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Choice of Law, Medical Malpractice, and Telemedicine: The Present Diagnosis with a Prescription for the Future

JEFFREY L. RENSBERGER*

I. INTRODUCTION

This article examines the law applied in interstate medical malpractice cases. My purpose is twofold. First, I synthesize the hundreds of cases in this area of law to understand the decisions the courts are making. The subject of malpractice is in itself an important topic in the field of choice of law because state policies regarding medical malpractice differ significantly and interstate medical care is common due to patients' needs for care by remote specialists. These two factors, differing state laws and interstate transactions, are the ingredients of a conflict of laws problem. Moreover, the general current toward greater mobility can be expected to increase the number of malpractice conflicts issues in the future. After reading the cases, somewhat to my surprise, I discovered what Albert Ehrenzweig would have called "true rules."¹ That is, regardless of the choice of law methodology used, the results of the cases show a fair amount of uniformity.

Second, I lay out a framework for analyzing a particular type of interstate malpractice case that we can expect to see more of in the near future. In recent years, communications technology, and specifically the Internet, has enabled physicians to begin diagnosing and treating patients from a distance without ever actually seeing them. This new technology, called telemedicine, increases the potential for claims of interstate malpractice by decreasing the expense of obtaining treatment from an out-of-state specialist. Instead of getting on a plane and flying to the Mayo Clinic, patients can go online and secure the same services. Telemedicine is one aspect of the broader issues raised by interstate regulation of professional activities on the Internet. What we discover in this context will also be of use to the interstate practice of law and other professions.

Telemedicine will become more common because it multiplies the power of health professionals to heal patients by distributing their

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1. See generally Albert A. Ehrenzweig, *Choice of Law: Current Doctrine and "True Rules,"* 49 CAL. L. REV. 240 (1961) (positing that courts reach predictable choice of law results despite methodological differences).

knowledge and skill over a wider area, at a much lower cost than is possible in a traditional practice.² By use of technologies ranging from telephones and fax machines to electronic transmissions of data from echocardiograms, telemedicine increases the ability of health professionals to cause effects in remote locations. But effects can be either good or bad. Thus, telemedicine also expands opportunities for malpractice to occur.

Telemedicine's ability to produce expanded effects is no different from that of earlier technologies that made communication less expensive. In the future, the new information technologies will probably not be seen as a sharp break from the past but rather as the next step in a process of expanding communications that began over a century ago with the telegraph and continued with the telephone and radio. What appears today to be revolutionary³ will probably appear evolutionary⁴ to our descendants.

Viewing telemedicine as the latest stage of an evolutionary process affects the analysis of the legal issues it raises. We do not need to invent new legal constructs for telemedicine. Instead, recognition of telemedicine's technological antecedents allows for a relatively smoother adoption of legal standards by analogizing to the law that has developed for those antecedents. And there is no lack of analogies. The telephone, for example, has widespread use in medical consultation.⁵ The telephone, like telemedicine, is a technology that allows widespread dissemination of an expert's knowledge and skill at a relatively low cost. Precedents involving the use of the telephone in the practice of medicine provide a guide in understanding the issues raised by telemedicine.

Choice of law has been influenced over the last century by new methods of transacting business and inflicting injury. Automobile

2. A great deal of information about telemedicine can be found on the web. See, e.g., American Telemedicine Association, at <http://www.atmeda.org> (last visited Aug. 31, 2000); E-health & Telemedicine, Arent Fox Attorneys at Law, at http://www.arentfox.com/quickGuide/businessLines/e-health/e-health_telemed/-e-health_telemed.html (last visited Aug. 31, 2000); Telemedicine Information Exchange, at <http://tie.telemed.org> (last visited Aug. 31, 2000).

3. See Ira Magaziner, *At the Crossroads of Law and Technology*, 33 *LOV. L.A. L. REV.* 1165, 1181 (2000) ("I believe that the challenge our legal system faces is this: Are we going to try to force the great creativity of this new Internet economy into old legal models, or are we going to realize that we have to adapt those models and transform them to enable this revolution to continue to flourish?").

4. See Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 *DUKE L.J.* 147, 160 n.132 (1999) ("I believe that lawyer activity on the Internet can be analyzed under traditional legal principles, just as any of the other activities in which lawyers regularly engage, and I reject the notion that an entirely new body of 'cyberlaw' must be created to cope with the innovations sparked by the 'Computer Revolution.'").

5. Stacey Swatek Huie, Comment, *Facilitating Telemedicine: Reconciling National Access with State Licensing Laws*, 18 *HASTINGS COMM. & ENT. L.J.* 377, 379-80 (1996).

cases,⁶ cases involving contracts formed over the telephone or otherwise at a distance,⁷ and workers' compensation cases involving multi-state employment⁸ are all artifacts of twentieth-century business and social practices which are made possible by technological innovations. During roughly the same period of time, there was a tumult in choice of law that many called revolutionary.⁹ But the changes in choice of law were not in response to new methods of transacting business. The revolution often was staged on facts that were technologically feasible in the nineteenth century.¹⁰ Rather, the changes in choice of law were the result of revolutions in theory, a shift in the way in which law was viewed.¹¹ Moreover, after the revolution, much of the old choice of law regime remained.¹² Thus, while choice of law has gone through significant changes this last century and technology has simultaneously advanced, one cannot convincingly join these two developments in a causal marriage. The courts sometimes have applied old methods to new problems and at other times have applied new methods to old problems. It is therefore useful to look at previous experience to construct a model for choice of law and telemedicine.

Before looking at the current caselaw on interstate malpractice, I will first lay out a bit of choice of law theory in order to provide a context for what I have observed in the cases. This brief excursus, in Part II, need not detain those at ease with choice of law issues. I have attempted to clarify and simplify the array of choice of law approaches by identifying the basic choices about choice of law policy that shape the specific systems used by courts. Part III reviews the caselaw on interstate medical malpractice to establish how the courts have analyzed choice of law in such cases. Finally, Part IV discusses how current caselaw trends might apply to the unique problems of telemedicine.

II. CHOICE OF LAW THEORY IN THE CONTEXT OF MALPRACTICE

Telemedicine seems to hold great promise for delivering advanced

6. *E.g.*, *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963) (dealing with a guest statute).

7. *E.g.*, *Linn v. Employers Reinsurance Corp.*, 139 A.2d 638 (Pa. 1958) (deciding a case in which a contract was created over the telephone).

8. *E.g.*, *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261 (1980); *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532 (1935).

9. Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 775-76 (1983).

10. *See, e.g.*, *Lilienthal v. Kaufman*, 395 P.2d 543 (Or. 1964); *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954).

11. *See* LEA BRILMAYER, *CONFLICT OF LAWS* 35 (2d ed. 1995) (noting the effect of the legal realist school on the development of choice of law).

12. *See* *Neumeier v. Kuehner*, 286 N.E.2d 454, 457-58 (N.Y. 1972) (setting out three choice of law guidelines, two of which apply the traditional *lex loci delicti* test).

medical care to people previously without access to such care. But telemedicine's distribution of medical care across state lines raises difficult issues involving interstate regulation. State tort law and licensing are two ways that states achieve regulation.

By imposing financial costs on substandard medical care, state tort law creates an incentive toward quality care. In addition to regulating the quality of medical care, the tort system also regulates the distribution of the cost of medical care. Part of this cost is the loss created by—to use a neutral term—unfortunate outcomes. The cost of these unfortunate outcomes is sometimes passed on from the patient to the health professional, from the health professional to his or her insurer, through the insurer to other health professionals, and from those health professionals to their patients. The tort system thus operates as a rather round-about insurance system for the risk of injury from medical care. Depending on where the floor of liability is set, states insure either all risks of medical care (strict liability) or only those risks arising from especially poor care (a negligence system).¹³ This process of distributing costs also relates closely to the tort system's goal of providing compensation for those injured. This function of the tort law is distinct from the first two because it is directed at the patient-plaintiff rather than the physician-defendant.

These three functions of the malpractice tort system—regulating the conduct of medical providers, distributing the costs of the medical enterprise among all participants in it, and providing compensation for those injured by the medical care industry—are valued differently in different states. Moreover, even states which agree that a particular goal is the most important one may disagree about how to achieve it. A state that focuses on distributing costs or compensation may impose a higher standard of liability, perhaps approaching strict liability, because identifying and deterring substandard conduct is not really its concern. Alternatively, a state may have a high concern for distributing costs but believe that high liability over-deters medical professionals from providing care; accordingly, the state may enact caps on damages. In short, state tort law differs because states' laws express differing values and differing means to achieve shared values. It is because of these differences that choice of law problems exist.

In creating tort law, states are motivated by some subset of all possible tort cases. Presumably, a state is not motivated by damages

13. While our system nominally awards damages only for negligent medical care, the actual awarding of damages is less than perfectly precise as it is administered by lay juries, trial court judges, and appellate courts. As a result, some damage caused by substandard care goes uncompensated and some adequate care is negatively sanctioned by damages.

awarded in the courts of other states where no plaintiff, defendant, or conduct local to the enacting states is involved. Instead, a state is concerned with those cases having a more direct bearing on it. It is of course possible that more than one state would like to regulate a particular episode of medical care. One of the goals of choice of law is to sort out such competing claims to authority over events or transactions.¹⁴ When a transaction or event touches two or more states in a way that plausibly draws into play their differing laws, choice of law decides which law to apply. It is possible that one state's claim is plausible but no more than that; upon examination, that state does not in fact desire to have its law apply. Perhaps more frequently, two or more states *do desire* to have their law applied to the litigation. A choice of law system must then devise a way to rank these conflicting claims to authority. Moreover, a properly-functioning choice of law system will have the added virtue of enabling medical providers to predict which legal system will govern a situation. Certainty, predictability, and upholding parties' expectations are themselves major goals in choice of law.¹⁵

The problem for choice of law in medical malpractice, and in telemedicine in particular, is to determine which state should be allowed to perform the regulatory and compensatory functions outlined above while simultaneously upholding the parties' expectations. The lack of an answer to this choice of law question introduces a great deal of uncertainty into the telemedicine health care delivery system. This uncertainty discourages investment in telemedicine. This disincentive, moreover, is not limited to those providing substandard care—for example, certain on-line Viagra vendors—a category of care givers we should like to discourage. Instead, this disincentive discourages *all* potential providers of telemedicine—an outcome that we should not desire. It is therefore important to establish a set of rules about interstate regulation that will provide greater certainty and thus facilitate the expansion of medical care to those previously under-served.

Beginning students of choice of law are often confused and demoralized by the variety of approaches to the choice of law problem.¹⁶ Some states, perhaps a dozen or so, still use the traditional approach of

14. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b)–(c) (1971) (listing relevant factors in determining the applicable rule of law as including “the relevant policies of the forum” and “the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue”) [hereinafter RESTATEMENT (SECOND)].

15. *Id.* at § 6(2)(f) (stating that one relevant factor in determining the applicable rule of law is “certainty, predictability and uniformity of result”).

16. Demoralization is not limited to neophytes in choice of law. See Louise Weinberg, *Methodological Interventions and the Slavery Cases; or, Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316, 1322 (1997) (pondering the role of choice of law in slavery cases, “I found myself, quite stunned, asking the heretical and in fact nihilistic question whether having a special

the *Restatement (First) of Conflict of Laws*.¹⁷ A plurality of states have adopted the approach of the *Restatement (Second) of Conflict of Laws*.¹⁸ Handfuls of states have adopted governmental interest analysis, the better law approach, or some other choice of law exotic.¹⁹ Moreover, many states have a mongrel choice of law system, borrowing from two or more choice of law models.²⁰ In the face of this variegation, describing of how states will resolve choice of law issues in telemedicine seems impossible. But the different approaches to choice of law can be organized around a few basic principles.

A. *Basic Choice of Law Choices*

The variety of approaches to choice of law can be simplified by viewing them as products of a series of choices driving the subsequent development of particular choice of law systems. Rather than separately explaining the *First Restatement*, the *Second Restatement*, interest analysis, and other approaches, I will identify these approaches as I proceed through the basic choices of choice of law, thereby demonstrating how they arise from different soils.

It is important to bear in mind the two levels on which choice of law operates. As a preliminary matter, choice of law must be able to weed out those states with no legitimate claim to govern a matter. The Due Process²¹ and Full Faith and Credit²² Clauses sometimes preclude a state from applying its own law.²³ The approaches described below offer advice on the content of those constitutional norms. The second level of choice of law assumes that two states' laws could be applied under the Constitution and then answers the prescriptive question of which law should apply.

1. THE PUBLIC APPROACH

The first question of orientation in choice of law is whether to focus

body of law for the conflict of laws has not been a mistake. Perhaps we should abandon the enterprise. The whole enterprise.”)

17. Seven states still use the *First Restatement* approach in full. Additionally, three use it in contract cases but not in tort cases. Another four use it in tort cases but not contract cases. Symeon C. Symeonides, *Choice of Law in the American Courts in 1998: Twelfth Annual Survey*, 47 AM. J. COMP. L. 327, 331-36 (1999).

18. Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey*, 45 AM. J. COMP. L. 447, 459, 460 (1997).

19. *Id.*

20. Symeonides, *supra* note 17, at 331-36.

21. U.S. CONST. amend. V.

22. U.S. CONST. art. IV, § 1.

23. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (citing Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)).

on the states or the parties involved in the dispute. The two dominant choice of law approaches of the twentieth century concern themselves primarily with the states.²⁴ I identify such an orientation as a public approach.

What do I mean by a choice of law approach that focuses on the state? The public orientation derives from the way one frames the choice of law question. One way to view choice of law is as an attempt to solve, or at least moderate, states' conflicting claims to legal authority over a given dispute or transaction. Legal authority over a dispute means, in this context, authority to decide what outcome should result from a given set of facts, or, as it is sometimes called, legislative jurisdiction.²⁵ If one views the choice of law enterprise as an exercise in determining proper legislative jurisdiction, then one is drawn to a public orientation. One is looking for a connection between the state and the litigation that allows the state to claim legitimate governance of it.

Choice of law under a public approach is all about such connections or, as the jargon would have it, "contacts" between the subject matter of the litigation and the state. These connections give the state (in a analysis very similar to that performed for judicial jurisdiction²⁶) its claim to governance. Once one decides that the task is to find connections that legitimate and prioritize state governance, the next question is what kind of connection properly counts. Historically, two types of connections have been used in choice of law to establish a state's authority to govern: territorial connections and domiciliary connections. These two categories create the major divergence in the public approaches to choice of law.

Which set of connections one chooses depends upon some basic assumptions about the nature of the law. A public approach to choice of law tries to determine whether a state has a legitimate claim to govern a dispute. The public approach therefore demands an answer to the fundamental jurisprudential question of what gives a state the authority to govern at all. Without going too far into an admittedly deep subject, I will explore how choice of law has answered that question.

24. Despite the nominal commitment to a public approach focusing on the states, one suspects that courts administering the rules of choice of law sometimes bent the rules to accommodate their concern about private parties. *See, e.g.*, *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961) (declining to assert state interest under interest analysis approach in order to allow recovery in contract); *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953) (failing to apply normal *First Restatement* rule to allow plaintiff to recover in tort).

25. Such lawmaking authority might or might not coincide with judicial authority—the power to adjudicate a particular case (i.e., judicial jurisdiction).

26. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

a. The Territorial Conception

If Alice and Bob both live in Texas and have a car accident there, undoubtedly Texas, and Texas alone, can legitimately claim governance of the disputes arising from the accident. This seems obvious, but why? One answer is that Texas law applies because the car accident occurred in Texas. Under this view, a state's laws can and should govern a dispute when the event giving rise to it occurred in that state. This view of the law and the choice of law implications flowing from it is called territorialism, a term used somewhat pejoratively today.

This is the approach of the *First Restatement of Conflict of Laws*,²⁷ which provided the dominant view for roughly the first half of the twentieth century. The *First Restatement* gives the place where the underlying events occurred the power to govern in order to protect "vested rights." Under this theory, when a tort occurs or a contract is made, the parties' rights become "vested" and are thereafter unalterable. Another state applying Texas law to the hypothetical simply enforces the rights that arose (and became fixed) in Texas. The language of vested rights might suggest that the *First Restatement* is concerned with the private interests or "rights" of the actors and thus should be classified under the private factors approach to choice of law. However, the right identified by the *First Restatement* is merely the product of its territorial commitment. Vested rights flow from a territorial understanding that a state can legitimately govern only events occurring within it. In the words of Joseph Beale, "[s]ince the power of a state is supreme within its own territory, no other state can exercise power there."²⁸

The rules characteristic of the *First Restatement* determine applicable law by looking to where a single key event occurred. In tort cases, the *First Restatement* looks to the place of the wrong,²⁹ which is defined as the place where the injury to the plaintiff occurred. The place of injury governs because injury is the last event in a tort chronology; until injury, no tort occurs, no matter how foul the negligence.³⁰ At the time of injury, the plaintiff will be in a particular state. That state alone can legitimately govern the rights of the parties because the tort sprang into existence within that sovereign's boundaries.

This identification of a single key event allows the territorial approach to achieve or at least to offer the hope of uniformity of outcome. Because the choice of law turns on the location of a single event,

27. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934) [hereinafter RESTATEMENT (FIRST)].

28. 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 61.1 (1935).

29. RESTATEMENT (FIRST), *supra* note 27, at § 377.

30. *E.g.*, Ala. & Great S. Ry. Co. v. Carroll, 11 So. 803 (Ala. 1892).

there will be no hard cases where important contacts are spread out among several states. In this sense, territorial choice of law is constitutional law as well. The system in each case ordains only one state to provide governing law.³¹ Choice of law under this approach does not need a scheme for sorting out conflicting legitimate claims to authority because only one claim—the claim of the state where the key event occurred—has legitimacy. Were it otherwise, the infrequent but recurring cases of tortious conduct in one state causing injury in another³² would create great difficulty for the place of the wrong rule. In such cases, does the rule look to the place where the negligence occurred or the place where the injury occurred? The territorial view opts for the latter with such authoritarianism that any other choice is not simply unwise, but quite illegal.

b. The Domiciliary or Personal Conception and Interest Analysis

I earlier asked why we all agree that if Alice and Bob both live in Texas and have a car accident there, Texas could legitimately apply its law to claims arising from the accident. The territorialist would answer, as discussed above, that only Texas can create liabilities for events occurring within its borders. A quite different answer is that Texas properly legislates to protect its domiciliaries and that because the parties to the case are from Texas, Texas law should apply. This is the personal conception of legislative jurisdiction, which bases its choice of law outcomes on where people live. This theory may also be referred to as the domiciliary conception of choice of law. The theory reasons that states have the prerogative of assigning liabilities to their citizens wherever the citizens go because states' laws are directed at benefiting and regulating people. Laws are admittedly addressed toward things and human conduct (such as injuries, agreements, and property); however, it is the people, not the things or conduct, in which the state is interested and which give the state a reason to want to legislate at all. Therefore, a law should follow the person as he or she moves through space, rather than attach itself only to local things.

This approach falls under the broader heading of interest analysis. Interest analysis is based directly on a public orientation. Its fundamental question is whether a state has an "interest" in applying its law. This question is frequently answered by ascertaining the parties' domiciliary connections. However, interest analysis, at least in its later forms, will

31. *E.g.*, *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 376-77 (1918) (holding that only the place of making of contract may invalidate it).

32. *E.g.*, *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277 (N.Y. 1993); *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679 (N.Y. 1985); *Carroll*, 11 So. at 803.

also examine the place where events occurred when the location might plausibly lead to a state having an interest. A tort cause of action for battery, for example, might logically be designed to control behavior within the state. Therefore, when Alice, a Texan, commits a battery against Bob, a Texan, in Oklahoma, Oklahoma has an interest despite the lack of a domiciliary connection. Under such an approach, state laws are classified according to whether they are designed to protect or regulate the person or whether they are designed to regulate conduct. The existence of a state interest then turns on the purpose of the state law and whether the local connection is of the right type to invoke the state interest.

Interest analysis and the personal approach provide a tidy solution to cases where the parties are both from the same state but are less decisive when the parties have a split domicile. Suppose that Alice and Bob, both Texans, have a car accident in Oklahoma. The territorial approach would place governance in Oklahoma as the place where the rights between the parties arose. The personal approach would normally³³ place governance in Texas, because only Texas is legitimately concerned with Texas domiciliaries. However, if the parties are from different states the personal approach sputters. If Bob is from Oklahoma and each party is favored by his or her own state's law, Oklahoma and Texas would both have a legitimate claim to govern the dispute arising from the accident.³⁴ Conversely, if each party is benefited by the law of his or her opponent's state, neither state would appear to have an interest in having its law applied to the benefit of a foreign party. These problems, known respectively as true conflicts and unprovided-for cases, are identified, but not solved, by a personal approach to choice of law. In addition, even in cases of common domicile, another state may have non-domiciliary interests based on conduct regulation. The interest analysis or personal approach to choice of law unlike the territorial approach fails to identify a single connector which determines whether a state may legitimately apply its own law. Because both parties' domiciles are relevant, the personal approach needs some sort of tiebreaker.³⁵ This is the second level of choice of law referred to above. At this point, two states laws could apply and it must be determined which law should apply.

33. This conclusion is subject to the presence of conduct-regulating rules in Oklahoma, which might give that state an interest.

34. The exact nature of the interest in each state would of course depend on the content of each state's law.

35. One way of breaking the tie is simply to resort to forum law. This was the suggestion in the early writings of interest analysis. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 107, 184 (1963). One suspects that states still have a latent preference for forum law. See Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 *GA. L. REV.* 49, 87-88 (1989).

The debate between the territorial and personal conceptions has run for centuries and continues to run.³⁶ It is not my purpose to resolve it; the foregoing discussion instead makes a more simple and fundamental point. Although the territorial and personal approaches to choice of law appear to be in conflict, they have a common link: both begin and end as an explanation of why states have laws and to what kinds of cases those laws may reasonably apply. They answer the question differently but share a common framing of the issue. The issue for each approach is to delineate the proper extent of a state's powers. For that reason, both approaches may be put under the heading of public approaches to choice of law.

2. THE PRIVATE APPROACH

An entirely different orientation towards choice of law looks to the parties, not the state, as the chief concern. These approaches are focused on the second level of choice of law; they assume that two or more states might properly apply their law and tackle the hard question of which law should apply. These approaches share a common orientation that distinguishes them from the public approach because they examine the choice of law problem from the standpoint of fairness to, and justice for, the parties rather than the standpoint of the states. These party-oriented approaches are often used to supplement the interest analysis approach, breaking ties created by domiciliary analysis.

There are several private approaches. Some courts apply the "better law."³⁷ This approach begins with the observation that a choice of law case is just that—a choice for the court to make between two competing legal rules. This view holds that the best approach to such a problem is to act as common law judges historically have acted and to choose the law that makes most sense.³⁸ Another choice of law approach focuses on the fairness to parties in the context of a multistate case rather than on the substantive rights of the parties. The concern is to choose the law that upholds, or at least does not upset, the parties' expectations.³⁹ Under this approach, there is a tendency to revert toward

36. Mark P. Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893, 902 (1988); Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309, 1319-20 (1999).

37. Symeonides, *supra* note 18, at 459 (listing Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin with respect to tort conflicts).

38. Ralph U. Whitten, *Improving the "Better Law" System: Some Impudent Suggestions for Reordering and Reformulating Leflar's Choice-Influencing Considerations*, 52 ARK. L. REV. 177, 227 (1999).

39. RESTATEMENT (SECOND), *supra* note 14, at 6(2)(f) (1971) (stating that one choice of law policy is "certainty, predictability and uniformity of result").

territorial solutions⁴⁰ because they often reflect the parties' presumed expectations. The search for "conflicts justice" is related to this "multistate fairness approach."⁴¹ The focus of each of these theories is on the parties rather than the state.

III. CHOICE OF LAW PRACTICE: THE LAW APPLIED TO INTERSTATE MEDICAL PRACTICE

With the basic choices laid out, I now examine how states have used them in the medical malpractice context. The following survey of interstate medical malpractice cases shows how courts have dealt with existing interstate medical practices. This is useful in and of itself and also as an indicator of how courts might deal with legal issues arising from telemedicine.

I have located eighty-five⁴² case decisions involving tort claims against health providers that discuss or apply choice of law. A summary of these cases shows that the courts have reached fairly consistent outcomes in interstate malpractice cases. I will approach this body of case law from two perspectives.

First, I will analyze groups of cases concerning issues that one may expect to occur with some frequency in malpractice cases. Some issues, such as the law applicable in determining whether a release given to one defendant releases all,⁴³ are important in general but do not raise special concerns for malpractice cases. I have not analyzed cases presenting such issues in detail. On the other hand, I have analyzed in detail cases addressing issues such as the law applicable in determining whether a plaintiff's claim must be submitted to an arbitration or screening panel because of these cases' obvious importance to interstate health professionals.⁴⁴ Finally, issues such as the applicable statute of limitations do not on their face seem to have special relevance to health care providers,

40. See, e.g., *Neumeier v. Kuehner*, 286 N.E.2d 454, 457-58 (N.Y. 1972) (reverting to the place of conduct and injury); *Cipolla v. Shaposka*, 267 A.2d 854, 856-57 (Pa. 1970) (applying the law of the place of conduct).

41. Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 983 (1994).

42. Several of the cases contain distinct pronouncements on more than one choice of law issue. I also have included a few cases whose statements on choice of law are probably best classified as dicta because they reinforce a point made in other cases. The cases I have analyzed have been culled from hundreds I have read to determine whether they contain any useful holdings on choice of law.

43. See, e.g., *Lamphier v. Wash. Hosp. Ctr.*, 524 A.2d 729 (D.C. 1987); *Daily v. Somberg*, 146 A.2d 676 (N.J. 1958).

44. See *infra* notes 77-164 and accompanying text.

but because of the volume of such cases I have included them in the analysis.⁴⁵

After this issue-specific case analysis, I will summarize the results of all the cases to determine whether any general choice of law patterns emerge. Regardless of the particular issue some basic questions emerge. Are courts deferential to the plaintiff's home state law? Are they deferential to the defendant's? Do they favor forum law so that the real battle is over jurisdiction? This analysis provides an overview of how courts, in the aggregate, are treating such cases.⁴⁶

A. *Analysis by Issue*

1. STATUTES OF LIMITATIONS

The applicable statute of limitations is one of the more frequently-litigated choice of law issues in medical malpractice cases. Of the approximately eighty cases collected that address the law applicable to malpractice actions, fifteen concern a statute of limitations issue.

At one time, most states applied a simple rule regarding the applicable statute of limitations. Limitations were classified as procedural and thus were applied along with other procedural law of the forum.⁴⁷ An exception to this rule existed for some statutory causes of action having a limitations period specifically applicable to them. These limitations periods were characterized as limiting not merely the remedy, but also the right sued upon; they were therefore applied as part of the substantive law.⁴⁸

The traditional approach is criticized on several grounds.⁴⁹ First, the decisive effect that a statute of limitations has on a case indicates that limitations should be classified as substantive, not procedural. Second, the procedural classification leads to forum shopping: a plaintiff whose claim is barred under the law of the state that would substantively govern need only find a state that has jurisdiction over the defendant and a longer statute of limitations. Doing so turns losing case into a poten-

45. See *infra* notes 47-76 and accompanying text.

46. Others in choice of law have employed an empirical approach to the body of caselaw. These other works do not concentrate on a particular subject matter. See, e.g. Patrick J. Borchers, *The Choice of Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 347 (1992); Solimine, *supra* note 35.

47. See RESTATEMENT (FIRST), *supra* note 27, at §§ 603, 604. See, e.g., Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (upholding the constitutionality of the Kansas court's application of its own statute of limitations).

48. See, e.g., Bournias v. Atl. Mar. Co., 220 F.2d 152 (2d Cir. 1955).

49. For a general discussion of the traditional approach to statutes of limitations and criticism of it, see Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 324-26 (1990) and Friedrich K. Juenger, *Forum Shopping, Domestic And International*, 63 TUL. L. REV. 553, 559 (1989).

tial winner.⁵⁰ Third, the distinction between a statute of limitations that bars the remedy and one that bars the right is abstract and unconnected to any sensible choice of law or limitations policy.

These criticisms have led to several measures of reform. In an attempt to curtail forum shopping, legislatures have enacted borrowing statutes. These statutes provide that when a cause of action would be barred under the limitations law of the state where the cause of action arose, the shorter limitations period of that state will be incorporated into the forum law to bar the claim.⁵¹ Additionally, some courts have simply changed the characterization of statutes of limitations from procedural to substantive. Under this approach, a court determines the substantive law that is to govern other issues in the case by using its normal choice of law process and then applies the statute of limitations of that state as part of the substantive law.⁵² A variation on this approach is to treat the statute of limitations as substantive by applying a separate choice of law analysis on the statute of limitations under whatever choice of law approach the court uses.⁵³

One finds examples of each of these approaches in the malpractice cases. The traditional procedural characterization is sometimes used, particularly in older cases,⁵⁴ but also in more recent

50. For a wonderful example of the forum shopping possibilities raised by the traditional rule, see *Ferens v. John Deere Co.*, 494 U.S. 516 (1990).

51. For examples of cases involving borrowing statutes in interstate malpractice cases, see *Dahlberg v. Harris*, 916 F.2d 443 (8th Cir. 1990); *Weethee v. Holzer Clinic, Inc.*, 490 S.E.2d 19 (W. Va. 1997); *Conway v. Ogier*, 184 N.E.2d 681 (Ohio Ct. App. 1961). The chief issue in borrowing statute cases is whether foreign rules that implement the borrowed foreign statute of limitations will also be applied. See *Dahlberg*, 916 F.2d at 446 (holding that although the forum will borrow a sister-state statute of limitations, forum commencement provisions apply); *Weethee*, 490 S.E.2d at 23 (remanding to determine whether to apply forum savings statute when statute of limitations is borrowed); *Conway*, 184 N.E.2d at 683-84 (holding that forum law applies to determine whether an otherwise time-barred counterclaim may be pleaded as recoupment).

52. See UNIF. CONFLICT OF LAWS - LIMITATION ACT § 2 cmt., 12 U.L.A. 158 (1999) ("This section treats limitation periods as substantive, to be governed by the limitations law of a state whose law governs other substantive issues inherent in the claim").

53. See, e.g., *Heavner v. Uniroyal, Inc.*, 305 A.2d 412, 418 (N.J. 1973).

54. See *Cuthbertson v. Uhley*, 509 F.2d 225, 226 (8th Cir. 1975) (applying forum law, under which cause of action accrues upon termination of treatment, as opposed to foreign law that tolls accrual until discovery of the injury); *Kozan v. Comstock*, 270 F.2d 839, 841-42 (5th Cir. 1959) (applying the forum's shorter statute of limitations as procedural although the action would have been timely under the law of the state where the alleged malpractice occurred); *Gattis v. Chavez*, 413 F. Supp. 33, 35 (D. S.C. 1976) (applying forum statute of limitations to alleged malpractice occurring in another state even though all parties lived in that other state at the time of the malpractice); *Keaton v. Crayton*, 326 F. Supp. 1155, 1158 (W.D. Mo. 1969) (applying forum's shorter statute of limitations to malpractice alleged to have occurred in another state under whose law the action would have been timely). See also *Conway*, 184 N.E.2d at 683-84 (defendant pled malpractice as a counterclaim to a physician's claim for nonpayment for services. Although a malpractice claim would have been barred under the law of the state where the malpractice occurred, the court characterized a forum rule that statutes of limitation are not a defense to a

ones.⁵⁵ Significantly, in about half of the cases applying the traditional rule that the statute of limitations is determined by forum procedural law, the forum was applying a shorter statute of limitations than existed in the other state.⁵⁶ This result is the same one reached under the modern approach which looks at the policy behind the statute of limitations.⁵⁷ A state has a legitimate procedural interest in protecting its courts from stale claims, regardless of whether or not the state has any other connection to the case. This procedural interest is served by applying a shorter statute of limitations. Applying a forum's shorter statute of limitations also raises no concerns of forum shopping by the plaintiff.

Interestingly, two of the cases⁵⁸ present what I call a "reverse" forum shopping problem: the defendant commits malpractice and then moves to a state with a shorter statute of limitations. Applying the procedural classification results in the plaintiff losing a claim because of the defendant's voluntary relocation.⁵⁹ Although characterizing the statute of limitations issue as procedural is not problematic when the forum has a shorter statute of limitations, these cases demonstrate the potential

claim for recoupment as procedural and would have allowed the claim in the form of recoupment.).

55. See *Cox v. Kaufman*, 571 N.E.2d 1011, 1015 (Ill. App. Ct. 1991) (applying forum state's statute of limitations as procedural law). One might also include *Huang v. D'Albora*, 644 A.2d 1 (D.C. 1994). In that case, the court acknowledged the exception to the traditional rule—a foreign statute of limitations where the limitations is part of the cause of action itself is substantive; the court held, however, that the rule in question concerning the tolling of the foreign statute of limitations was procedural and thus applied forum law that did not allow for tolling. *Id.* at 4. Cases involving borrowing statutes involve similar analyses. When a foreign statute of limitations is invoked under a borrowing statute, courts must also address whether related rules, such as tolling of the claim, are also invoked. Courts often, although not invariably, address this as a problem to be solved by determining whether the statute of limitations-related rule is procedural. See *supra* note 51.

56. See *Cuthbertson*, 509 F.2d at 226 (applying forum statute of limitations which began to run from termination of treatment in preference to foreign statute of limitations which began to run from the discovery of the cause of action although both statute of limitations were two years); *Keaton*, 326 F. Supp. at 1158 (applying forum statute of limitations even if action would not be barred in state where cause of action arose). *Kozan*, 270 F.2d at 841-42 (applying forum statute of limitations barring a tort action after one year in favor of the foreign statute of limitations barring the action after two years). Cf. *Gattis*, 413 F. Supp. at 35, 40 (applying the forum's statute of limitations, yet finding that the statute did not bar the claim, the court did not state whether the claim would have been barred under the law of the other state). See also *Huang*, 644 A.2d at 4 (applying a no-tolling rule of the forum as procedural, resulting in the claim being time-barred).

57. See RESTATEMENT (SECOND), *supra* note 14, at § 142(1) (“[a]n action will not be maintained if it is barred by the statute of limitations of the forum”).

58. *Keaton*, 326 F. Supp. at 1157-58; *Kozan*, 270 F.2d at 841-42.

59. If the forum's statute of limitations is long enough to allow the claim or forum law otherwise allows the claim, the plaintiff suffers no prejudice by the defendant's move. For an example, see *Gattis*, 413 F. Supp. at 35.

unfairness to the plaintiff of applying a forum's shorter statute of limitations after a defendant's relocation.

More recent cases usually take a substantive approach to statute of limitations. For example in *Merkle v. Robinson*,⁶⁰ the physician had treated the plaintiff in West Virginia at a time when both he and the patient lived in that state; after the defendant retired to Florida, the Plaintiff sued him there.⁶¹ The action was timely in West Virginia but not in Florida.⁶² The court, applying the "most significant relationship" test of the Second Restatement, concluded that West Virginia law should apply so as to allow the claim because all contacts with the case were in West Virginia, with the lone exception of the defendant's later-acquired domicile.⁶³

What is notable about *Merkle* is that the Florida court applied a longer foreign statute of limitations. Thus, the court was willing to subordinate its own procedural interest in avoiding adjudication of stale claims⁶⁴ in the interest of upholding the substantive policies of another state. The court's conclusion avoids the problem of reverse forum shopping incident to a defendant's relocation. In fact, this likely influenced the court: the court noted that the plaintiff originally had filed suit in West Virginia, but that the action had been dismissed because the state's long-arm statute did not reach the defendant.⁶⁵ More broadly, the result in *Merkle* liberates statute of limitations outcomes from the vagaries of jurisdiction. Under the procedural approach, a plaintiff hoped to find a state with both jurisdiction and a long enough statute of limitations. Conversely, a defendant hoped that he or she would not be subject to the jurisdiction of a state that was unrelated to the cause of action, but happened to have a longer statute of limitations than the state in which the malpractice occurred.

None of the remaining cases using the substantive approach result in the application of a longer foreign statute of limitations.⁶⁶ One of them applied a foreign statute of limitations, but it was shorter than that

60. 737 So. 2d 540 (Fla. 1999).

61. *Id.* at 541.

62. *Id.*

63. *Id.* at 542, 543.

64. The court discounted this concern by asserting that few such claims would come to Florida courts. *Id.* at 543.

65. *Id.* at 541 n.2.

66. One other possible case of a court applying a longer foreign statute of limitations is *Washington v. United States*, 769 F.2d 1436 (9th Cir. 1985). In that case, brought under the Federal Tort Claims Act 28 U.S.C. § 1346 against the United States, the treatment had occurred in New York at a time when the plaintiff resided in that state; however, the plaintiff had subsequently moved to California. *Id.* at 1437. The court concluded that the "center of gravity" or "grouping of contacts" test dictated the application of New York limitations law and that under that law the action was timely. *Id.* at 1437-38, 1439. But the opinion does not state whether the

of the forum.⁶⁷ Three other cases (two of which were decided under New Jersey choice of law rules) applied the forum's longer statute of limitations.⁶⁸ These cases are distinguishable from the earlier cases applying the forum's longer statute of limitations as procedural because there were significant connections to the forum in these cases. Although in two of the cases the treatment of the patient occurred in a state other than the forum, in both of these cases the plaintiff resided in the forum at the time of the alleged malpractice and the defendant was licensed in the forum as well as in the state of treatment.⁶⁹ In the third case applying a longer forum statute of limitations, the forum was the place of treatment, the plaintiff's residence shortly after the alleged negligence, and the place where the relationship between the parties was centered.⁷⁰ Thus, in all of the cases applying a forum's longer statute of limitations under a substantive approach, the forum had connections that gave it an interest, both in compensating the plaintiff and in deterring the defendant by virtue of his local license.⁷¹ The existence of such factors removes the specter of an unrelated forum applying its own statute of limitations thereby unfairly extending the time in which to sue.

One also may make some general observations about the cases as a group. In eleven of the fifteen cases, the forum statute of limitations was applied, compared to only four applications of the foreign statute of limitations. The sample includes some older cases applying the rule that limitations is a matter of procedure governed by forum law. One might think that the older cases cause an undue emphasis on forum law in this sample. But the procedural characterization in fact retains vitality. Not all of the cases employing the procedural characterization are old.⁷² Moreover, a number of the borrowing statute cases use a procedural characterization to employ a forum rule, such as tolling, that relates to and implements a borrowed foreign statute of limitations.⁷³ A total of eight of the fifteen cases thus involve the procedural characterization in some form. Additionally, the cases using a substantive approach tend to

action would have been timely under California law. For this reason, one cannot say whether the court allowed the use of a longer foreign statute of limitations.

67. See *Bonerb v. Richard J. Caron Found.*, 159 F.R.D. 16 (W.D.N.Y. 1994) (applying shorter statute of limitations of the place of injury and domicile of defendant, but action not time-barred because of the relation back to a previously filed complaint).

68. See *Schum v. Bailey*, 578 F.2d 493 (3d Cir. 1978); *Dasha v. Adelman*, 699 N.E.2d 20 (Mass. App. Ct. 1998); *Safer v. Estate of Pack*, 715 A.2d 363 (N.J. Super. App. Ct. 1998).

69. See *Schum*, 578 F.2d at 496-97; *Safer*, 715 A.2d at 364.

70. See *Dasha*, 699 N.E.2d at 24.

71. See *Schum*, 578 F.2d at 496; *Dasha*, 699 N.E.2d at 26; *Safer*, 715 A.2d at 364.

72. See *supra* note 55 and accompanying text.

73. See *supra* note 51 and accompanying text. For this reason, I have included these cases in the count of cases applying forum law, although it should be noted that they also apply a foreign statute of limitations.

apply the statute of limitations of the place of treatment. Of the six cases using the substantive approach, four apply the law of the place of treatment.⁷⁴ Only two apply the law of some other state, and in both cases it was the law of plaintiff's home state and the forum.⁷⁵ Moreover, these latter two cases were both decided under the choice of law rules of the same state and the latter case relied heavily on the former.⁷⁶

2. MALPRACTICE SCREENING AND ARBITRATION LAWS

A group of cases concerning medical malpractice pre-litigation screening procedures is of particular importance to the present and future of interstate malpractice cases. Beginning in the 1970s and 1980s, a number of states enacted statutory schemes designed to lower malpractice premiums and ultimately health care costs by requiring some form of pre-litigation review of medical malpractice claims.⁷⁷ To what extent do these statutory schemes apply in other states having no such statutes?⁷⁸

The answer depends in part on the language of the particular statute. The Maryland statute, for example, requires mandatory arbitration as a condition to bringing an "action or suit . . . in any court of this State."⁷⁹ This explicit language greatly aids in determining the applicability of this statute in the courts of another state.⁸⁰ Other statutes, however, have no such limiting language,⁸¹ and courts must therefore perform a choice of law analysis. An examination of the cases that do not characterize screening statutes as procedural reveals a clear trend. In the majority of cases, the law of the state in which the treatment occurred applies. The place of treatment is usually also the physician's home state.⁸² Thus, if the physician has his or her office in a state that

74. See *supra* notes 60-71 and accompanying text.

75. See *supra* note 69 and accompanying text.

76. See *Safer*, 715 A.2d at 364 ("we adopt and apply the *Schum* analysis and result").

77. As a part of such measures, or sometimes as a separate piece of legislation, a number of states enacted damage caps as well. This topic is to be considered in a later section. See *infra* notes 187-246 and accompanying text.

78. Even when not directly applicable, it has been argued that compliance with a mandatory arbitration statute extends the time for suit in another state. See *Huang v. D'Albora*, 644 A.2d 1, 2-3 (D.C. 1994); *Cox v. Kaufman*, 571 N.E.2d 1011, 1014-15 (Ill. App. Ct. 1991).

79. See MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-02(a)(2) (1991).

80. Several courts have relied on this particular or other similar statutory language to conclude that another state's malpractice screening law does not apply or have characterized the medical malpractice screening provisions of another state as procedural and thus not applicable. See *Huang v. D'Albora*, 644 A.2d 1, 2-3 (D.C. 1994); *Cox v. Kaufman*, 571 N.E.2d 1011, 1015-16 (Ill. App. Ct. 1991); *Jenkins v. Cowen*, 86-1988, 1987 WL 14601 at *1 (D.D.C. 1987); *Ransom v. Marrese*, 501 N.E.2d 702, 706 (Ill. App. Ct. 1986). But see *Biedsoe v. Crowley*, 849 F.2d 639, 644 (D.C. Cir. 1988).

81. See NEV. REV. STAT. ANN. 41A.016(1) (1999); VA. CODE ANN. § 8.01-581.2(A) (2000).

82. For examples of cases in which the physician rendered care outside his home state, see

has a screening statute designed to protect health professionals, he or she gets the benefit of that screening statute. However, health care providers generally do not receive the benefit of a screening statute adopted in a state where they do not practice, even if the case has other connections to that state.

For example, in *Edwardsville National Bank & Trust Co. v. Marion Laboratories, Inc.*,⁸³ the defendants allegedly were negligent in their treatment of an Illinois patient in Indiana, the state of their practice. The injury to the patient, resulting in his death, also occurred in Indiana.⁸⁴ Because the case's only connection with Illinois was the domicile of the patient, the plaintiffs argued that Illinois would apply its own law to protect a citizen against a screening statute favorable to nonresident defendant.⁸⁵ Rejecting this argument and using the "most significant relationship" test of the Second Restatement as adopted by Illinois,⁸⁶ the Seventh Circuit concluded that the "most significant contacts require the application of Indiana's law."⁸⁷ *Edwardsville* demonstrates that the domicile of plaintiff is not sufficient grounds for applying the plaintiff-favoring law of that state. Other cases using a modern interest approach bear this out by applying screening statutes from the place of treatment in preference to the law of the plaintiff's home state.⁸⁸

Other cases support application of the law of the place of treatment, although in some of these cases, there are additional contacts with that state. In *Harper v. Silva*,⁸⁹ a Nebraska physician negligently treated a Kansas patient in Kansas, where the physician was also licensed. The court held that Kansas law applied because Kansas was the place of injury, the plaintiff's domicile, and the physician's licensing state.⁹⁰ In

Harper v. Silva, 399 N.W.2d 826 (Neb. 1987), discussed *infra* notes 89-90 and accompanying text, and *Wall v. Noble*, 705 S.W.2d 727 (Tex. App. 1986), discussed *infra* notes 94-97 and accompanying text.

83. 808 F.2d 648 (7th Cir. 1987).

84. *Id.* at 651.

85. Specifically, the plaintiffs argument was that "[g]iven the significant interest of Illinois in 'compensating its domiciliaries for injury,' and that it has little incentive to limit tort recoveries against non-domiciliaries, an Illinois court would, in all likelihood, apply Illinois law." *Id.*

86. *Id.* The court employed Illinois' choice of law rules because the case had been transferred from Illinois to Indiana. See generally *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

87. *Edwardsville*, 808 F.2d at 651.

88. *E.g.*, *Bledsoe v. Crowley*, 849 F.2d 639, 642-43 (D.C. Cir. 1988) (applying Maryland screening statute to a claim by a District of Columbia Plaintiff where Maryland was the place of treatment); *Castelli v. Steele*, 700 F. Supp. 449, 454 (S.D. Ind. 1988) (using the place of injury rule moderated by interest analysis to apply the place of the treatment); *Truck Ins. Exch. v. Tetzlaff*, 683 F. Supp. 223, 225-26 (D. Nev. 1988) (using an interest analysis approach to apply a Nevada screening statute where treatment and injury were in Nevada and the only connection to California was the domicile of the injured patient).

89. 399 N.W.2d 826 (Neb. 1987).

90. *Id.* at 828.

Jenkins v. Cowen,⁹¹ a plaintiff from Indiana received treatment from the defendant in both the District of Columbia and in Maryland. The court applied the District of Columbia's screening statute over Maryland law, which had no screening statute; the court reasoned that significant parts of the treatment—the initial consultation, the decision to do multiple surgeries, the decision to proceed without adequate informed consent, and the follow up to the surgery—had occurred in the District of Columbia.⁹² However, *Jenkins* is not a pure place of treatment case because the court also found that the District of Columbia had a greater interest than Maryland because of the defendant's incorporation in the District and the presence of his office there.⁹³

On the other hand, when the treatment occurs in a state that does not have a screening statute, the place of treatment rule means that the defendant will not benefit from such a scheme. For example, in *Wall v. Noble*,⁹⁴ the Louisiana defendant had his principal office in Louisiana—a state with a screening statute—and also had a satellite office in Texas. The defendant examined the plaintiff in Texas, where the decision was made to undergo surgery.⁹⁵ Although the surgery itself was performed in Louisiana, the plaintiff alleged that the negligent treatment was the decision to undertake the surgery and thus occurred in Texas.⁹⁶ Using the most significant relationship test, the court applied Texas law.⁹⁷ *Wall* presents a nice counterpart to cases such as *Edwardsville*. In *Edwardsville*, the domicile of the plaintiff alone was not enough to mandate the application of the plaintiff's home state's law; conversely, in *Wall*, the defendant-physician's domicile and the presence of his principal office in a state with a screening statute was not enough to trigger the application of that state's law.

While the place of treatment is *usually* also the place of injury, this is not always the case. For example, the physician's negligence may be in misdiagnosing a disease. In such a case, the injury will not occur until it has ripened, which may well occur in the plaintiff's home state. Where the plaintiff is domiciled in a non-screening state and the injury occurs there, are these two contacts enough to offset the application of the law of the place of the negligent treatment? Under these facts, the cases still generally apply the law of the place of treatment. In *Castelli*

91. No. Civ.A. 86-1988, 1987 WL 14601 (D.D.C. Jul. 17, 1987).

92. *Id.* at *2.

93. *Id.* at *3. For further discussion of residence consideration see *infra* notes 126, 158-162, 232-233 and accompanying text.

94. 705 S.W.2d 727 (Tex. App. 1986).

95. *Id.* at 733.

96. *Id.*

97. *Id.*

v. Steele,⁹⁸ an Illinois patient obtained kidney treatment in Indiana. Thereafter, she developed an abscessed kidney, allegedly due to bad advice given in Indiana.⁹⁹ Despite the fact that the injury arose outside of the state of Indiana, the court reasoned that Indiana law applied because each act of negligence complained of occurred in Indiana.

This is probably the most important factor because Indiana doctors are strictly regulated by the state of Indiana and must conform their practices to the laws of this state. Additionally, defendant Steele, his corporation, and all the other doctors in the corporation are Indiana residents. The doctor-patient relationship was initiated in Indiana, and all of the diagnosis and treatment was rendered in Indiana. The mere fact that plaintiff resided in Illinois and might well have developed her injuries there does not outweigh the more significant Indiana contacts.¹⁰⁰

Generally, the cases, consistent with *Castelli*, create a rule that the law applied on the issue of medical malpractice screening will be the law of the place of treatment, regardless of the place of injury.¹⁰¹ Refusing to accord greater weight to the place of injury than to the place of treatment is the correct analysis. The type of case under consideration involves a plaintiff and a physician from different states. Whether the injury occurs in the state of treatment (as in the case of a negligently performed procedure) or in the plaintiff's state after returning from the treatment (as in the case of misdiagnosis), giving controlling weight to the place of injury simply gives double consideration to either the place of treatment or the state of the plaintiff's domicile as the injury will surely occur in one of those two states.¹⁰² Moreover, it is unclear why a

98. 700 F. Supp. 449 (S.D. Ind. 1988).

99. *Id.* at 454.

100. *Id.* at 454-55. See also *Bledsoe v. Crowley*, 849 F.2d 639, 642 (D.C. Cir. 1988) ("attempt[ing] to separate the place where the injury occurred from the place where the negligence took place makes no sense in the context of an alleged failure to diagnose a slowly growing brain tumor").

101. See *Bledsoe*, 849 F.2d at 642; *Blakesley v. Wolford*, 789 F.2d 236, 243 (3d Cir. 1986). But see *Capone v. Nadig*, 963 F. Supp. 409, 414 (D. N.J. 1997) (finding alleged malpractice and injury occurred in state of physician's office even though symptoms stemming from physician's failure to diagnose disease manifested themselves in other state).

102. See *Blakesley*, 789 F.2d at 241 (discounting the significance of the effects of the injury being in the Plaintiff's home state because "looking to the place where the effects of an injury will be felt gives improper additional weight to the factor of the plaintiff's state of residence"). But see *Workman v. Chinchinian*, 807 F. Supp. 634 (E.D. Wash. 1992):

[A] more practical approach in a medical malpractice case such as this, where the injury is caused by delayed diagnosis, would be to find the residence of the plaintiff as the place of the injury. To base the determination regarding place of the injury on such adventitious circumstances as the place where the plaintiff undergoes subsequent treatment would frustrate any hope of predictability in determining choice of law problems.

Id. at 638.

case like *Edwardsville*—where the treatment and injury occurred in the same state—should have a different result than *Castelli*—where the facts were identical except that the injury occurred after the plaintiff returned home. The place where the injury manifests itself is arbitrary. Using a place of injury approach would result in one choice of law result for negligent failure to diagnose (the plaintiff's home state) and another for negligent performance of a medical procedure (the defendant's home state), without a principled reason for such a distinction.

These cases are true conflicts: the home state of each party is interested in applying its own law.¹⁰³ Neither state loses its interest because the injury is shifted to another state. The harm to the plaintiff will in the long run be experienced in his home state, regardless of where the initial physical manifestation of injury occurs. The patient will sooner or later return to the home state or, in a wrongful death case, the home state likely is where the decedent's survivors live. On the other hand, the failure to apply a state's screening statute to a physician practicing in that state harms the state's interests in regulating medical care. Therefore, focusing on the injury to the plaintiff does not make the conflict go away because the application of either law results in one state losing.

In a true conflict, it is necessary to have a tiebreaker.¹⁰⁴ Otherwise, each forum will apply its own law, thus¹⁰⁵ turning the case into a jurisdictional struggle. Because the personal or domiciliary approach has failed to decide the choice of law issue in these true conflicts, the tiebreaker necessarily will be territorial in nature. The only two candidates for such a territorial tiebreaker are the place of treatment and the place of injury. I believe that the place of treatment offers a superior tiebreaker. The cases generally support this view.

A place of treatment tiebreaker no more offends the state interests than a place of injury tiebreaker because either rule advances one state's interests and disables the other. Unlike the place of injury rule, how-

103. See *Truck Ins. Exch. v. Tetzlaff*, 683 F. Supp. 223 (D. Nev. 1988).

The Court further determines that both California and Nevada have an interest in application of their respective laws in the present case. California's interest involves the speedy and efficient resolution of medical malpractice actions; it involves, moreover, the efficacious placement of liability with the party legally responsible for injury caused to California citizens through medical malpractice. Nevada's interest involves the protection of its health care providers from frivolous medical malpractice claims. This interest is tied closely to the interest of controlling malpractice insurance rates and ultimately the cost of health care. A true conflict exists.

Id. at 226.

104. See *supra* notes 34-36 and accompanying text.

105. Each state applying its own law if it were the forum was the approach originally suggested by Brainerd Currie, the inventor of interest analysis. See *CURRIE, supra* note 35.

ever, the place of treatment rule serves to uphold the parties' expectations. Whether people actually have expectations about the applicable law is a great unanswered empirical question; yet, intuition has led many to assume that people do not have any actual expectations in tort cases.¹⁰⁶ Still, even assuming that a patient sitting in a physician's waiting room is not contemplating choice of law, the place of treatment rule upholds what Willis Reese calls "natural expectations."¹⁰⁷ These are the after-the-fact assumptions that the parties and the public-at-large would have about the case.¹⁰⁸ Fairness also seems best served by a rule that allows a party who does not stray from his or her home to benefit from his or her own state's laws.¹⁰⁹ Conversely, the party who goes to another state should bear the burden of any differences in the laws of that state.¹¹⁰ One factor in assessing choice of law under the Second Restatement, which also finds expression in the malpractice cases, is the place of the relationship between the parties.¹¹¹ The place of treatment rule best reflects the preference for the place where the relationship between the parties is centered.

The superiority of the place of treatment tiebreaker over the place of injury tiebreaker is illustrated by several cases applying the traditional *lex loci delicti* test to screening statutes. Under this approach, the court looks to the place of injury as the sole determinant of choice of law.

106. See, e.g., *Tooker v. Lopez*, 249 N.E.2d 394, 399 (N.Y. 1969).

107. See Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 329-30 (1972).

108. *Id.* at 329-30.

[Natural expectations are] the expectations that [parties] presumably would have had if their minds had been directed to the issue at hand. Expectations of the first type are often encountered in such areas as contracts, trusts, and marriage. Expectations of the second type are also significant. To foster public confidence and respect, it is important that the law reach results appealing to common sense, and a person is likely to think that a result makes sense if it is one he would have anticipated had he thought about the question beforehand. This, of course, is as true in choice of law as it is in any other legal field. It is desirable, in other words, that a person's rights and duties should be determined under a law whose application he had reason to expect.

Id.

109. See *Capone v. Nadig*, 963 F. Supp. 409, 413 (D. N.J. 1997) ("[B]y entering the state . . . the visitor has exposed himself to the risks of the territory and should not expect to subject persons living there to a financial hazard that their law had not created.") (quoting D. F. Cavers, *THE CHOICE OF LAW PROCESS* 146-47 (1965)).

110. See *Bledsoe v. Crowley*, 849 F.2d 639, 647 (D.C. Cir. 1988) ("[P]atients are inherently on notice that journeying to new jurisdictions may expose them to new rules. The maxim 'When in Rome do as the Romans do' bespeaks the common sense view that it is the traveler who must adjust.") (Williams, J., concurring).

111. RESTATEMENT (SECOND), *supra* note 14, at § 145; see *Jenkins v. Cowen*, No. Civ.A. 86-1988, 1987 WL 14601, at *3 (D.D.C. July 17, 1987); *Wall v. Noble*, 705 S.W.2d 727, 733 (Tex. App. 1986).

Whether a screening statute applies depends on whether the injury occurred in the state of treatment or in the plaintiff's home state after returning there. For example, in *Knoblett v. Kinman*,¹¹² the plaintiff was taken from his native Illinois to an Indiana hospital for treatment of a broken arm.¹¹³ After receiving treatment and returning home, the plaintiff learned that he had suffered nerve damage.¹¹⁴ The court found the place of injury to be in Indiana and thus applied Indiana's screening statute.¹¹⁵ However, if the court had determined that the nerve damage occurred after the plaintiff's return to Illinois, the screening statute would not have applied. The court thus based its decision on a difficult fact question—the place of onset of the nerve damage—that had no policy implications for the choice of law issues in the case.

Similarly, in *Salazar v. United States*¹¹⁶ the patient originally was treated in Kansas by a physician who then consulted with a Nebraska physician.¹¹⁷ The Nebraska physician gave instructions for treating the patient while he was in the Kansas hospital and while he was transported via helicopter to Nebraska.¹¹⁸ When the patient arrived in Nebraska, his hand had become necrotic, allegedly due to negligent instructions given by the Nebraska physician to the nurse accompanying the patient on the flight.¹¹⁹ The court applied the Kansas place of the tort rule, and, with little analysis, concluded that Kansas law applied.¹²⁰ In choosing Kansas law, the court may have misapplied Kansas choice of law: the court phrased the test as the place of the "tort" and applied Kansas law because that was where the negligent acts occurred.¹²¹ The results of this analysis may be defensible as an application of the place of treatment rule.¹²² However, if the court was really applying the traditional place of injury rule, it would have had to determine precisely where on the flight from Kansas to Nebraska the hand became necrotic—an enterprise that is both difficult¹²³ and irrelevant to the choice of law policies

112. 623 F. Supp. 805 (S.D. Ind. 1985).

113. *Id.* at 806.

114. *Id.*

115. *Id.* at 807.

116. No.Civ.A. 86-4358-5, 1989 WL 117711 (D. Kan. Sept. 14, 1989).

117. *Id.* at *1.

118. *Id.*

119. *Id.*

120. *Id.* at *3.

121. *Id.*

122. Note, however, that when the patient is in one state and the physician rendering advice is in another, it is less than clear which state should be regarded being the place of treatment. This has obvious implications for telemedicine, which are considered below. See *infra* note 288 and accompanying text.

123. For another case involving facts that would be difficult to analyze under the place of the injury rule, see *Purnell v. United States*, No. Civ. A. 86-4475, 1987 WL 11211 (E.D. Pa. May 21,

involved. As another court said, an “attempt to separate the place where the injury occurred from the place where the negligence took place makes no sense in the context of an alleged failure to diagnose”¹²⁴ The place of treatment rule offers a better tiebreaker than the place of injury rule because determining the place of injury can be difficult, has little bearing on choice of law policies, and it does not protect the parties’ expectations.

In contrast to the line of cases supporting a place of treatment rule, some cases take a fundamentally different approach by preferring forum law. This preference reflects a cruder form of interest analysis in which a forum with an interest will always apply its own law without regard to the interests of other states or to potential forum choice of law policies that do not involve state interests.¹²⁵ Kentucky has the most naked forum preference approach. It has explicitly taken a *lex fori* position—apply the law of the forum whenever possible.¹²⁶ This approach has been applied in the context of a malpractice screening statute. In *Kennedy v. Ziesmann*,¹²⁷ a Kentucky patient consulted with an Ohio physician at a satellite office that the physician maintained in Kentucky.¹²⁸ The consultation ultimately led to an operation in Ohio, which gave rise to the plaintiff’s claim.¹²⁹ The court held that Kentucky law applied not only to the physician who had the satellite office in Kentucky, but also to another physician with no apparent connections to Kentucky and to the Ohio hospital where the surgery was performed.¹³⁰ In part, the court

1987) where a patient died from a hemorrhage caused by a prescription after taking the medication and traveling through several states.

124. *Bledsoe v. Crowley*, 849 F.2d 639, 642 (D.C. Cir. 1988) (applying the law of the place of treatment, which was also place of defendant’s residence and practice, in a failure to diagnose case); *see also* 789 *Capone v. Nadig*, 963 F. Supp. 409, 414 (D. N.J. 1997) (rejecting argument that injury necessarily occurred in plaintiff’s home state when symptoms arose in a failure to diagnose case). *But see* *Workman v. Chinchian*, 807 F. Supp. 634, 638 (E.D. Wash. 1992):

[A] more practical approach in a medical malpractice case such as this, where the injury is caused by delayed diagnosis, would be to find the residence of the plaintiff as the place of the injury. To base the determination regarding place of the injury on such adventitious circumstances as the place where the plaintiff undergoes subsequent treatment would frustrate any hope of predictability in determining choice of law problems.

Id. at 638.

125. Examples of such forum choice of law policies include uniformity of outcome and upholding expectations.

126. On Kentucky choice of law and the *lex fori* approach in general, *see Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972).

127. 522 F. Supp. 730 (E.D. Ky. 1981).

128. *Id.* at 730.

129. *Id.*

130. *Id.* at 731-32.

reasoned that the Ohio screening scheme was contrary to Kentucky public policy.¹³¹

Ziesmann stands for the proposition that the domicile of the plaintiff standing alone may be a sufficient basis upon which to apply the law of the plaintiff's home state.¹³² This proposition is directly at odds with the cases earlier discussed.¹³³ Such a rule should not be favored. It makes the outcome of the issue—and perhaps the case—dependent on whether the plaintiff can get jurisdiction over the defendant in the plaintiff's home state. While applying the forum's law furthers the domestic policies of the forum, it does so at the expense of the policies of a sister state, which may have more connections to the case. It assumes that Kentucky has no multistate policies, that is, no policies that call for limiting the application of Kentucky law in deference to concerns of fairness to outsiders, expectations of the parties, and the interests of other states.

Similar to *Ziesmann* is *Kaiser-Georgetown Community Health Plan, Inc. v. Stutsman*.¹³⁴ In that case, the Virginia plaintiff received treatment in a Virginia clinic which was operated by a HMO headquartered in the District of Columbia.¹³⁵ The court, using interest analysis, declined to apply Virginia's screening statute and instead applied the law of the District of Columbia in part because of plaintiff's employment there.¹³⁶ According to the court, plaintiff's employment in the District of Columbia gave the District an interest in her welfare.¹³⁷ This reasoning is analogous to that in *Ziesmann*, where the court applied forum law to benefit a forum domiciliary. Although the plaintiff was a "local" in a less profound sense than that of domicile,¹³⁸ the analytic underpinnings of the two cases are the same: apply forum law favorable to local plaintiffs. Whatever one thinks of the propriety of applying forum law to benefit domiciliaries, one must question whether the plaintiff's employment is a sufficiently sturdy connection with the forum to characterize her as a "local."¹³⁹

In applying the District of Columbia's law, the court also consid-

131. *Id.*

132. Although one of the defendants had an office in Kentucky where plaintiff initially sought treatment, the others did not have any contact with the state. *See id.*

133. *See supra* notes 83-99 and accompanying text.

134. 491 A.2d 502 (D.C. 1985).

135. *Id.* at 505.

136. *Id.* at 510.

137. *Id.*

138. In this case, the individual within the District of Columbia is "a member of its workforce who contract[ed] for health services with a District of Columbia Corporation." *Id.*

139. The court characterized the place of treatment as a mere "happenstance," because the defendant operated facilities in both the District and in Virginia. Plaintiff could just as easily have sought treatment in the District clinic closest to her workplace. *Id.* at 58.

ered that the HMO was headquartered in the District of Columbia. This was said to give rise to a forum interest in "holding its corporations liable for the full extent of the negligence attributable to them."¹⁴⁰ Thus, the domiciliary interest in *Stutsman* is not just the desire of the forum to benefit a local plaintiff, but it is also the desire to burden, or regulate, a local defendant. In the cases previously discussed, regulation of the defendant was justified by the defendant's treatment of a patient within the state. In *Stutsman*, the court substituted local corporate presence for the place of treatment as a basis for regulating the defendant. Based on this analysis, the court concluded that the case was a false conflict; "Virginia's interest would in fact be well-served, and its public policy not contravened, by the application of District law to the action."¹⁴¹ Virginia was only interested, the court said, in protecting its health care providers. Although the Virginia Malpractice Act applies to health care providers licensed in Virginia, "the state's interest in the application of its statute becomes attenuated when its intended beneficiaries are foreign corporations with principal place of business outside the state."¹⁴²

It is true that the District of Columbia had an interest in *Stutsman*, although one might wonder to what extent a legislature has non-resident workers in mind when it legislates.¹⁴³ What is troublesome is the court's assertion that Virginia lacked an interest. Virginia enacted the screening statute to keep down medical costs. If the statute does not apply to a situation such as *Stutsman* where the treatment was rendered in Virginia, that goal will be undermined. While the screening statute directly benefits health providers, the ultimate and intended beneficiaries of the sought-after lower medical costs were Virginia consumers of medical services. Thus, the absence of a Virginia corporate defendant does not mean that Virginia lacks an interest. Virginia still has an interest because higher recoveries on interstate cases like *Stutsman* would tend to increase costs to other Virginia consumers who receive medical care from the same physicians.

In contrast to *Stutsman*, other cases have applied the screening statute of the state in which the treatment occurred even when the defendant

140. *Id.* at 509-10.

141. *Id.*

142. *Id.*

143. One can also question the District of Columbia's interest in burdening its local defendant with higher liability. The court noted that Virginia law in this case operated to the detriment of the Virginia plaintiff by limiting compensation and used that conclusion to argue that Virginia lacked an interest in these circumstances. *Id.* at 510-11. But the same reasoning would lead to the conclusion that the District had no interest in applying its higher recovery law to the detriment of a local defendant. In short, since each state's law benefited the party from the other state, the court could have categorized the problem before it as a case in which neither state had an interest.

resided elsewhere. In *Hill v. Morrison*,¹⁴⁴ the defendant resided in Kansas but treated the Plaintiff at his office in Missouri.¹⁴⁵ The court, using the most significant relationship approach of the Second Restatement, held that the Missouri screening statute applied because Missouri was the state with the most significant relationship to the injury and no other state had an overriding interest.¹⁴⁶ It is significant that while both parties in *Hill* had some Missouri connections—the defendant had an office there and the plaintiff was a college student there—both were domiciled in states that apparently had no screening statutes, Kansas and Tennessee respectively.¹⁴⁷ Applying the screening statute makes sense on such facts: Missouri had an interest despite the absence of a local domiciliary because other Missouri patients, who would presumably constitute the bulk of patients at defendant's Missouri office, would benefit from lower medical costs produced by a lower recovery in the case.¹⁴⁸

This interest was recognized in *Packer v. Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.*,¹⁴⁹ which involved a fact pattern similar to *Stutsman*: a Virginia patient was treated in Virginia by a physician employed by a HMO headquartered in the District of Columbia.¹⁵⁰ The court concluded that Virginia had superior interests and applied that state's screening statute.¹⁵¹ *Packer* can be distinguished from *Stutsman* because of the absence of plaintiff contacts with the forum in *Packer*. In *Stutsman*, the plaintiff was employed in the District; the court reasoned that the contact gave the District an interest in protecting her.¹⁵² The District had no such contacts with the plaintiff in *Packer*.¹⁵³ The court therefore was left with only the defendant-regulating interest set out in *Stutsman*. The court found this interest to be insufficient to overcome Virginia's interest in keeping down health care costs.¹⁵⁴ Unlike the court in *Stutsman*, the court in *Packer* recognized that a screening statute is designed to benefit citizens of the state generally by assuming that medical services in the state are available in the future.¹⁵⁵

144. 870 F. Supp. 978 (W.D. Mo. 1994).

145. *Id.* at 980.

146. *Id.* at 981.

147. *Id.* at 980.

148. The court identifies Missouri's interest as "the increased cost of health care and the continued integrity of that system of essential services." *Id.* at 981.

149. 728 F. Supp. 8 (D.D.C. 1989).

150. *Id.* at 9.

151. *See id.* at 11-12.

152. *See supra* notes 135-36 and accompanying text.

153. *See Packer*, 728 F. Supp. at 9.

154. *Id.* at 11.

155. *Id.* at 11 n.5.

Similarly, in *Bledsoe v. Crowley*,¹⁵⁶ a District of Columbia plaintiff sued two Maryland psychiatrists in the District of Columbia for failing to diagnose a brain tumor.¹⁵⁷ The defendants were licensed in both jurisdictions, but all treatment occurred in Maryland.¹⁵⁸ The court held that Maryland's screening statute should apply because the "state where the defendant's conduct occurs has the dominant interest in regulating it."¹⁵⁹ A concurring opinion agreed that Maryland law should govern because of the "systemic interests in . . . states' being able to develop coherent policies governing medical malpractice liability and . . . individuals' being able to take advantage of medical services outside their home jurisdictions."¹⁶⁰ The concurrence reasoned that the first interest cannot be served if the law is determined by the plaintiff's domicile, because then some portion of the medical services that the state's physicians render will be subject to a higher liability regime.¹⁶¹ Health professionals would avoid this exposure by refusing to take interstate patients—an outcome at odds with the second interest.¹⁶² Thus, the best choice of law rule is the place of the treatment.¹⁶³

On the whole, the cases support a place of treatment rule in the application of screening statutes. A place of injury rule would artificially divide cases into two categories depending on whether the injury manifested itself at once or after the plaintiff had returned home. A rule basing choice of law on the plaintiff's domicile, while serving to further the interests of the plaintiff's home state, would undermine attempts by states with screening statutes to lower the costs of health care. A plaintiff's domicile choice of law rule would also frustrate expectations; it would be better to place the burden of coming under foreign law on the party—the patient—who chooses to seek a benefit from that state. This latter factor not only upholds parties' expectations it also prevents a freeloading problem: patients who seek medical services in a state other than their home are seeking a beneficial relationship in that state. In states with screening statutes, one such benefit is a lower cost of medical services.¹⁶⁴ Thus, plaintiffs who urge the application of their home

156. 849 F.2d 639 (D.C. Cir. 1988).

157. *Id.* at 640. The plaintiff was a Maryland resident at the time of the first treatment and subsequently moved to the District of Columbia. *Id.*

158. *Id.*

159. *See id.* at 643 (quoting *Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) (quoting RESTATEMENT (SECOND) § 146 cmt. d (1969)).

160. *Bledsoe*, 849 F.2d at 646 (Williams, J., concurring).

161. *Id.*

162. *Id.* at 647.

163. *Id.*

164. At least the legislatures of such states believe this benefit will be achieved. Whether in fact it is achieved is an empirical question beyond the scope of this article.

state's law are trying to receive a benefit from the state of the treatment without carrying the corresponding burden; the cost of their care is in effect being subsidized by other patients who are receiving lower malpractice recoveries.

3. INFORMED CONSENT

A relatively small number of cases address what law should apply when medical services were performed without adequate informed consent. In general, the cases apply the law of the state where the consultation providing the information occurred.

If the defendant doctor acted in his own state of licensure and the only contact with another state is the plaintiff's domicile there, the law of the defendant's state should apply. For example in *Knight v. Department of Army*,¹⁶⁵ the plaintiff, a resident of Alabama, was initially treated for a heart condition in Georgia.¹⁶⁶ He was told that he needed further care and could receive it in either Georgia, the District of Columbia, or Texas.¹⁶⁷ The plaintiff chose to go to Texas where, during the course of treatment, he underwent a blood transfusion that was later found to have contained the AIDS virus.¹⁶⁸ Plaintiff sued for failure to inform him of the risk of HIV infection.¹⁶⁹ The court concluded that Texas's law applied in preference to Alabama's partly because of the expectations of the parties: the plaintiff and the physicians reasonably could expect only the law of Texas to apply because the treatment was given in that state.¹⁷⁰ Moreover, although the plaintiff's home state had an interest in assuring that their citizen was adequately compensated, Texas had a more compelling interest in "seeing that surgeons practicing in Texas comply with reasonable standards of their profession."¹⁷¹

Even if the defendant's contacts with the plaintiff's home state are greater, the law of the state of treatment still applies. In *Blakesley v. Wolford*,¹⁷² the patient had initially consulted with the defendant while the defendant was in the plaintiff's home state on other business.¹⁷³ The defendant generally outlined the medical procedure, but told the patient that the procedure would have to be done in Texas, where the defendant had his practice.¹⁷⁴ The plaintiff then went to Texas where the defen-

165. 757 F. Supp. 790 (W.D. Tex. 1991).

166. *Id.* at 791.

167. *Id.* at 791-92.

168. *Id.* at 792.

169. *Id.*

170. *Id.* at 793.

171. *Id.*

172. 789 F.2d 236 (3d Cir. 1986).

173. *Id.* at 237.

174. *Id.*

dant again explained the operation.¹⁷⁵ Relying on the choice of law principle that a party acting in his own home state (here the physician) is entitled to the application of his home state's law that tends to protect him, the court concluded that Texas law applied despite the initial contacts in Pennsylvania between the parties.¹⁷⁶ Behind this conclusion, however, lies a decision about whether the defendant truly is a stay-at-home party. After all, he ventured into another state and made contact with the patient there. One could characterize the defendant as having reached out beyond his state, thus subjecting himself to foreign law.¹⁷⁷ Similarly, the plaintiff could be viewed as the party who stayed at home until lured into another state by the defendant. The court responded to such concerns by characterizing the initial consultation as too insignificant a connection to require that all subsequent conduct be measured by the law of the state where that initial contact occurred.¹⁷⁸ The plaintiff was told that the operation would have to be in Texas and voluntarily choose to go there.¹⁷⁹

The only case that is perhaps inconsistent with this approach is *Hitchcock v. United States*.¹⁸⁰ The plaintiff in *Hitchcock* had allegedly received a rabies immunization without adequate warnings.¹⁸¹ Although the immunization occurred in Virginia, the decision about what risks to disclose were made by the defendant (the United States government) in the District of Columbia; for that reason, the court applied the law of the District of Columbia.¹⁸² Although the case could be read as a departure from the place of treatment rule, it can also be read to support a rule applying the law of the place where the defendant acted. *Hitchcock* is therefore a refinement of the place of treatment rule, taking into account that the defendant's negligent conduct was not in the state of treatment.

The place of treatment rule makes sense for informed consent cases. It is assumed in these cases that the parties are from different states. When the physician's home state has a standard more protective of him, the case will present a true conflict between the interests of the

175. *Id.*

176. *Id.* at 242 ("when a defendant acts within his home state, he may properly rely on that state's defendant-protecting law").

177. *Cf. Scharfman by Scharfman v. Nat'l Jewish Hosp. & Research Ctr.* 506 N.Y.S.2d 90, 92 (N.Y. App. Div. 1986) (finding that Colorado defendant's screening of potential patients in New York office added to "significant contacts" with New York and subjecting defendant to New York law); *Wall v. Noble*, 705 S.W.2d 727, 733 (Tex. App. 1986) (applying Texas substantive law where physician and patient made medical decision in physician's Texas office even though surgery occurred in other state).

178. *Blakesley v. Wolford*, 789 F.2d 236, 242 (3rd Cir. 1986).

179. *Id.* at 243.

180. 665 F.2d 354 (D.C. Cir. 1981).

181. *Id.* at 355.

182. *Id.* at 360-61.

two states.¹⁸³ Such cases need a tie-breaker, and the place of the defendant's conduct is preferable to the place where the injury manifests itself.¹⁸⁴ This result also upholds the expectations—or presumed expectations—of the parties.¹⁸⁵ On the other hand, if the law of the defendant's home is more favorable to the plaintiff, that state will have an interest in attaching tort liability to deter conduct falling below the standard of care.¹⁸⁶

4. DAMAGES ISSUES

This section reviews cases dealing with damages issues. Some of these cases overlap with those considered under malpractice screening laws because they involve a damages cap that is imposed by a malpractice tort reform statute.¹⁸⁷ Others deal with damages issues that could arise in any tort case, such as the heads of damages recoverable in a survival action.¹⁸⁸

To clarify the analysis, the cases are broken into two major groups. One group involves true conflicts. In this group, the state of the defendant's practice limits damages more than the home state of the plaintiff does. The other group involves what appear to be unprovided-for cases: the defendant's state allows more liberal damages, ostensibly to protect a plaintiff, but there is no local plaintiff to be protected; the plaintiff's state has a limitation on damages, ostensibly to protect defendants, but there is no local defendant to protect. Both groups of cases need a tiebreaker. This section attempts to identify and catalogue the tiebreakers selected by the courts in these two groups of cases.

In cases where the defendant's state allows fuller recovery than the plaintiff's state, one could say that neither state has an interest in applying its law.¹⁸⁹ To overcome this apparent anomaly in such cases, the courts have engaged in a common mode of interest analysis and transformed the defendant's state's apparent pro-plaintiff policy (higher damages) into a defendant-regulating policy. By making this shift, the defendant's state acquires an interest in regulating or deterring a local

183. See *Blakesley*, 789 F.2d at 240; *Knight v. Dep't of Army*, 757 F. Supp. 790, 793 (W.D. Tex. 1991).

184. See, e.g., *Blakesley*, 789 F.2d at 241. See also *supra* notes 101-124 and accompanying text.

185. See *Knight*, 757 F. Supp. at 793.

186. See *Hitchcock*, 665 F.2d at 360 (the state had an "interest in having its law applied to decide the liability of a business headquartered there").

187. See, e.g., *Kaiser-Georgetown Cmty. Health Plan, Inc. v. Stutsman*, 491 A.2d 502, 506 (D.C. 1985).

188. See *Capone v. Nadig*, 963 F. Supp. 409, 412 (D. N.J. 1997).

189. Brainerd Currie suggested that in such cases the forum apply its own law by default. See *Currie*, *supra* note 35.

defendant by awarding higher damages to the plaintiff. For example, in *Workman v. Chinchinian*,¹⁹⁰ an Idaho plaintiff sued a Washington defendant for failing to diagnose a tumor.¹⁹¹ While Washington, the defendant's state, allowed full recovery for tort victims, Idaho, the plaintiff's state, placed a cap on damages.¹⁹² The court applied Washington law to the benefit of the foreign plaintiff because the "primary purpose" of the Washington "policy is to deter wrongful conduct."¹⁹³ The policy was thus found to be defendant-oriented, and because there was a Washington defendant, Washington had an interest. Idaho, on the other hand, lacked an interest in applying its cap on damages because that law was designed to "protect Idaho defendants and their insurance carriers, not Washington residents and their insurance carriers."¹⁹⁴ Thus, the case became a simple false conflict. This is the pattern followed by the other potential unprovided-for damages cases—cases where each party is benefited by the other party's domiciliary law.¹⁹⁵

These cases take a few analytic gyrations but may be restated rather simply: when the plaintiff's home state allows less liberal damages than the place of treatment, apply the law of the place of treatment. Moreover, the state with the higher damages standards will always have an interest in interstate malpractice cases. If it is also the home state of the plaintiff, then it has an interest in seeing its citizens fully compensated. If instead it is the state in which the physician practices, it has a regulatory interest.

A somewhat larger group of cases deals with the perhaps more vex-

190. 807 F. Supp. 634 (E.D. Wash. 1992).

191. *Id.* at 637.

192. *Id.* at 640.

193. *Id.*

194. *Id.*

195. In *Estate of Sullivan v. United States*, 777 F. Supp. 695 (N.D. Ind. 1991), the plaintiff was from a state that capped damages in medical malpractice cases but was mistreated in Arizona, a state with no cap. *Id.* at 697. The court applied Arizona law because Arizona "has an interest in ensuring the quality of those medical practitioners employed in a Veterans Administration hospital in Arizona and is free to choose to not enact a medical malpractice liability cap as a means of protecting its interests." *Id.* at 702. Likewise, in *Kaiser-Georgetown Community Health Plan, Inc. v. Stutsman*, 491 A.2d 502 (D.C. 1985), the court applied the more liberal damages law of the District of Columbia to the benefit of a Virginia plaintiff because the corporate defendant health care provider was headquartered in the District. The court found that the "District has a significant interest, reflected in the fact that it imposes no cap on liability for malpractice, in holding its corporations liable for the full extent of the negligence attributable to them." *Id.* at 509-10. Moreover, the District of Columbia had an interest in protecting the plaintiff because she worked there. *Id.* at 510. One might also add to this group *Lasley v. Georgetown University*, 842 F. Supp. 593 (D. D.C. 1994). The court in that case applied the law of the place of defendant's practice because it had a "significant interest in holding its health care providers liable for the full extent of the negligence attributable to them." *Id.* at 595 n.1. The choice of law statements in the case, however, appear as dicta because on the damages question the law of the two jurisdictions was the same. See *id.* at 595.

ing situation presented when each state's law favors the party from that state. In these cases, the physician is from a state that caps damages or applies some other rule disallowing certain types of damages. The plaintiff hails from a state that has no cap and permits fuller relief. These cases present classic true conflicts. Either the defendant's state will not be able to protect its citizen as it would like or the plaintiff's state will not be able to provide what it believes to be full compensation for its citizen. If we simply throw up our hands and advise each state to apply its own law,¹⁹⁶ the outcome of the case will turn on personal jurisdiction and forum shopping. Once again, we need a tiebreaker.

In the true conflict cases that I have found, one group of courts did in fact give up on a solution and applied forum law. A much larger group of cases used as a tiebreaker either the place of treatment rule or the plaintiff's domicile rule.

Of the cases that simply apply forum law, one is the notorious and much criticized *Rosenthal v. Warren*.¹⁹⁷ In *Rosenthal*, a New York patient sought and obtained treatment from a Massachusetts physician in Massachusetts.¹⁹⁸ Massachusetts had a cap on wrongful death damages; New York had none.¹⁹⁹ The court found that New York law, the law of the forum,²⁰⁰ should apply because the Massachusetts damages limitation "is one not based upon logic, reason or social policy,"²⁰¹ but is instead "absurd and unjust."²⁰² The reasoning amounts to selecting the law of the forum: if Massachusetts had been the forum, one would hardly expect a Massachusetts court to conclude that its own laws are "absurd and unjust."²⁰³ This is illustrated by *Petrella v. Kashlan*, the other case relying on a preference for forum law.²⁰⁴ In *Petrella*, the Florida mother of a Florida decedent sued in New Jersey for malpractice alleged to have occurred in New Jersey while her son was temporarily in that state.²⁰⁵ Florida law allowed a parent to recover in wrongful death actions for their mental pain and suffering; New Jersey law did not allow

196. This was of course the initial position of interest analysis. See *supra* note 38.

197. 475 F.2d 438 (2d Cir. 1973). For criticism of *Rosenthal*, see Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1605-06 (1978).

198. *Rosenthal*, 475 F.2d at 439.

199. *Id.* at 439.

200. The case was filed in federal district court in New York as a diversity case. The court was therefore applying New York choice of law principles. *Id.* at 440.

201. *Id.* at 445.

202. *Id.* (quoting Justice Hatch in *Medinger v. Brooklyn Heights R.R.*, 39 N.Y.S. 613, 616 (1896), quoted in *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 40 (1966)).

203. To the same effect is *Holzager v. Valley Hospital*, 482 F. Supp. 629, 634-35 (S.D.N.Y. 1979), which applied the law of the plaintiff's domicile as against the place of the treatment, which had a charitable immunity rule, on the ground that the latter rule was "unfair and unjust."

204. 826 F.2d 1340 (3d Cir. 1987).

205. *Id.* at 1341.

such recovery.²⁰⁶ The court recognized the true conflict and resolved it by defaulting to forum law: "New Jersey's interest in this case is no less than Florida's and the judge correctly held that its law of damages should be applied."²⁰⁷ *Rosenthal* and *Petrella* succinctly illustrate the problem with simply applying forum law in true conflicts. The plaintiff wins if he or she can get jurisdiction at home (*Rosenthal*). If the plaintiff cannot do so the defendant wins (*Petrella*).²⁰⁸

The remaining cases seek a solution that does not depend upon the identity of the forum. The dominant approach is to use the place of the treatment to resolve the true conflict. For example, in *Kenerson v. Stevenson*,²⁰⁹ a Maine patient was injured and subsequently died following treatment in a New Hampshire Hospital by a New Hampshire physician.²¹⁰ New Hampshire law did not allow punitive damages; apparently Maine law did.²¹¹ The plaintiff's Maine domicile was "the sole significant contact with the state of Maine."²¹² Using the Second Restatement's most significant relationship test, the Maine court held that New Hampshire law applied.²¹³

Other cases applying the place of treatment approach do so, in part, to uphold the expectations of a defendant who does not venture outside his state's boundaries. In *Blakesley v. Wolford*,²¹⁴ the court applied the damages law²¹⁵ of the place of treatment rather than the more liberal law of the plaintiff's domicile because "when a defendant acts within his

206. *Id.* at 1342.

207. *Id.* at 1343.

208. In fact, the jurisdictional basis in *Rosenthal* for the New York suit against the Massachusetts physician is weak under today's standards. The court had relied on attaching insurance obligations of the Defendant in New York. *Rosenthal*, 475 F.2d at 440. Such a jurisdictional basis is no longer valid under the due process clause. See *Rush v. Savchuck*, 444 U.S. 320, 332-33 (1980).

209. 621 F. Supp. 1179 (D. Me. 1985). A fuller statement of the facts of the case is found in an earlier opinion on jurisdiction. See *Kenerson v. Stevenson*, 604 F. Supp. 792 (D. Me. 1985).

210. *Kenerson*, 621 F. Supp. at 1181.

211. *Id.* It should be noted, however, that New Hampshire allowed for "liberal compensatory damages" when the defendant's acts are "wanton, malicious or oppressive." *Id.*

212. *Id.*

213. *Id.* To the same effect is *Rieger v. Group Health Ass'n*, 851 F. Supp. 788 (N.D. Miss. 1994). In that case, the plaintiff had received treatment from a Maryland physician while living in Maryland and then moved to Mississippi. *Id.* at 789-90. Maryland capped non-economic damages; Mississippi did not. *Id.* at 791. In applying the most significant relationship test, the court concluded the Maryland cap should apply. *Id.* at 790, 792. In *Rieger*, as in *Kenerson*, the sole connection the state with higher standards of damages had to the case was that it was the domicile of the plaintiff. Likewise, in *Perloff v. Symmes Hospital*, 487 F. Supp. 426 (D. Mass. 1980), the sole connection to the state with the more generous law of damages was that it was the plaintiff's domicile; moreover, the plaintiff moved to that state after the events in question. *Id.* at 427-28. The court therefore discounted the plaintiff's domicile entirely. *Id.* at 429.

214. 789 F.2d 236 (3d Cir. 1986).

215. See *id.* at 240 for a description of the two states' damages laws.

home state, he may properly rely on that state's defendant-protecting law."²¹⁶ Similarly, in *Capone v. Nadig*,²¹⁷ the court faced a true conflict between the less generous law of the state of treatment, which was designed to afford "protection of its resident defendants from excessive damage awards,"²¹⁸ and the more generous law of the plaintiff's state, which was based on the "primary interest in seeing that a decedent's estate is justly compensated by a tortfeasor."²¹⁹ The court applied the law of the place of treatment, breaking the domiciliary tie by favoring the party that stayed at home over the party that ventured out of state: "it is only fair that the law of the state to which the patient has voluntarily traveled, and in which the doctor has chosen to [practice], be applied to adjudicate the respective rights, duties, and obligations between the parties."²²⁰ Because the patient sought out the defendant in the defendant's state of practice, the court concluded that the "relationship between [the plaintiff] and the defendant was centered in" that state and that state's law should apply.²²¹

Another group of cases takes a different approach, applying the law of the plaintiff's home state rather than the law of the state where the defendant's conduct occurred. However, most of these cases can be distinguished because of the uniqueness of the defendant. Three of the cases were brought against the United States under the Federal Tort Claims Act for malpractice committed by a medical employee of the United States.²²² In these cases, the place of treatment is much less compelling as a tiebreaker because the defendant is the ultimate nationwide actor. Because the defendant is present and active in both the place of treatment and in the plaintiff's home state, it is unlikely to have acted in reliance on the local law of the place of treatment.

For example, in *Pietrantonio v. United States*,²²³ the plaintiff initially consulted with a Veterans Administration physician in his home state of Michigan; this physician sent him for further treatment to a Veterans Administration in Wisconsin.²²⁴ The latter facility failed to diag-

216. *Id.* at 242 (citing *Cipolla v. Shaposka*, 267 A.2d 854, 856 (1970)).

217. 963 F. Supp. 409 (D. N.J. 1997).

218. *Id.* at 413.

219. *Id.*

220. *Id.* at 413-14 (quoting *Blakesley*, 789 F.2d at 243).

221. *Id.* at 414. See also *Mascarella v. Brown*, 813 F. Supp. 1015, 1021 (S.D.N.Y. 1993) (choosing the locus of the alleged malpractice—the place of treatment—when the tortfeasor is domiciled in that state to provide the law governing damages).

222. *Tyminski v. United States*, 481 F.2d 257 (3d Cir. 1973); *Pietrantonio v. United States*, 827 F. Supp. 458 (W.D. Mich. 1993); *Merchs. Nat'l Bank & Trust Co. of Fargo v. United States*, 272 F. Supp. 409 (D. N.D. 1967).

223. 827 F. Supp. 458 (W.D. Mich. 1993).

224. *Id.* at 459-60.

nose lung cancer in an X-ray taken there.²²⁵ Wisconsin law placed a cap on damages while Michigan law did not.²²⁶ Although this case could be regarded as a true conflict because the plaintiff's home state allowed full recovery and the state of the defendant's conduct limited recovery, analyzing the interests reveals only a doubtful interest on the part of the state of the defendant's conduct. Wisconsin enacted its cap to protect some class of defendants, presumably local ones, from excessive liability; it is doubtful that the legislature intended to protect the U.S. government as a defendant.²²⁷ For this reason, the court recognized Michigan's interest, but made no mention of a Wisconsin interest.²²⁸ The court also concluded that the Michigan plaintiff's expectations deserved protection because he "did not go to Wisconsin except by referral from his Michigan doctor."²²⁹ Similarly, in *Merchants National Bank & Trust Co. of Fargo v. United States*,²³⁰ a mental patient had been committed in his native North Dakota and then transferred to a Veterans Administration facility in South Dakota.²³¹ He was negligently released from that facility and killed his North Dakota wife.²³² The court, characterizing the mental patient's presence in South Dakota as "simply happenstance," found that South Dakota, which had a damage cap, had no interest in the case while North Dakota had an interest in full recovery.²³³

The absence of a state interest in protecting the United States as a defendant from unnecessary damages awards is also illustrated by *Tyminski v. United States*. In *Tyminski*,²³⁴ the plaintiff received treatment in New York and later moved to New Jersey, which allowed certain damages not available under New York law.²³⁵ In a case against a defendant other than the United States, applying the interests of a state to which the plaintiff elected to move after the conduct in question would raise serious questions of fairness.²³⁶ But because of the national scope of this defendant, such concerns were diminished. Likewise, the

225. *Id.* at 459.

226. *Id.* at 461.

227. For an example of an explicit consideration of whether the United States as a defendant is within the scope of a damage-regulating statute, see *Estate of Sullivan v. United States*, 777 F. Supp. 695, 702 (N.D. Ind. 1991).

228. *Pietrantonio*, 827 F. Supp. at 462.

229. *Id.*

230. 272 F. Supp. 409 (D. N.D. 1967).

231. *Id.* at 412.

232. *Id.* at 411.

233. *Id.* at 419, 420.

234. 481 F.2d 257 (3d Cir. 1973).

235. *Id.* at 265. Specifically, New Jersey law allows for recovery of gratuitous nursing services. *Id.*

236. See, e.g., *Reich v. Purcell*, 432 P.2d 727, (Cal. 1967) (declining to apply the law of a later-acquired domicile to prevent forum shopping).

state of New York had little interest in protecting the United States from such damages.²³⁷

Outside the Federal Tort Claims Act context, only one case applies the more liberal law of a plaintiff's home state over the law of the place of treatment. In *Haydu v. Hospital for Joint Diseases Orthopaedic Institute*,²³⁸ the court applied plaintiff-favoring Connecticut damages law²³⁹ even though the Connecticut patient had been treated by the New York defendant solely in New York.²⁴⁰ The court relied on a pattern of New York cases that it characterized as consistently calling for "application of the law of the decedent's domicile" in wrongful death conflicts cases.²⁴¹ The court also thought that applying the law of plaintiff's domicile "encourages the use of New York medical facilities and therefore is in New York's interest."²⁴²

If New York truly wanted to encourage out-of-state plaintiffs to come into the state for treatment, a more direct route than a choice of law rule would be to raise the permitted damages substantively. Moreover, the *Haydu* court's rationale does not take into account that it takes two to have a physician-patient relationship. Although the court's choice of law rule would encourage the patient to seek the relationship, it would discourage the New York physician from accepting it. The court's choice of law rule creates an incentive for physicians to decline patients from those states that have more liberal damages laws. Significantly physicians are more likely to be worried about post-care litigation than the patients. Were a patient seriously contemplating possible litigation about the quality of the care, he or she would choose another physician. If providing medical care across state lines is an important policy, then the better way to achieve it is by encouraging physicians to accept out-of-state patients by protecting physicians with favorable home state law.²⁴³

In summary, the place of treatment rule generally predicts the result of choice of law cases relating to damages issues. When the state of treatment has higher damages, that state's law is applicable in order to

237. The court found that as to the award of damages, "there exists no object of wrongdoing New York would have a particular interest in preventing." *Tyminski*, 481 F.2d at 267.

238. 557 F. Supp. 577 (S.D.N.Y. 1983).

239. *Id.* at 577.

240. *Id.* at 578.

241. *Id.* at 579.

242. *Id.* at 580.

243. *Haydu* has also been criticized as a misapplication of New York choice of law. See *Morgan Guar. Trust Co. of N.Y. v. Garrett Corp.*, 625 F. Supp. 752, 762 n.14 (S.D.N.Y. 1986) ("[w]e agree with the Second Circuit that this [holding in *Haydu*] is unlikely to have been a New York court's ruling in such a case") (citing *O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842, 850 n.12 (2d Cir. 1984)).

regulate the defendant's conduct.²⁴⁴ When it is the plaintiff's home state that has higher recovery, courts apply the law of the place of treatment rule more often than either the rule favoring forum law²⁴⁵ or the rule favoring the plaintiff's home state law.²⁴⁶

B. General Analysis

In this section, I analyze the choice of law outcomes of interstate malpractice cases in the aggregate. That is, I attempt to make some general observations about all the cases without regard to the specific issue they present. To do so, I created several categories of choice of law results. One category, for example, consists of cases applying the law of the place of injury, the traditional choice of law rule until the latter part of the twentieth century. Other categories are based on where the treatment occurred and where the plaintiff was domiciled.

Of the cases in my database, I excluded eight from this analysis as stating only dicta.²⁴⁷ Of the remaining cases, eleven apply forum law as procedural. Most of these cases involve a statute of limitations,²⁴⁸ although some involve characterization of other issues as procedural.²⁴⁹ The group of cases dealing with various substantive issues then remains.²⁵⁰ Of these cases, two large groups of about equal size are easily identified.

One group consists of cases that apply the law of the place of treatment even though the plaintiff was domiciled elsewhere and the law of the plaintiff's state favored him or her. There are thirteen such cases.²⁵¹

244. See *supra* notes 89-195 and accompanying text.

245. See *supra* notes 197-208 and accompanying text.

246. See *supra* notes 222-243 and accompanying text.

247. See *Schleier v. Kaiser Found. Health Plan of the Mid-Atlantic States, Inc.*, 876 F.2d 174 (D.C. Cir. 1989); *Zimbauer v. Milwaukee Orthopaedic Group, Ltd.*, 920 F. Supp. 959 (E.D. Wis. 1996); *Rosario v. United States*, 824 F. Supp. 268 (D. Mass. 1993); *Lindsey v. United States*, 693 F. Supp. 1012 (W.D. Okla. 1988); *Hasenei v. United States*, 541 F. Supp. 999 (D. Md. 1982); *Simon v. United States*, 438 F. Supp. 759 (S.D. Fla. 1977); *Carr v. Bio-Medical Applications of Wash. Inc.*, 366 A.2d 1089, (D.C. 1976); *Safer v. Estate of Pack*, 677 A.2d 1188 (N.J. Super. Ct. App. Div. 1996).

248. See *Cuthbertson v. Uhley*, 509 F.2d 225 (8th Cir. 1975); *Kozan v. Comstock*, 270 F.2d 839 (5th Cir. 1959); *Heinrich v. Sweet*, 49 F. Supp. 2d 27 (D. Mass. 1999); *Weethee v. Holzer Clinic, Inc.*, 490 S.E.2d 19 (W.Va. 1997); *Huang v. D'Albora*, 644 A.2d 1 (D.C. 1994); *Cox v. Kaufman*, 571 N.E.2d 1011 (Ill. App. 1991); *Gattis v. Chavez*, 413 F. Supp. 33 (D. S.C. 1976); *Keaton v. Crayton*, 326 F. Supp. 1155 (W.D. Mo. 1969); *Conway v. Ogier*, 184 N.E.2d 681 (Ohio Ct. App. 1961).

249. See *Dill v. Scuka*, 279 F.2d 145, 147 (3d Cir. 1960) (standard for sufficiency of evidence); *Ransom v. Marrese*, 501 N.E.2d 702 (Ill. App. Ct. 1986) (dealing with a malpractice screening statute).

250. This group includes some additional statute of limitations cases in which the court characterized statute of limitations as substantive, not procedural.

251. See *Capone v. Nadig*, 963 F. Supp. 409 (D. N.J. 1997); *Bledsoe v. Crowley*, 849 F.2d 63

Given that each party is favored by his or her own state's law, these cases are true conflicts. Because such cases cannot be resolved on the basis of state interests (each state has one), another basis of decision must be used. These cases use the place of treatment, which, as noted above, serves to protect the expectations of the parties.²⁵²

In contrast to the foregoing cases, another major group applies the law of the plaintiff's domicile, in preference to the law of the place of treatment, when each party is favored by his or her own state's law. There are fourteen such cases.²⁵³ These cases also present true conflicts but appear to resolve the conflict by applying the law of the plaintiff's domicile. Upon closer examination, however, most of these cases involve additional contacts between the defendant and the plaintiff's home state. For example, in *Wall v. Noble*,²⁵⁴ a Louisiana physician performed surgery on the Texas plaintiff in Louisiana. However, the physician also had a Texas office and it was in *that* office that the defendant initially saw the plaintiff and gave her medical advice leading to the surgery.²⁵⁵ In *Scharfman by Scharfman v. National Jewish Hospital & Research Center*,²⁵⁶ the court applied plaintiff-favoring New York law to the benefit of a New York plaintiff against a Colorado hospital that had provided treatment in Colorado.²⁵⁷ The court relied on the fact that

(D.C. Cir. 1988); *Garcia v. Public Health Trust of Dade County*, 841 F.2d 1062 (11th Cir. 1988); *Petrella v. Kashlan*, 826 F.2d 1340 (3d Cir. 1987); *Edwardsville Natl. Bank and Trust Co. v. Marion Labs. Inc.*, 808 F.2d 648 (7th Cir. 1987); *Blakesley v. Wolford*, 789 F.2d 236 (3d Cir. 1986); *Bonerb v. Richard J. Caron Found.*, 159 F.R.D. 16 (W.D.N.Y. 1994); *Troxel v. A.I. duPont Inst.*, 636 A.2d 1179 (Pa. Super. Ct. 1994); *Mascarella v. Brown*, 813 F. Supp. 1015 (S.D.N.Y. 1993); *Castelli v. Steele*, 700 F. Supp. 449 (S.D. Ind. 1988); *Truck Ins. Exch. v. Tetzlaff*, 683 F. Supp. 223 (D. Nev. 1988); *Perloff v. Symmes Hosp.*, 487 F. Supp. 426 (D. Mass. 1980); *Conway v. Ogier*, 184 N.E.2d 681 (Ohio Ct. App. 1961). Another three cases apply the law of the place of treatment as against the law of the plaintiff's domicile without making clear whether the plaintiff's home state's law favored him. In each case, however, the law of the place of treatment did favor the defendant. See *Adams v. Harron*, No. 97-2547, 1999 WL 710326 (4th Cir. Sept. 13, 1999); *Hill v. Morrison*, 870 F. Supp. 978 (W.D. Mo. 1994); *Kenerson v. Stevenson*, 621 F. Supp. 1179 (D. Me. 1985).

252. See *supra* notes 104-111, 214-221 and accompanying text.

253. *Kuehn v. Childrens Hosp. Los Angeles*, 119 F.3d 1296 (7th Cir. 1997); *Dahlberg v. Harris*, 916 F.2d 443 (8th Cir. 1990); *Schum v. Bailey*, 578 F.2d 493 (3d Cir. 1978); *Tyminski v. United States* 481 F.2d 257 (3d Cir. 1973); *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973); *Rieger v. Group Health Ass'n*, 851 F. Supp. 788 (N.D. Miss. 1994); *Almonte v. N.Y. Med. Coll.* 851 F. Supp. 34 (D. Conn. 1994); *Pietrantonio v. United States* 827 F. Supp. 458 (W.D. Mich. 1993); *Haydu v. Hosp. for Joint Diseases Orthopaedic Inst.* 557 F. Supp. 577 (S.D.N.Y. 1983); *Kennedy v. Ziesmann*, 522 F. Supp. 730 (E.D. Ky. 1981); *Holzager v. Valley Hosp.* 482 F. Supp. 629 (S.D.N.Y. 1979); *Merchants Nat'l Bank & Trust Co. of Fargo v. United States* 272 F. Supp. 409 (D. N.D. 1967); *Scharfman by Scharfman v. Nat'l Jewish Hosp. & Research Ctr.* 506 N.W.S. 2d (N.Y. App. Div. 1986); *Wall v. Noble*, 705 S.W.2d 727 (Tex. App. 1986).

254. 705 S.W.2d at 727.

255. *Id.* at 733.

256. 506 N.Y.S.2d at 90.

257. *Id.* at 92.

“from a New York office [the defendant] screens potential patients.”²⁵⁸ Thus, in addition to the plaintiff’s residence acting as a contact with New York, the “defendant’s activities . . . constitute[d] significant contacts” with that state.²⁵⁹ In *Schum v. Bailey*,²⁶⁰ a New Jersey patient was treated in New York by a New York defendant.²⁶¹ The court applied plaintiff-favoring New Jersey law, in part, because the defendant-physician was also licensed in New Jersey and had been on the staff of several hospitals there.²⁶² Because the defendant had a local professional presence in the plaintiff’s state, that state acquired an interest in addition to the mere protection of the plaintiff.²⁶³ New Jersey also was interested in applying its more rigorous laws to regulate the defendant’s conduct in order to deter substandard care.²⁶⁴

Another subgroup of these cases applying the law of the plaintiff’s domicile are Federal Tort Claims Act cases.²⁶⁵ When a defendant has a nationwide presence, applying the plaintiff’s state’s law makes more sense than in the usual malpractice case. In such cases, it is less realistic to speak of the state of treatment as having an interest in protecting a “local” defendant. Also, in each F.T.C.A. case the defendant certainly had additional contacts in the plaintiff’s home state. Thus, of the fourteen cases initially noted, eight are removed from the sample on the basis of additional defendant contacts.

Six cases remain that clearly favor the plaintiff’s state over the defendant’s in a true conflict.²⁶⁶ In four of these cases, however, the analysis used by the court focused less on the plaintiff’s domicile than on the forum. In these four cases the court applied the law of the forum, which happened also to be the law of plaintiff’s home state, because of that law’s substantive superiority.²⁶⁷ These cases establish a forum-pref-

258. *Id.*

259. *Id.*

260. 578 F.2d 493 (3d Cir. 1978).

261. *Id.* at 493.

262. *Id.* at 497.

263. *Id.*

264. *Id.* The other cases involving a true conflict and applying the law of the plaintiff’s domicile when the defendant has additional contacts in that state are *Kuehn v. Childrens Hospital, Los Angeles*, 119 F.3d 1296 (7th Cir. 1997) and *Almonte v. New York Medical College*, 851 F. Supp. 34 (D. Conn. 1994).

265. See *Pietrantonio v. United States*, 827 F. Supp. 458 (W.D. Mich. 1993); *Tyminski v. United States*, 481 F.2d 257 (3d Cir. 1973); *Merchants Nat’l Bank & Trust Co. of Fargo v. United States*, 272 F. Supp. 409 (D. N.D. 1967).

266. See *Dahlberg v. Harris*, 916 F.2d 443 (8th Cir. 1990); *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973); *Rieger v. Group Health Ass’n*, 851 F. Supp. 788 (N.D. Miss. 1994); *Haydu v. Hosp. for Joint Diseases Orthopaedic Inst.*, 557 F. Supp. 577 (S.D.N.Y. 1983); *Kennedy v. Ziesmann*, 522 F. Supp. 730 (E.D. Ky. 1981); *Holzsgager v. Valley Hosp.*, 482 F. Supp. 629 (S.D.N.Y. 1979).

267. See *Rosenthal*, 475 F.2d at 445 (refusing to apply the law of the state of treatment because

erence choice of law rule for true conflicts. If the plaintiff is unable to secure jurisdiction in his or her home state and instead must file suit in the physician's home state, a court in that state taking the same choice of law approach would apply defendant-favoring forum law. Additionally, two of these four cases can be classified in the preceding category of cases—the defendant had additional contacts with the plaintiff's state—because the court relied on such contacts in addition to its preference for forum law.²⁶⁸

Thus, two cases appear to apply the law of the plaintiff's domicile over the law of the place of treatment in a true conflict. In *Dahlberg v. Harris*,²⁶⁹ the court held that a Wisconsin borrowing statute did not require the forum court to adopt the defendant-favoring commencement provision of the jurisdiction whose statute of limitations applied; rather, the Wisconsin commencement provision was applicable.²⁷⁰ However, this analysis was driven by analogous Wisconsin precedent construing the borrowing statute and was not based on a policy of favoring local plaintiffs.²⁷¹ The other case, *Haydu v. Hospital for Joint Diseases Orthopaedic Institute*,²⁷² discussed previously, does have an explicitly plaintiff-oriented focus.²⁷³ *Haydu* rests on a questionable analysis of New York policy and has been criticized in subsequent cases.²⁷⁴

This leaves unprovided-for cases to consider. I have identified a total of fourteen cases where each party would benefit from the application of the law of his or her opponent's home state. In these cases, the law of the place of treatment imposes a higher standard of recovery than the law of the plaintiff's home state does. The dominant approach in these cases is again to apply the law of the place of treatment. In six of the fourteen cases, the court applied the law of the place of treatment to serve the deterrent interests of the state in which the treatment occurred.²⁷⁵ This technique, common under interest analysis, converts a

it was "absurd and unjust"); *Rieger* 851 F. Supp. at 791 (refusing to apply the law of the place of treatment as contrary to the public policy of the forum); *Ziesmann*, 522 F. Supp. at 731 (using forum law in light of the earlier cases in that forum indicating a "preference for the application of Kentucky law to cases pending in Kentucky courts"); *Holzager* 482 F. Supp. at 635 (applying forum law as against the place of the treatment, which had a charitable immunity rule, on the ground that the latter rule was "absurd and unjust").

268. See *Rosenthal*, 475 F.2d at 444; *Ziesmann* 522 F. Supp. at 731.

269. 916 F.2d at 443.

270. *Id.* at 448.

271. *Id.*

272. 557 F. Supp. 577 (S.D.N.Y. 1983).

273. See *supra* notes 238-242 and accompanying text.

274. See *supra* note 243 and accompanying text.

275. See *Workman v. Chinchinian*, 807 F. Supp. 634, 640 (E.D. Wash. 1992); *Estate of Sullivan v. United States* 777 F. Supp. 695, 702 (N.D. Ind. 1991); *Lamphier v. Wash. Hosp.* 524 A. 2d 729, 731 (D.C. 1987); *Jenkins v. Cowen*, Civ.A.No. 86-1988, 1987 WL 14601, at 2 (D.D.C.

difficult unprovided-for case into a soluble false conflict.²⁷⁶ Another three cases applied the law of the place of treatment without relying on the deterrent interests of the forum.²⁷⁷ Two more cases followed the deterrence rationale, but applied plaintiff-favoring law from a jurisdiction other than the place of treatment.²⁷⁸ The remaining three cases apply the law of the plaintiff's home state,²⁷⁹ although in one of these cases the plaintiff's home state was also the state of the treatment.²⁸⁰

Another group of cases applies the law of the place of the injury, which usually is also the place of treatment. In all, there are six cases using the place of the injury rule.²⁸¹ In five of these six cases, the place of injury was also the place of treatment.²⁸² Thus, cases applying the law of the place of injury add weight to a general rule favoring the law of the place of treatment.

Finally, there is a group of cases for which it is difficult to account because it was unclear from the opinion what difference, if any, existed between the law of the two states involved. Without this information, it is impossible to classify the cases as true conflicts, false conflicts, or otherwise. In these cases, eight out of twelve apply the law of the place of treatment.²⁸³ The other four apply the plaintiff's law.²⁸⁴

July 17, 1987); *Doyle v. United States*, 530 F. Supp. 1278 (C.D. Cal. 1982); *Daily v. Somberg*, 146 A. 2d 676, 681-82 (N.J. 1958).

276. See *supra* notes 189-195 and accompanying text.

277. See *Farwell v. Un*, 902 F.2d 282, 286-87 (4th Cir. 1990); *Prince v. Trus. of Univ. of Pa.*, 282 F. Supp. 832 (E.D. Pa. 1968); *Christopher v. United States*, 237 F. Supp. 787, 789-98 (E.D. Pa. 1965).

278. *Kaiser-Georgetown Comty. Health Plan, Inc. v. Stutsman*, 491 A.2d 502, 509-10 (D.C. 1985); *Hitchcock v. United States* 665 F.2d 354, 360 (D.C. Cir. 1981).

279. See *Dasha v. Adelman*, 699 N.E.2d 20 (Mass. App. Ct. 1998); *D.L.C. v. Walsh*, 908 S.W.2d 791 (Mo. Ct. App. 1995); *Harper v. Silva*, 399 N.W.2d 826 (Neb. 1987).

280. See *Dasha*, 699 N.E.2d at 26.

281. See *Ham v. Hosp. of Morristown, Inc.*, 917 F. Supp. 531 (E.D. Tenn. 1995); *Donnelly v. McLellan*, 889 F. Supp. 136 (D. Vt. 1995); *Salazar v. United States* 1989 WL 117711 (D. Kan. Civ. A.No. 86-4358-9, 1989); *Purnell v. United States Civ. A.No. 86-4475*, 1987 WL 11211 (E.D. Pa. May 21, 1987); *Knoblett v. Kinman*, 623 F. Supp. 805 (S.D. Ind. 1985); *Tatham v. Hoke*, 469 F. Supp. 914 (W.D. N.C. 1979).

282. The lone exception, which applied the law of the state where the injury manifested itself, is *Purnell*, 1987 WL 11211, at 3.

283. See *Sutton v. Young*, No. 94-4207, 1995 WL 643029 (10th Cir. Nov. 2, 1995); *Ewing v. St. Louis-Clayton Orthopedic Group, Inc.*, 790 F.2d 682 (8th Cir. 1986); *Washington v. United States* 769 F.2d 1436 (9th Cir. 1985); *Ham v. Hops. of Morristown, Inc.*, 917 F. Supp. 531 (E.D. Tenn. 1995); *Lasley v. Georgetown Univ.* 842 F. Supp. 593 (D.D.C. 1994); *Knight v. Dep't of Army*, 757 F. Supp. 790 (W.D. Tex. 1991); *Wojiski v. Gordon*, Civ.A.No. 89-8785, 1990 WL 39153 (E.D. Pa. Mar. 29, 1990); *Bankston v. Univ. of Chicago Hosps. & Clinics*, 639 F. Supp. 1151 (N.D. Ill. 1986).

284. See *Ewing v. St. Louis-Clayton Orthopedic Group, Inc.*, 790 F.2d 682 (8th Cir. 1986); *Safer v. Estate of Pack*, 715 A.2d 363 (N.J. Super. Ct. App. Div. 1998); *Mayer v. United States* 1989 WL 152671 (N.D. Ill. Dec. 4, 1989); *Dower v. Davis*, Civ. A.No. 86-2658-06, 1987 WL 12847 (D.D.C. July 28, 1987). Also included as miscellaneous cases are *Fitsock v. Kaiser Found.*

As the table below illustrates, caselaw support for applying the law of the plaintiff's domicile over the law of the place of treatment is weak. Regardless of whether each party is benefited by his or her own state law or is benefited by the other party's state law, more cases apply the law of the place of treatment than the law of the plaintiff's domicile. Moreover, most of those cases applying the law of the plaintiff's domicile involve additional defendant contacts with that state. Additionally, the place of injury rule in effect applies the law of the place of treatment in most cases. Generalizing, one may say that in interstate medical malpractice cases, the law applied is that of the place of treatment, unless the defendant has significant additional contacts with the plaintiff's home state.

	Place of Treatment	Plaintiff's Domicile	Adjustments
True Conflict	13	14	
Unprovided-for-cases	9	3	
Place of Injury	5	1	
Unclassified	8	4	
Total	35	22	
		(8)	Plaintiff's domicile had other connections with Defendant; FTCA cases
		(4)	Plaintiff's domicile law applied because it was the forum
Revised Total	36	11	

IV. SOLUTIONS TO THE CHOICE OF LAW PROBLEM IN TELEMEDICINE

The preceding discussion of cases lays a foundation for assessing how courts will choose the applicable law in telemedicine cases. While there are some critical factual differences between existing cases and telemedicine cases, much of what the courts have done to date solves telemedicine choice of law cases in a satisfactory manner.

The domiciliary approach to choice of law likely will do little to resolve interstate telemedicine problems because telemedicine cases are almost certain to fall into the category of cases that are hardest for a domiciliary approach to resolve. As discussed above, the easiest cases for a domiciliary-based approach to digest are those in which the parties are from the same state and the conduct or event occurred in a second state.²⁸⁵ The personal approach holds that only the state of common

Health Plan of the Mid-Atlantic States, Inc., Civ. A. No. 89-0490, 1990 WL 129445 (D.D.C. Feb. 6, 1990); *Merkle v. Robinson*, 737 So. 2d 540 (Fla. 1999) and *Packer v. Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.*, 728 F. Supp. 8 (D.D.C. 1989). In these cases, the place of treatment was the same as the plaintiff's domicile.

285. See *supra* notes 33-35 and accompanying text.

domicile has any legitimate claim to govern, and thus such cases are really just “false” conflicts. But cases of common domicile are unlikely to arise in the context of telemedicine. The paradigm case in telemedicine is a physician from one state treating a patient from another. While telemedicine holds great promise for in-state provision of medical services—transmitting services from major urban hospitals to under-served rural areas within the same state—such intrastate cases do not create choice of law problems. Thus, choice of law problems in telemedicine uniformly will involve a patient and a physician from different states. The personal, or domiciliary, approach to choice of law has difficulty handling precisely these cases.²⁸⁶ In a situation where the physician is from a state with a screening statute and the patient is from a state with no such scheme, interest analysis would declare a true conflict. The defendant’s state wishes to protect its resident physician from unfounded claims; the plaintiff’s state wishes to protect its resident’s immediate access to court. The domiciliary approach to choice of law provides no solution in this situation. If each state simply applies its own law when it is the forum, jurisdiction will govern the result.

The other category of split domicile cases are those in which each party is benefited by their opponent’s state’s law. These unprovided-for cases are likewise difficult for a domiciliary-based approach to solve because neither state advances its policy by applying its law. Resolution of these cases requires finding an interest that is not based on benefiting a local citizen. Courts usually find an interest in burdening and regulating a local to ensure safe conduct.²⁸⁷

Because a personal approach to choice of law fails in telemedicine cases, courts then inevitably will be drawn to territorial solutions. As the preceding survey shows, courts addressing choice of law in traditional medical malpractice practice cases have generally reverted to the place of the treatment. In true conflicts cases, this approach upholds concerns of fairness and protecting expectations. In unprovided-for cases (i.e., those where the physician is held to a higher standard of liability under his or her own state’s law), the rule continues to protect expectations and allows a court to find and fulfill an interest in regulating conduct.

Telemedicine cases typically will arise in a different context than traditional malpractice choice of law cases. In the vast majority of traditional malpractice cases the place of injury was also the place of treatment. Cases departing from this pattern usually involved a misdiagnosis. In contrast, in the telemedicine context, negligence and

286. *See id.*

287. *See supra* notes 189-195 and accompanying text.

injury generally *will* be spread across two states; after all, physical distance between the physician and the patient is the presupposition of telemedicine. In the past, courts more often have applied the law of the place of treatment than that of the place of injury when the two are different.²⁸⁸

However, the place of injury rule may be a more attractive alternative in telemedicine cases because in those cases the place of treatment rule loses some of its allure. As noted above, one argument in favor of the place of treatment rule is that it promotes fairness. A patient who comes into a physician's state should expect to be subject to any less favorable law of that state; a physician acting within his or her own state should be able to count on the protections of that state's laws.²⁸⁹ However, in telemedicine cases this fairness argument supporting the place of treatment rule is not as strong. The plaintiff has not gone into the physician's home state. Conversely, the physician could be characterized as projecting himself into the plaintiff's state by digitally treating a person physically there. As the rationale for using the place of treatment rule in telemedicine cases weakens, its competitor, the place of injury rule, may appear more appealing.

I would hope, however, that courts in telemedicine cases do not jettison the place of treatment rule. The characterization suggested in the preceding paragraph—that the defendant-physician is injecting himself into the plaintiff's state—begs the question. The physician is certainly virtually in the patient's state, but similarly the patient is virtually in the physician's state. In truth, both are at home in the body and abroad in their digital spirits. Although a mechanical application of the place of treatment rule becomes impossible in telemedicine, we may retain the policies it promotes by adjusting it to a new context.

We apply the place of treatment rule for two reasons: it is fair and it is more sensible than the place of injury rule. As for the latter reason, the place of injury rule remains subject to criticism as merely double-counting the plaintiff's domicile.²⁹⁰ Indeed, this criticism is even more true in telemedicine cases than in traditional ones because the patient predictably will be injured in his home state. The place of treatment rule also continues to serve the goal of allowing the state in which the physician practices to set standards for him.

Moreover, there is a consistency argument: because the cases are relatively stable in applying the law of the place of treatment in non-telemedicine cases, we should not create a rule that treats telemedicine

288. See *supra* notes 98-101, 122 and accompanying text.

289. See *supra* notes 109-110 and accompanying text.

290. See *supra* note 102 and accompanying text.

providers differently and more harshly than their colleagues practicing face-to-face medicine. Such a distinction would create a disincentive to practicing telemedicine that is contrary to sound health care policy. Additionally, courts should take into account a policy of furthering interstate access to medical care.²⁹¹ A choice of law rule that burdens a telemedicine provider with higher standards of liability when treating patients from certain states will simply discourage the provider from providing care for patients from those states.

Finally, applying the law of the patient's state would lead to a free-loading problem. Lower standards of liability are often enacted to lower the total cost of the activity in question. In the context of medical malpractice, the goal of many states with lower standards of liability is to reduce the cost of medical care for in-state consumers of those services. Allowing an out-of-state patient to impose higher liability on a physician not only subverts the state's attempt to create a lower liability regime, but also bestows a benefit on the patient without the associated cost of that benefit. In effect, the recovery by the out-of-state patient at a higher level of liability is subsidized by the in-state patients of the physician.

Refinement of the place of treatment rule to reflect the different dynamics of telemedicine may also sustain fairness arguments. The place of treatment rule protect the stay-at-home party. In telemedicine cases, though, both parties have stayed at home. Or have they? If both truly had remained local, they never would have entered into a patient-physician relationship. Clearly, one or the other did something to establish the relationship. To properly apply the place of treatment rule to telemedicine, one must examine the origins of the patient-physician relationship. Did the telemedical provider aggressively thrust himself into the plaintiff's state, seeking out-of-state transactions, or was the defendant passive, waiting for patients in other states, probably upon a referral from their local physician, to "come to" him for treatment? By analogy, most of the cases departing from the place of treatment rule in the existing body of caselaw do so where the defendant had additional contacts in the plaintiff's state.²⁹² Thus, the place of treatment rule can continue to be used with the caveat that a physician's solicitation of the patient from another state may subject him to that state's laws.

The devil, of course, is in the details. If a telemedicine provider, who is a specialist in a rare and serious medical condition, informs professional colleagues in another state of his availability for telemedical consults, would such conduct amount to solicitation? What if this physician has performed consultations on ten patients from that state in prior

291. See *Bledsoe v. Crowley*, 849 F.2d 639, 647 (D.C. Cir. 1988) (William, J., concurring).

292. See *supra* notes 254-265 and accompanying text.

years? On twenty patients? Or will courts only find solicitation where more aggressive self-promotion is directed at patients themselves? Again, the existing caselaw offers analogies in which medical providers have been subjected to the law of the patient's state because of the defendant's contacts there.²⁹³

To some extent, the choice of law regime applied to telemedicine will depend upon what emerges as the dominant business model for telemedicine. Internet physicians offering on-line prescriptions for Viagra offer no services that are not locally available. Additionally, these telemedicine providers directly target patients. For this type of telemedicine provider, the law of the patient's state is likely to be applied. On the other end of the spectrum is a less aggressive and more traditional model. The telemedicine treatment is originated by the patient's face-to-face medical provider, who seeks a telemedicine consultation with an out-of-state specialist. The telemedicine provider offers services which *are not* locally available and his patients are directed to him by another health professional, who can be trusted to provide some level of protection for the local patient. In this model, the law of the place of treatment is more likely to be applied.

This disparity of outcomes would not be all bad. Lurking behind choice of law issues in telemedicine is a foundational question of whether we wish to encourage or discourage it. The probable answer to that question is that we wish to encourage good telemedicine (consultations via technology with experts normally not available to the patient) and discourage bad telemedicine (on-line Viagra prescriptions). The choice of law approach I have outlined would dovetail into these substantive policies: the freebooters more likely would be subject to the law of the patient's state and the learned experts would be protected by their own state's laws.

V. CONCLUSION

Caselaw demonstrates that the law applied in interstate medical malpractice cases is and generally should be the law of the place the treatment, unless the physician has initiated the relationship by seeking the patient out in the patient's home state. This rule allows the state of treatment to either protect or regulate physicians who act locally and

293. See *Scharfman by Scharfman v. Nat'l Jewish Hosp. & Research Ctr.* 506 N.Y.S.2d 90 (N.Y. App. Div. 1986) (applying the law of the plaintiff's residence where defendant hospital conducted activity from a New York office which screens potential patients); *Wall v. Noble*, 705 S.W.2d 727 (Tex. App. 1986) (applying law of plaintiff's residence where doctor had a satellite office in that state and the decision as to the need for surgery was made there). *But see* *Blakesley v. Wolford*, 789 F.2d 236 (3d Cir. 1986) (finding that the law of the place of treatment applied despite physician initially consulting patient in the patient's home state).

also protects parties expectations. In the future, as telemedicine becomes more common, the same rule should continue to be applied. This approach will encourage use of telemedicine while protecting of patients from potentially harmful aspects of it.