes arise, to facilitate settlement. Predictability also reduces the cost and complexity of litigation. Justice is important because it is unlikely that any legal rule, no matter how easy to apply, will long survive if it produces results that are perceived to be unjust. The results will be unjust if they are poor responses to the social problem to which the rule is addressed. Accessibility is necessary if the legal system is not to serve only the wealthy and the privileged. Tension is likely to arise between the need for just results on one hand and predictability and accessibility on the other. The more we try to mold each decision to fit the particular circumstances of a case, the less predictable and more costly the administration of justice is likely to become.

The solution to this problem lies in functional rules that are satisfactory responses to underlying social problems and that also yield reasonable predictability when

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14. See Juenger, *supra* note 5, at 8.

15. See *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966); *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

16. See *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

17. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

18. *Id.* at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.

administered by the members of a learned profession. It may well be that there is no other solution. In a system based on case law and precedent, the only reliable rule may be one that summarizes a series of just and reasonable decisions.

The rigid and simple territorial choice-of-law rules seemed child's play to apply. If, for example, the tort rule was place-of-wrong, the court could stick a pin in the map where the plaintiff was injured, find the tort law of that place, and apply it. But intelligent lawyers and judges who were unhappy with the result thus obtained found ways around the mechanical rule. Characterization tricks could be played. What was alleged to be a "tort" problem could have its label switched to "procedural"<sup>19</sup> so that the law of the forum rather than of the place of injury applied. This was formerly fairly common in the United States with an issue as important as the measure of damages for tortious injury<sup>20</sup> and is still found in English decisions.<sup>21</sup> Lawyers and judges also circumvented the rule by putting a different substantive label on the problem so that a new territorial rule would emerge and point to a place other than where injury occurred. "Tort" could change in this way, for example, to "contract,"<sup>22</sup> or "family law,"<sup>23</sup> or "administration of estates."<sup>24</sup> As a last resort, the "public policy" doctrine could preclude application of the law selected by the forum's choice-of-law rule.<sup>25</sup>

The reason for recharacterization is that important policies underlying a law not selected by the territorial rule will be impaired and policies of the law selected are either not relevant or should yield. If, as is typical of the label-switching opinions, this reason is not stated, the recharacterization appears arbitrary and the results are unpredictable—far less predictable than they would be under a rule that originally directed attention to maximum accommodation of policies underlying the domestic laws of contact states. A functional approach moves public policy to the foreground to shape the original selection of governing law instead of serving as a last-minute escape from that choice.

There is no reason why functional choice-of-law rules that take account of the purposes of conflicting domestic laws and that also produce reasonably predictable results cannot be stated. Once the different policies of two or more jurisdictions are implicated, the conflict between them should be resolved by result-oriented presumptions. Examples are, for torts, a presumption that the law favorable to the plaintiff should be applied and, for contracts, a presumption that the law that validates the contract should be applied. These presumptions are not pulled out of the air. They reflect widely shared trends in the development of the substantive area involved and in transjurisdictional policies. Moreover, the presumptions as to results are rebuttable.

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19. *See, e.g.*, *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (limit on damages for wrongful death).

20. *See, e.g., id.*

21. *See, e.g.*, *Chaplin v. Boys*, [1969] 3 W.L.R. 322, 2 All E.R. 1085.

22. *See, e.g.*, *Hudson v. Continental Bus Sys.*, 317 S.W.2d 584 (Tex. Civ. App. 1958) (writ refused, no reversible error).

23. *See, e.g.*, *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

24. *See, e.g.*, *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953).

25. *See, e.g.*, *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936).

The factors that might rebut them are drawn from the same transjurisdictional trends and policies that formed the basis for the original presumption. Examples are denial of tort recovery for injury to an employee<sup>26</sup> and refusal to validate contracts of adhesion.<sup>27</sup> The rule I propose to govern choice of law for contract validity is: *A contract is valid if valid under the law of the settled place of business or residence of the party wishing to enforce the contract unless the settled place of business or residence of the other party has an invalidating rule designed to protect against contracts of adhesion.* This rule is one that can be administered by judges and lawyers in a way that will yield an acceptable degree of predictability of results and will respond satisfactorily to almost all transjurisdictional contract cases. There are, to be sure, other factors that will affect the proper response to a conflict concerning the validity of a contract. There may be strong rules invalidating contracts that are illegal or immoral even though they are not contracts of adhesion. But the rule I suggest will work well in almost all cases and, when it does not, other relevant factors<sup>28</sup> can be stated as exceptions to this broad validating rule.

#### D. Forum Preference for Its Own Law

It has been charged that functional analysis, particularly the aspect of it that focuses on the policies underlying domestic rules, is a circumlocution for applying the law of the forum.<sup>29</sup> As a practical matter, a court using this method will find a sufficient forum interest to make forum law relevant and then will resolve any clash between forum and foreign policies by finding that forum law is "better."<sup>30</sup>

There is evidence to support this charge. Probably the most notorious example is *Lilienthal v. Kaufman*.<sup>31</sup> This 1964 Oregon Supreme Court opinion refused to enforce the commercial indebtedness of an Oregon resident when suit was brought by a California creditor. Under a unique Oregon procedure, the debtor had been declared a spendthrift. A guardian was appointed, and the guardian exercised his power to avoid the obligation. The Oregon debtor had traveled to California to borrow the money to finance a business venture, and the California creditor was unaware of the debtor's "spendthrift" status. The court resolved the clash between Oregon and California policies by explicitly adopting a forum-preference rule saying "[w]e are of the opinion that in such a case the public policy of Oregon should prevail and the law of Oregon should be applied . . ."<sup>32</sup> The result has been widely condemned<sup>33</sup> and

26. See *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978) (Louisiana law applied to deny recovery to California employer for injury to employee in Louisiana).

27. See *Zogg v. Penn Mut. Life Ins. Co.*, 276 F.2d 861, 864 (2d Cir. 1960) ("If any trend is discernible in these cases, it is that of a forum to apply its own law to adhesion contracts of insurance entered into by its residents.").

28. See the factors set out in R. WEINTRAUB, *supra* note 2, at § 7.5 (Does the rule reflect a current trend? Do the laws differ in basic policy or minor detail? Should the parties have foreseen the interest of the state with the invalidating rule? Is the context noncommercial? Have the courts of one state deferred in similar cases to the policies underlying the law of the other state?).

29. See Brilmayer, *supra* note 13, at 389-99; Juenger, *supra* note 5, at 10, 13.

30. *Id.*

31. 239 Or. 1, 395 P.2d 543 (1964).

32. *Id.* at 16, 395 P.2d at 549.

33. See, e.g., D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 192 (1965).

is probably wrong because the invalidating Oregon rule was aberrational, the California creditor was unfairly surprised, and the preferred transjurisdictional solution would have been to validate this commercial agreement.

But *Lilienthal* is not an example of a decision in which forum law was declared "better." The court was applying Currie's mandate that in the event of a true clash between forum and foreign objectives, forum law should prevail. The court quickly abandoned this notion in a tort case decided three years later.<sup>34</sup> The court probably leaned too far in the opposite direction by denying an Oregon wife damages for injuries to her husband in the course of his employment in Washington. Oregon law gave her the right to recover, but Washington law did not. There would have been no unfair surprise to the Washington employer in holding it liable under the law of the state where the employee resided and where the employer was licensed to do business. The court stated that "state chauvinism and interstate retaliation are dangers to be avoided."<sup>35</sup>

*Conklin v. Horner*<sup>36</sup> is a classic example of interest fabrication coupled with preference for "better" forum law. That case involved an Illinois host and guest and a crash in Wisconsin. Illinois had a guest statute which would have barred the action by the passenger, but Wisconsin law permitted recovery. The Wisconsin Supreme Court found three Wisconsin policies that would be advanced by permitting recovery: compensation of the injured guest, avoidance of loss to Wisconsin taxpayers or medical creditors, and deterrence of negligent driving in Wisconsin.<sup>37</sup> The compensation policy is simply another way of saying that Wisconsin law should be manna for the injured of the world even though the social consequences of failure to compensate are likely to be experienced in Illinois, which had contrary policies. This is the antithesis of interest analysis. Preventing the cost of medical treatment from falling on Wisconsin taxpayers or doctors is a legitimate concern, but first there should be some showing that, on the facts of *Conklin*, these evils were likely to occur. The contention that the increased chances of civil recovery will make Illinois hosts drive more carefully in Wisconsin is untenable.

Even though *Conklin* was criticized as a distortion of interest analysis,<sup>38</sup> the court did not alter its opinion. In *Hunker v. Royal Indemnity Company*,<sup>39</sup> criticisms of *Conklin* were dismissed as "naive."<sup>40</sup> *Hunker* itself, however, showed that the Wisconsin court would not invariably prefer its own law. In *Hunker*, two Ohio residents were driving in Wisconsin in the course of their employment. After a crash in Wisconsin, the passenger brought a direct action against his fellow employee's liability insurer. Under Ohio law, worker's compensation was the sole remedy, but under Wisconsin law, tort recovery was available. Despite its finding that Ohio and

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34. *Casey v. Manson Constr. & Eng'r Co.*, 247 Or. 274, 428 P.2d 898 (1967).

35. *Id.* at 284, 428 P.2d at 907 (quoting *Clark v. Clark*, 107 N.H. 351, 354, 222 A.2d 205, 208 (1966)).

36. 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

37. *Id.* at 476-77, 157 N.W.2d at 583.

38. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 245-47 (1971).

39. 57 Wis. 2d 588, 204 N.W.2d 897 (1973).

40. *Id.* at 604 n.2, 204 N.W.2d at 905 n.2.

Wisconsin were “both interested jurisdictions,”<sup>41</sup> the court applied Ohio law and barred suit. *Conklin* was distinguished as follows:

The bar of co-employees’ actions does not represent merely past thinking. The trend, to the extent that it is discernible, appears to be toward barring these actions rather than permitting them. We cannot conclude, as we did in . . . *Conklin*, that Wisconsin’s rule of liability unmistakably represents the better law.<sup>42</sup>

Thus, forum preference is not the rule, even in the home of *Conklin v. Horner*.

Another case in which the court used interest analysis and resolved a clash of state policies in favor of the law of a sister state is *Offshore Rental Company v. Continental Oil Company*.<sup>43</sup> A California employer sued a Louisiana company for injury in Louisiana to a key employee. A California statute arguably provided a cause of action for resulting losses to the employer, but no recovery was available under Louisiana law. The California Supreme Court resolved the “true conflict”<sup>44</sup> between California and Louisiana policies in favor of the “stronger, more current interest of Louisiana.”<sup>45</sup>

A similar result was reached by the Minnesota Supreme Court in *Bigelow v. Halloran*.<sup>46</sup> The plaintiff lived in Iowa at the time she was shot by her Minnesota boyfriend, who then turned the gun on himself and committed suicide. After she moved to Minnesota, the plaintiff brought suit against her assailant’s estate. Under Minnesota law, the action for an intentional tort was terminated by defendant’s death, but the claim survived under Iowa law. The court found that “the governmental interests test prove[d] to be inconclusive”<sup>47</sup> because both Iowa and Minnesota policies were implicated. However, the court resolved the conflict in favor of Iowa law as the “better rule”<sup>48</sup> because it was more in accord with trends in the law of survival of actions.

*Cipolla v. Shaposka*<sup>49</sup> also belies the inevitability of forum preference. Two young men, one from Delaware and one from Pennsylvania, attended school in Delaware. At the end of the school day, the Delaware resident was driving his friend home to Pennsylvania. The car crashed in Delaware. Under Delaware law, the host driver was not liable for his ordinary negligence, but he was liable under Pennsylvania law. A majority of the Pennsylvania Supreme Court resolved the “true conflict”<sup>50</sup> in favor of Delaware law on the ground that the Delaware defendant “should not be put in jeopardy of liability exceeding that created by [his] state’s laws just because a visitor from a state offering higher protection decides to visit there.”<sup>51</sup> The opposite

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41. *Id.* at 594, 204 N.W.2d at 900.

42. *Id.* at 610, 204 N.W.2d at 908.

43. 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

44. *Id.* at 164, 583 P.2d at 725, 148 Cal. Rptr. at 871.

45. *Id.* at 169, 583 P.2d at 729, 148 Cal. Rptr. at 875.

46. 313 N.W.2d 10 (Minn. 1981).

47. *Id.* at 12.

48. *Id.* at 13.

49. 439 Pa. 563, 267 A.2d 854 (1970).

50. *Id.* at 568, 267 A.2d at 857.

51. *Id.* at 567, 267 A.2d at 856–57. The court cited *D. CAVERS*, *supra* note 33, at 146–47.



result should have been reached. The host intended to drive into Pennsylvania. Thus, Pennsylvania had a reasonable nexus with defendant's course of conduct, and, although it was less clear at the time of the case in 1970 than it is today,<sup>52</sup> the Delaware guest statute should have yielded to the Pennsylvania rule which better tracked current liability developments. But whether or not one agrees with the result, *Cipolla* is further evidence that interest analysis is not another way of saying "forum law applies and our resident wins."

The clearest example of a court inventing a nonexistent interest is *Dym v. Gordon*,<sup>53</sup> the guest-statute case in which the New York Court of Appeals, rather than manipulating the analysis to apply forum law, managed to apply Colorado law to deprive one New Yorker of recovery against another.

When one turns to transjurisdictional commercial contracts, the cases are legion in which a forum has upheld an agreement under foreign law against a local defendant. This is so common a result in usury cases<sup>54</sup> that, according to the Second Restatement, validation is the rule.<sup>55</sup> The Restatement would have better reflected the results reached in adjudication if it had taken validation as its basic rule for all contract issues.

#### E. Interest Analysis Focuses on Domicile at a Time of Great Population Mobility

It has also been charged that policy analysis is really a complex way of saying that each jurisdiction is interested in making the benefits of its law available to its own citizens but not to others.<sup>56</sup> This not only raises grave questions of unfair discrimination, but also focuses on domicile at a time of unprecedented population mobility.<sup>57</sup>

It is true that insofar as social consequences of applying law are likely to be experienced where the parties live, interest analysis does focus on residence. But there are other contacts that are relevant to policies underlying local law. For example, the place where the defendant acts may have a rule designed to deter his conduct. If so, the purpose of that rule will be advanced by applying it even though none of the parties resides there. It is necessary, however, to be realistic about whether a rule permitting recovery of civil damages will shape conduct. It is unlikely that such a rule will deter negligent driving. If the driver is not made careful by the risk to his life and the lives of his loved ones, or by the threat of criminal punishment, it is unrealistic to think that when he crosses the state line he will say to himself, "I'd better slow down; this state permits guests to recover against their hosts."

52. See *infra* note 66, which traces the disappearance of guest statutes since 1970.

53. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

54. See, e.g., *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927).

55. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 203 (1971).

56. See Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173, 179-81 (1982); Juenger, *supra* note 5, at 9.

57. See Corr, *Interest Analysis and Choice of Law: The Dubious Dominance of Domicile*, 1983 UTAH L. REV. 651 (1983); Juenger, *supra* note 5, at 39-40; Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 777 (1983).

Mobility is not as great a problem when dealing with companies as opposed to individuals, and even with individuals there are ways to avoid unfair discrimination against foreigners and to take account of mobility.

First, the benefits of local law should be made available to a nonresident when this will not offend any policy of his state and will accord with the forum's view of appropriate social responsibility. For example, a host driver should be liable to his guest if liable under the law of the host's residence, even if there is no liability under the law of the guest's residence or the place of injury.<sup>58</sup> This will make residents of the host's state responsible loss distributors, and courts in that state should not be so callous as to wish to implement this policy only when their own residents are injured. Certainly the guest's residence will not object to his recovery. And if the guest later moves to the host's state, application of its law has cast bread upon the waters.

Second, mobility should be taken account of directly. In each case, the question of how likely it is that social consequences will be experienced in a state other than the one in which the parties resided at the time of the occurrence should be addressed. Moves that have occurred between the event and decision of the case should be considered, subject to the caveat that doing so should not encourage house shopping, deter a move otherwise in a party's best interest, or be unfair to the other party.<sup>59</sup>

#### F. *Depeceage*

"Depeceage" refers to the application of the laws of different states to separate issues in the same case.<sup>60</sup> The problem existed under territorial choice-of-law rules. Many outcome determinative rules were dysfunctionally characterized as "procedural."<sup>61</sup> This was a shorthand way of saying that the law of the forum applied, although the law of another state applied to "substantive" issues. Even with regard to admittedly substantive issues, territorial rules could point in different directions. In products liability cases, for example, the law of the place of injury applied to tort counts and the law of the place where the sales contract was made applied to warranty counts.<sup>62</sup>

In some respects interest analysis will lessen the likelihood of depeceage. When adjudicating products liability cases, courts will not automatically be pointed in different directions just because physical injury occurred outside the state of sale. It is true, however, that, on balance, policy analysis may increase the incidence of depeceage.<sup>63</sup> Every law in putative conflict requires separate analysis concerning its underlying purposes and the territorial reach of those policies.

In this as in all other matters, there is no substitute for perspicacity and common sense. If depeceage produces a result different from the one that would be reached

58. *Labree v. Major*, 111 R.I. 657, 673, 306 A.2d 808, 818 (1973).

59. R. WEINTRAUB, *supra* note 2, at § 6.28.

60. See Reese, *Depeceage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973).

61. See *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (measure of damages for wrongful death).

62. See *Handy v. Uniroyal, Inc.*, 327 F. Supp. 596 (D. Del. 1971).

63. See Juenger, *supra* note 5, at 10, 41-42; Wilde, *Depeceage in the Choice of Tort Law*, 41 S. CAL. L. REV. 329, 345-46 (1968).

under the law of any jurisdiction, this may be either a superior accommodation of state policies or a horrible and unfair distortion of those policies. In a products liability suit, for example, it may be that the victim is entitled to the generous compensation policies of his domicile if that state has sufficient contacts with the defendant or the defendant's course of conduct to make application of its law fair. It is less justifiable to apply the punitive damages rules of the victim's home state if they permit recovery when none would be permitted in any state where the defendant acted. In a case like *Kilberg v. Northeast Airlines*,<sup>64</sup> however, it is not sensible to apply the degree-of-culpability measure of wrongful death recovery in force at the place of the crash but remove the statutory limit on that recovery. This is likely to produce a higher recovery than would be available under the law of any contact state, advance the policies of none of these states, and therefore be unfair to the defendant.

### III. PRODUCTS LIABILITY

#### A. Functional Considerations

Much of the literature illustrating interest analysis has focused on guest statutes, which prevent a guest passenger from recovering against his host driver unless the driver is guilty of more than "ordinary" negligence.<sup>65</sup> Now that guest statutes have all but disappeared,<sup>66</sup> it is time to focus on more practical and difficult topics, such as products liability.<sup>67</sup> Even within a single jurisdiction, there are many complex rules relating to products liability. Each suit is likely to be based on at least three theories—

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64. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). In *Kilberg*, a New York domiciliary boarded the defendant's airplane in New York. The plane crashed at its destination in Massachusetts and the New Yorker was killed. The Massachusetts wrongful death act measured recovery according to the culpability of the defendant, but had a \$15,000 limit on recovery. New York had no limit on recovery, but measured compensation by the amount of pecuniary loss to the decedent's dependents. The New York Court of Appeals held that the Massachusetts recovery limit was inapplicable because it was procedural and against public policy.

For another example of improper depeage, see *Harris Corp. v. Comair, Inc.*, 712 F.2d 1069 (6th Cir. 1983), which applies Kentucky law to deny an employer a cause of action for injury to an employee and Ohio law to prevent indemnity for worker's compensation benefits paid to the employee's widow.

65. See, e.g., Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 34-39.

66. In 1970, 28 states had statutory or judge-made rules that prevented any guest passenger in an automobile from recovering for his host's ordinary negligence. See R. WEINTRAUB, *supra* note 38, at 207. In 1980, there were only 9 such states. See R. WEINTRAUB, *supra* note 2, at § 6.9. As of June 1, 1985 only Alabama retained a traditional guest statute. ALA. CODE § 32-1-2 (1983). The Arkansas statute was repealed by 1983 Ark. Acts, No. 13, §§ 1, 2. The Delaware statute was repealed by 64 Del. Laws 59 § 1. The Indiana statute was changed from one of general application to one preventing recovery only by guests who are family members or hitchhikers. IND. CODE ANN. § 9-3-3-1 (West Supp. 1984). The Iowa statute was held to violate the equal protection clause of the Iowa Constitution. *Bierkamp v. Rodgers*, 293 N.W.2d 577 (Iowa 1980). The Nebraska statute was amended to apply only to guests who are spouses or within the second degree of consanguinity or affinity. NEB. LAWS 1981, LB 54, § 1. The Oregon statute was amended to apply only to guests in aircraft and watercraft. OR. REV. STAT. § 30.115 (1983). The Texas statute, which had been amended to apply only to guests within the second degree of consanguinity or affinity, was declared unconstitutional under the "equal rights" provision of the Texas Constitution. *Whitworth v. Bynum*, No. C-3547, slip op. (Tex. July 10, 1985). The Utah statute was held to violate the equal protection clause of the Utah Constitution. *Malan v. Lewis*, 693 P.2d 661 (Utah 1984). Georgia formerly had a judge-made rule preventing recovery by guests for the ordinary negligence of a host driver. See *Bickford v. Nolen*, 240 Ga. 255, 240 S.E.2d 24 (1977). A statute now permits recovery. GA. CODE ANN. § 105-104.1 (1984).

67. This is the topic suggested by Professor P. J. Kozyris, Chairman of the American Association of Law Schools Section on Conflict of Laws at the time of the January 1985 Association meeting. This article is the basis for my presentation at that meeting.

negligence, strict liability in tort,<sup>68</sup> and breach of warranty. If the victim is a consumer, there are likely to be additional counts based on special federal<sup>69</sup> and state<sup>70</sup> legislation intended to protect consumers. Thus, different elements of the cause of action, different defenses, and different doctrines of contributory and comparative fault are likely to apply to each theory. This chaos is compounded exponentially when the different rules of other jurisdictions are considered. The litigant's ultimate nightmare is reached if there are multiple defendants and hundreds of plaintiffs, all from different jurisdictions, as will occur in the typical airplane crash<sup>71</sup> or class action.<sup>72</sup>

There is no conflicts magic that can make sense of the underlying bedlam of rules that passes for products liability law. However, it is possible to formulate choice-of-law rules that take account of the interests of the various contact states and resolve the policy clashes that result. This can be done by recognizing the widely shared developments that make it more likely that victims will be adequately compensated. This suggests a plaintiff-favoring rule. If such a rule is to be fair to the defendant, it must choose plaintiff-favoring law only if that law's compensation policy will be advanced by recovery and only if the jurisdiction with that rule has a sufficient nexus with the defendant or defendant's course of conduct to make the use of its law reasonable. The rule that emerges will resemble the Hague Convention on the Law Applicable to Products Liability.<sup>73</sup>

68. See RESTATEMENT (SECOND) OF TORTS, § 402 A (1965).

69. See, e.g., 15 U.S.C. §§ 2051-83 (1982), the Consumer Product Safety Act. Section 2072 of the Act permits recovery of damages resulting from a knowing violation of a rule or order issued by the Consumer Product Safety Commission. Recovery under the section may also include attorney's fees and other costs of suit.

70. See, e.g., ME. REV. STAT. ANN. tit. 11, § 2-316(5) (Supp. 1984) (non-uniform addition to Maine's version of the Uniform Commercial Code):

Any language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties [of] merchantability or fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, shall be unenforceable. Consumer goods and services are those new or used goods and services, including mobile homes, which are used or bought primarily for personal, family, or household purposes. *Id.*

71. See, e.g., *In re Air Crash Disaster Near Chicago*, 644 F.2d 594 (7th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981) (wrongful death actions filed against the airplane manufacturer and the airline in six different district courts on behalf of dependents and decedents from ten states, Puerto Rico, and three foreign countries—defendants' conduct had contacts with seven states).

72. See, e.g., *In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir. 1984), *cert. denied*, 104 S. Ct. 1417 (1984) ("agent orange" litigation in which the special master estimated the number of potential claimants to exceed 40,000 from every state and several foreign countries). See also *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 690 (E.D.N.Y. 1984) and Judge Weinstein's 21 page "guide" to his "present thinking" on the conflict-of-laws issues in the case. *Id.* at 713.

73. *Convention on the Law Applicable to Products Liability, III Acts and Documents of the 12th Session of the Hague Conference on Private International Law* (1972), reprinted in 21 AM. J. COMP. L. 150 (1973) [hereinafter cited as *Convention*].

The *Convention* first entered into force on January 10, 1977 after it had been ratified by France, Norway, and Yugoslavia. It was ratified by the Netherlands in 1979 and has been signed but not ratified by Belgium, Italy, Luxembourg, and Portugal. 31 NETHERLANDS INT'L L. REV. 272-73 (1984).

The *Convention* applies to the liability of all persons, other than transporters, who are engaged in the commercial chain of preparation or distribution of a product. *Convention*, Art. 3. See *Explanatory Report by W. Reese, III Acts and Documents of the 12th Session of the Hague Conference on Private International Law, supra*, at 252, 259. Harm covered is "injury to the person or damage to property as well as economic loss; however, damage to the product itself and the consequential economic loss shall be excluded unless associated with other damage . . ." *Convention*, Art. 2(b).

The major choice-of-law provisions in the *Convention* are:

Article 4

The Convention went awry in mixing the apples of plaintiff's choice with the oranges of massed territorial contacts. Under the Convention, plaintiff can choose between the law of the defendant's principal place of business and the law of the place of injury only if the plaintiff's habitual residence, defendant's principal place of business, and the place where the product was acquired are in different jurisdictions.<sup>74</sup> If the plaintiff's residence is also the place where the product was acquired or where the defendant has its principal place of business, that law must apply.<sup>75</sup> If this critical mass fails to form, the law of the place of injury must apply if any of the other enumerated contacts are present.<sup>76</sup> It would make more sense to use a building block approach for plaintiff's choice. If it is desirable to apply the law of defendant's principal place of business, the plaintiff should not lose this option because there are contacts with other places that also make application of their law reasonable. In his typically insightful manner, David Cavers has worked this basic change on the Convention formulae.<sup>77</sup> He would always allow the plaintiff to choose the law of defendant's business, but would permit an additional choice of the law of plaintiff's habitual residence if the product was acquired there or caused harm there.<sup>78</sup> The plaintiff could also choose the law of the place where the product was acquired, even if he did not reside there, but only if the harm was caused there.<sup>79</sup>

There are four problems with Professor Cavers' rule. First, it still suffers from the critical mass syndrome. Second, it may not be desirable to give the plaintiff the benefit of defendant's law. Third, it may not be desirable to give the plaintiff the same choice for all issues.<sup>80</sup> Fourth, the Convention rule protecting the reasonable expectations of the defendant is preferable to the Cavers rule.

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The applicable law shall be the internal law of the State of the place of injury, if that State is also—

- (a) the place of the habitual residence of the person directly suffering damage, or
- (b) the principal place of business of the person claimed to be liable, or
- (c) the place where the product was acquired by the person directly suffering damage.

Article 5

Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also—

- (a) the principal place of business of the person claimed to be liable, or
- (b) the place where the product was acquired by the person directly suffering damage.

Article 6

Where neither of the laws designated in Articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury.

Article 7

Neither the law of the State of the place of injury nor the law of the State of the habitual residence of the person directly suffering damage shall be applicable by virtue of Articles 4, 5 and 6 if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels.

74. *Convention, supra* note 73, at Art. 6.

75. *Id.* at Art. 5.

76. *Id.* at Art. 4.

77. See Cavers, *The Proper Law of Producer's Liability*, 26 INT'L & COMP. L.Q. 703, 728-29 (1977).

78. *Id.*

79. *Id.*

80. Professor Cavers does say: "In a fully developed set of proposals I should hesitate to rule out *depeçage* . . . ." *Id.* at 709.

If the plaintiff acquires the product outside of his residence, Professor Cavers allows the plaintiff to choose the law of the place of purchase only if the harm occurs there.<sup>81</sup> Occurrence of the harm there is likely to be fortuitous and adds nothing to the fairness of applying the law of that jurisdiction.

The hardest question for interest analysis is whether plaintiff should be able to choose the law of defendant's principal place of business if that law is more favorable to plaintiff than the law of his residence or the law of the place of purchase. In favor of this choice, it can be argued that the state where defendant acted wishes to deter improper manufacture,<sup>82</sup> the defendant can hardly complain about being subjected to his or her "own" law, and the plaintiff's residence can have no objection to more adequate compensation at the expense of foreigners. But a number of courts, including the United States Supreme Court, have found the deterrence argument too weak in this context to influence choice of law.<sup>83</sup> Moreover, circumstances could deprive the other two arguments of cogency. The place of plaintiff's residence may wish to encourage within its borders the sale or manufacture of the product. For

81. *Id.*

82. For cases in which the courts based their choice of law at least in part on the deterrence argument, see, *Tomlin v. Boeing Co.*, 650 F.2d 1065, 1071 (9th Cir. 1981) (period of limitations, law of manufacturer's principal place of business); *In re Air Crash Disaster at Mannheim, Germany*, 575 F. Supp. 521, 526 (E.D. Pa. 1983) (whether recovery available under strict liability theory, law of place of manufacture); *Baird v. Bell Helicopter Textron*, 491 F. Supp. 1129, 1140-41 (N.D. Tex. 1980) (whether recovery available under strict liability theory, law of place of manufacture; but applies the rules of plaintiff's domicile that limit or prevent recovery on the issues of measure of damages and loss of consortium, *id.* at 1151-52); *cf. Foster v. Day & Zimmerman, Inc.*, 502 F.2d 867 (8th Cir. 1974) (whether recovery available under strict liability theory, law of place of manufacture; but court notes special circumstances here of a product used on a military post in training exercises giving the state where injury occurred "little if any contact with or interest in the parties or in the subject matter of this litigation," *id.* at 870); *Melton v. Borg-Warner Corp.*, 467 F. Supp. 983 (W.D. Tex. 1979) (apply law of place of manufacture on the ground that in "a products liability case, it is the product, not the conduct of the parties, their agents or employees, which is the subject of [the] lawsuit," *id.* at 986); *Mitchell v. United Asbestos Corp.*, 100 Ill. App. 3d 485, 426 N.E.2d 350 (1981) (statutory limit on wrongful death recovery, place where decedent had worked with asbestos has interest in deterring wrongful conduct).

83. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (the Court held that the *forum non conveniens* dismissal of an action brought on behalf of Scottish plaintiffs was not an abuse of discretion and the Court did not decide whether the law of Pennsylvania, where the helicopter was manufactured, or the law of Scotland, where it crashed, should apply; but, even though it is likely that a Scottish court would apply Scottish law, which does not include strict liability, the Court rejected the argument that the dismissal was an abuse of discretion and stated that "the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant," *id.* at 260-61); *Bennett v. Enstrom Helicopter Corp.*, 679 F.2d 630, 632, *on rehearing*, 686 F.2d 406, 408 (6th Cir. 1982), *cert. denied*, 459 U.S. 1210 (1983); *Harrison v. Wyeth Laboratories Div. of Am. Home Prods. Corp.*, 510 F. Supp. 1, 5 (E.D. Pa. 1980) (unfair to defendant to impose upon it standards higher than those of country where product distributed); *Jones v. Searle Laboratories*, 93 Ill. 2d 366, 444 N.E.2d 157 (1982); *Deemer v. Silk City Textile Mach. Co.*, 193 N.J. Super. 643, 475 A.2d 648 (App. Div. 1984) ("Whatever incidental benefits a liability judgment may contribute toward the correction of a defective design or the deterrence of wrongful conduct with respect to the future distribution of a product, the principal aim of a product liability or other personal injury claim is fairly to compensate the injured party," *id.* at 651, 475 A.2d at 652); *cf. Wayne v. Tennessee Valley Authority*, 730 F.2d 392 (5th Cir. 1984) (the state where plaintiffs were domiciled and injured has a stronger interest than the state where the product was manufactured, even though law of domicile bars action); *Hines v. Tenneco Chems., Inc.*, 728 F.2d 729 (5th Cir. 1984) (apply law of place where plaintiff resided when injured although its law bars action); *Adams v. Buffalo Forge Co.*, 443 A.2d 932 (Me. 1982) (apply law where plaintiff resides despite his argument that plaintiff's residence has no interest in applying law more favorable to defendant than law of place where defendant does business or product acquired, but then change law of residence to accord with law of other contact states permitting recovery without privity); *Cousins v. Instrument Flyers, Inc.*, 44 N.Y.2d 698, 376 N.E.2d 914, 405 N.Y.S.2d 441 (1978) (allowing plaintiff to choose whatever law is most favorable to him is "incongruous"); *Bewers v. American Home Prod. Corp.*, 99 A.D.2d 949, 472 N.Y.S.2d 637 (1st Dept. 1984) (United Kingdom has greater interest in applying its law to product manufactured and distributed there despite fact that United States defendants licensed the manufacture and are alleged to have engaged in a conspiracy to market the product in the United Kingdom without adequate warnings).

example, a country that is striving to reduce its birth rate may wish to have an effective oral contraceptive distributed there without the hindrance of either strict liability or what that country considers excessive warnings.<sup>84</sup> Application of defendant's law, when it is more favorable to plaintiff than the law where plaintiff resides, may discourage commercial enterprises from locating in defendant's state. It is also likely to cause forum shopping as the afflicted converge on local courts much to the discomfort of judicial administrators and the delight of the plaintiffs' bar.<sup>85</sup> If defendant's state has no such concerns and wishes to be magnanimous, and if plaintiff's state has no objection, then it is fine to open the floodgates. However, a rule with the opposite presumption would be preferable.

Even if the plaintiff's state provides the most generous compensation and it is fair to the defendant to be exposed to this law, it is not necessarily desirable to apply that law to punitive damages. A number of courts have held that plaintiff's residence is interested in the adequacy of recovery for actual damages, but that the award of punitive damages should be left to jurisdictions where the defendant has acted in a manner sufficiently outrageous to warrant such damages.<sup>86</sup> It is those jurisdictions that should decide whether defendant's conduct should be punished and deterred.<sup>87</sup>

Finally, Professor Cavers would permit application of the law of plaintiff's residence or of the place of acquisition if the defendant could "reasonably have foreseen the presence in that State"<sup>88</sup> of the product. The Convention requires that the defendant be able to foresee the product's presence there "through commercial channels."<sup>89</sup> The Convention rule is better. Tourists who buy products abroad should not be able to subject foreign manufacturers to liability rules more favorable to users than the rules of any place where the goods are marketed.

### B. Proposed Choice-of-Law Rule for Products Liability

In the light of the preceding discussion, the following rule is suggested for products liability cases:

84. See *Harrison v. Wyeth Laboratories Div. of Am. Home Prods. Corp.*, 510 F. Supp. 1, 4-5 (E.D. Pa. 1980): Faced with different needs, problems and resources . . . India may, in balancing the pros and cons of a drug's use, give different weight to various factors than would our society, and more easily conclude that any risks associated with use of a particular oral contraceptive are far outweighed by its overall benefits to India and its people. *Id.*

85. See *Deemer v. Silk City Textile Mach. Co.*, 193 N.J. Super. 643, 651, 475 A.2d 648, 652 (App. Div. 1984): Furthermore, the effect of holding New Jersey law applicable in a matter of this kind is to subject any corporation conducting manufacturing activities in this state against whom a product liability claim is asserted to suit in New Jersey under New Jersey law. Such a holding would have the undesirable consequence of deterring the conduct of manufacturing operations in this state and would likely result in an unreasonable increase in litigation and thereby unduly burden our courts. *Id.*

For products liability cases granting *forum non conveniens* dismissals to United States defendants sued by foreign plaintiffs injured abroad, see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Harrison v. Wyeth Laboratories Div. of Am. Home Prods. Corp.*, 510 F. Supp. 1 (E.D. Pa. 1980); *Jones v. Searle Laboratories*, 93 Ill. 2d 366, 444 N.E.2d 157 (1982); *Bewers v. American Home Prod. Corp.*, 99 A.D.2d 949, 472 N.Y.S.2d 637 (1st Dept. 1984).

86. See, e.g., *In re Air Crash Disaster Near Chicago*, 644 F.2d 594, 612-13 (7th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981); *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 690, 705 (E.D.N.Y. 1984).

87. Professor Willis Reese makes this point in his excellent article on airplane accidents. See Reese, *The Law Governing Airplane Accidents*, 39 Wash. & Lee L. Rev. 1303, 1313 (1982).

88. Cavers, *supra* note 77, at 728-29.

89. *Convention*, *supra* note 73, at Art. 7.

- (I) To determine whether plaintiff will be compensated and the extent of compensation for actual damages:
- (A) Apply the law of plaintiff's habitual residence if the product that caused the harm or products of the same type are available there through commercial channels and the defendant should have foreseen this availability.
  - (B) If the law of plaintiff's habitual residence is not available under rule (I)(A), the defendant may nevertheless choose that law.
  - (C) If the law of plaintiff's habitual residence is not applied under rules (I)(A) or (I)(B), the plaintiff may elect the law of any of the following places:
    - 1. the defendant's principal place of business;
    - 2. the place where the product was acquired if the defendant should have foreseen its availability there through commercial channels;
    - 3. the place where the defendant manufactured, designed, or maintained the product or any of its component parts.
- (II) On issues affecting the availability and measurement of punitive damages, the plaintiff may elect the law of any of the places designated in rule (I)(C).

It should be remembered that this rule is only a presumption that is likely to represent the results of proper interest analysis and resolution of conflicts by drawing on transjurisdictional policies and trends. If, as may sometimes occur, both defendant's and plaintiff's states wish plaintiff to have the advantage of the higher recovery available under defendant's law, then that is the law that should be applied.

The most controversial aspect of the rule is probably (I)(B), which gives the defendant the privilege of asserting plaintiff's law as a cap on liability. There are two reasons for this provision. First, other contact jurisdictions (those listed in (I)(C)) are not likely to have to live with the long range consequences of what they regard as undercompensation. Second, giving the defendant this choice makes it fairer to give the plaintiff the choices in (I)(C) and (II).

#### IV. CONCLUSION

It is unlikely that there will ever be a legal system that provides simple answers to complex questions. It is even less likely that such a system would be desired. The territorial rules of the First Restatement of Conflict of Laws<sup>90</sup> approached this kind of mindless formalism and no tears should be shed over their disappearance. The conflict of laws has been returned to the realm of sound legal analysis. There, with the other subjects of the law, it will be free to adjust to constantly changing social realities.

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90. RESTATEMENT OF CONFLICT OF LAWS (1934).