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NEUMEIER v. KUEHNER: WHERE ARE THE EMPEROR'S CLOTHES?

Aaron D. Twerski*

Neumeier v. Kuehner¹ is a case of exceptional importance. There is every reason to expect that its impact on choice-of-law decisions throughout this country will be as telling and profound as that of *Babcock v. Jackson*.² Indeed it may turn out that *Neumeier* will overtake *Babcock* as the seminal conflicts case. *Babcock* announced to the world the official demise of the First Restatement and the rejection of rigid, broad-based choice-of-law rules. To replace it the court began charting a policy-centered or interest analysis approach. *Neumeier* officially heralds the news that the most sophisticated conflicts court in the nation has become somewhat disenchanted with interest analysis. The court chose the occasion of *Neumeier* to turn its back on *pure interest analysis* for very good reason. The fact pattern in *Neumeier* when placed under the scrutiny of interest analysis yielded no rational resolution to the choice-of-law question. In fact, what was worse, it yielded no real interests for the court to evaluate. It was simply an anathema to the court to make the statement that it had before it a simple interstate accident case for which the host-guest policy of neither of the two contact states was relevant.³ In this instance interest analysis had gone bankrupt. It takes uncommon intellectual honesty to state that "the emperor is wearing no clothes." Especially after admiring the fine silk and splendid colors of the fabric, the investment in one's own pronouncements is usually too great for the retraction to be made by its original protagonist. Yet, in *Neumeier*, Chief Judge Fuld, the author of *Babcock*, explicitly questioned the very foundations of interest analysis.⁴ The reverberations will be felt for a long time to come.

If *Neumeier* has declared open season on fanciful interest analysis it must be admitted that it has also suggested to the courts the desirability of formulating narrow choice-of-law rules. Having questioned the adequacy of the interest analysis approach, the court

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1. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

2. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

3. See text accompanying notes 8 through 13 *infra*.

4. 31 N.Y.2d at 127, 286 N.E.2d at 457, 335 N.Y.S.2d at 69.

was forced to look around for a substitute framework to resolve choice of law problems. The answer was to formulate rules. For some academic commentators the mere idea of formulating a choice-of-law rule is abhorrent.⁵ For others the thought of continuing on with a methodological approach to choice-of-law without formulating rules is viewed as a drastic error.⁶ I think it is a fair statement that the court in *Neumeier* rejected the first set of academic opinion and adopted wholeheartedly the position of the "rulists." For this writer it seems that the entire question has been misunderstood, and the Fuldian choice-of-law rules bear out the state of confusion existing in the art. If we are to have rules it would seem fair to ask that there be some philosophical base underlying the rules. The New York court has suggested that only two options are available: (1.) *ad hoc* interest analysis and (2.) narrowly framed but rigid rules. There is, however, another alternative. It just might be possible to formulate "principled rules" that combine a fair degree of predictability and principled choice-of-law theory.⁷ The Fuldian rules for this author represent a potpourri of the worst aspects of pure interest analysis and the rigidity of the First Restatement all tied together in one package. Having no philosophical base they cannot stand the test of time.

The task now before us is a rather formidable one. We must first examine why the court rejected the classic teaching of interest analysis in *Neumeier*. We then must turn our attention to the Fuld rules and examine just how they will operate in actual practice. Finally it will be necessary to read the signals the leading courts have been giving us the past few years as to the direction they wish to go in choice-of-law and attempt to formulate a principled, predictive choice-of-law methodology based on the decisional path they have been forging. The choice cannot be between *ad hoc* decision-making and unprincipled rules. We cannot abandon this most challenging area of the law to either the romanticists or the technicians.

5. B. CURRIE, NOTES ON METHODS AND OBJECTIVES IN THE CONFLICT OF LAWS, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 177-88 (1963); Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, the Choice-of-Law Process*, 46 TEXAS L. REV. 141 (1967); Baade, *Judge Keating and the Conflict of Laws*, 36 BROOKLYN L. REV. 10 (1969). Professor Leflar's choice-influencing considerations are essentially "anti-rulist"; see R. LEFLAR, AMERICAN CONFLICTS LAW § 105 (1968).

6. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972) and Rosenberg, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 551, 641 (1968).

7. See, e.g., CAVERS, THE CHOICE-OF-LAW PROCESS 139-203 (1964).

I. ZERO-INTEREST ANALYSIS: THE UNPROVIDED FOR CASE

A. *The Illogic of the Unprovided For Case*

Neumeier presented the New York Court of Appeals for the first time with a choice-of-law case in which, under traditional analysis, neither of the contact states had a legitimate governmental interest. How did this strange result come to pass? It was very simple indeed. In *Neumeier* the defendant was a New York resident who travelled from Buffalo, New York to Ontario, Canada. In Fort Erie, Ontario, he picked up his guest, Neumeier, an Ontario resident. Their trip was to take them to Long Beach, also in Ontario, and back again to Neumeier's home in Fort Erie. On the way to Long Beach, at a railroad crossing, the defendant Kuehner's car was struck by a train. Both the host and his guest passenger were killed in the collision.

This simple fact pattern, superimposed on the legal positions of New York and Ontario as to host-guest liability, was destined to produce an anomalous situation. New York, as we all know, has no host-guest statute. Ontario, on the other hand, requires a guest to prove gross negligence against his host in order to recover.⁸ Under interest analysis in order to determine whether there is a true policy conflict one must examine the policies supporting the supposedly conflicting rules. Traditional analysis would lead a court to conclude that New York's policy favoring compensation is not relevant since New York is primarily concerned with the welfare of its domiciliaries. Since the plaintiff is an Ontario domiciliary New York really has no stake or interest as to whether the plaintiff recovers. Conversely, the Ontario host-guest statute has no necessary claim to application. Numerous rationales have been offered for host-guest statutes. Whether the reason be that they were designed to protect insurance companies from host-guest collusion or to protect hosts from ungrateful guests it is clear that Ontario has no strong reason to opt for the operation of the host-guest statute in this instance. The defendant is a New Yorker and if the policies of Ontario's host-guest statute are to protect Ontario domiciliaries or insurance companies doing business in Ontario, then Ontario could care little if compensation were offered off the back of a New York defendant. The late Professor Brainerd Currie, when faced with this kind of dilemma, was quite direct as to its implication. He said:

8. Highway Traffic Act of Province of Ontario [ONT. REV. STAT. ch. 172 (1960)], § 105(2), as amended, Stat. of 1966, ch. 64, § 20(2). The statute provides that the guest passenger cannot recover unless the host was guilty of gross negligence.

"This is the 'unprovided for case' in a very special sense. Neither state cares what happens."⁹ Realizing that this statement was somewhat shocking, Currie went on to defend this position:¹⁰

It may be that the laws of neither state, nor of both states together, purport to dispose of the entire universe of possible cases. Identical laws do not necessarily mean identical policies, and different laws do not necessarily mean conflicting policies, when it is remembered that the scope of policy is limited by the legitimate interests of the respective states.

The net result of all this is that the methodology of interest analysis tells the court that it has before it a simple interstate auto accident case for which neither state has any relevant policy. When Currie said that "traditionalists may stand aghast at this anomaly"¹¹ he understated the reaction considerably. Is it really possible for rational people to conclude that neither New York nor Ontario has any concern with the outcome of this commonplace accident phenomenon?¹² It defies belief. Only the almost mesmerizing effect of the brilliant Currie writing prevented this statement from being subjected to the strongest ridicule.

Why is it that interest analysis met its Waterloo with the advent of the unprovided for case? The answer as this author sees it is rather elementary. In evaluating interests Currie and his academic followers placed tremendous emphasis on the *interest of the domicile state of the parties in granting or denying recovery*. For example, whenever plaintiff hailed from a state granting recovery and defendant was domiciled in a state denying recovery the interest analysts claimed that there was an irreconcilable conflict. After all doesn't the domicile state of one party want him to recover and the domicile state of the other party seek to deny recovery? There was rarely any attempt to view the policies behind these rules in broader perspective. They either protected a domiciliary interest or did not.¹³ It was as simple as all that.

9. B. CURRIE, SURVIVAL OF ACTIONS: ADJUDICATION VERSUS AUTOMATION IN THE CONFLICT OF LAWS, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 152 (1963). Professor Baade has called this phenomenon the "no policy" case or "the case where a sensible result could only be obtained by *altruistic* interest analysis." Baade, *Judge Keating and the Conflict of Laws*, 36 BROOKLYN L. REV. 10, 30 (1969).

10. B. Currie, *supra* note 9, at 153.

11. *Id.* at 152.

12. Professor B. Currie seeks to ameliorate the fears of the traditionalists by adverting to the fact that under traditional First Restatement analysis such a result is possible. See *id.* at 153 n.80. See also Cavers, *supra* note 7, at 39 and 47, for further comments by Professor Currie on the unprovided for case.

13. Recognition was, of course, given to admonitory policies of states designed to

In an unprovided for case like *Neumeier* we face a situation where there are no domiciliary interests to protect on the part of the contact states. New York has no domiciliary interests to protect by its pro-compensation rule since the plaintiff is not a New Yorker. Ontario has no domiciliary interests to protect by its anti-compensation rule because the defendant is not an Ontario domiciliary. Thus, the entire structure of interest analysis crumbled. Having defined the interests as domiciliary oriented when you run out of domiciliaries to protect you run out of interests.¹⁴ The emperor indeed stands naked for all to see.

encourage or discourage certain kinds of activity. But when dealing with negligence concepts these policies are given short shrift. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 219-20 (1971). Clearly when the issue goes to the measure of recovery there is a heavy tendency to view this issue as domiciliary oriented. Professor Cavers has taken a far different view of compensatory policies. Cavers, *supra* note 7, at 144.

14. It is interesting to note the marked difference in the discussion of this problem between the pure interest analysts and Professor David Cavers who has tempered his analysis with considerations other than the standard compensation and anti-compensation interests. See Cavers, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 551, 647, 652 (1968). For Professor Currie the resolution of the unprovided for case depended on the willingness of the pro-compensation court to discover an altruistic purpose in its statute. In responding to a Cavers hypothetical Professor Currie argued for giving the benefit of the New York rule of unlimited recovery for wrongful death to a Massachusetts plaintiff, despite that state's ceiling on recovery. The plaintiff's husband had been killed by the negligence of the New York defendant's servant in Massachusetts.

Professor Currie, writing in the role of Judge to decide the Cavers' hypothetical, remarked as follows:

It would be possible, of course, for New York's courts to hold that the policy of compensation without arbitrary limitation is designed primarily for New York people, and to classify nonresidents on the basis of the laws of their home states in order to deny them the protection of New York law when it is withheld from them by their own law. I would not make such classifications arbitrarily, however. In some situations—for example in the case in which domestic law protects married women from liability for the debts of their husbands—I would be quick to classify and to deny the nonresident married woman a protection, or a disability, not bestowed or imposed by her home state. In other cases—concerning, for example, debtors' exemptions—I should much prefer the principle of equal treatment for all. (See Currie, 'Selected Essays on the Conflict of Laws,' 545-57 (1963).)

Here, since New York will apply its law to give full compensation to the survivors of the New York citizen killed in Massachusetts, I would apply the principle of equality and do the same for the survivors of the deceased citizen of Massachusetts. I find comfort in the fact that the New York defendant's liability insurance will cover it in both cases; in the arrangement of such insurance there is no way to predict whether the victim will be a citizen of New York or of Massachusetts.

Of course I am here venturing to define the scope of New York's policy, which is essentially a task for the legislature. If I am wrong I invite the legislature to correct our decision should I lead my brethren into error as well. But if New York's policy is to be narrowly and selfishly defined in this situation, out of consideration for those local interests that would benefit from such a definition, the decision should be made by the legislature, which is the proper institution to respond to the pressures from local private interests—not by this court, in which sensitivity to such pressures would be, to say the least, unbecoming.

Currie, *in* Cavers, *supra* note 7, at 47-48.

Before turning to the *Neumeier* opinion to examine how the court dealt with this serious theoretical flaw I shall turn briefly to some recent academic opinion of the interest analysts. The unprovided for case presented a considerable challenge to them. Unless they were ready to stand with Currie and admit that in a simple interstate auto accident there was no law which had a claim to application some polity had to be found to rescue the situation. Salvation was discovered in the "common policy" doctrine.¹⁵ It hypothecates a common policy of all states in providing compensation to the victims of auto accidents at the hands of negligent drivers. Host-guest statutes are viewed as limited exceptions to the normal compensatory policy. Thus, in a case like *Neumeier* both New York and Ontario are viewed as having a common policy of compensating plaintiffs for ordinary negligence. Ontario, however, has an exception to this policy for the purpose of protecting Ontario insurers or Ontario domiciliaries. Since the defendant is a New York defendant and the insurer has insured the defendant in New York the Ontario exception is not applicable; ergo, the common policy of compensation surfaces and controls the outcome of the case.

For all the ingenuity that this approach offers it suffers the same basic flaw discussed earlier. If indeed there is an underlying policy which favors the compensation of plaintiffs for injuries done them by negligent defendants, it must be admitted that in the case of host-guest, New York and Ontario have parted ways. The common policy has changed to diversity with regard to whether a guest should be able to recover from a host for ordinary negligence.¹⁶ In order to

It is clear that using Professor Currie's approach New York would be deciding the level of its altruism. Where does the New York court receive counsel as to how to make the decision as to how altruistic it is to be? Furthermore, where else in the law do we decide cases based on a given level of altruism? The tendency to inject into conflicts jurisprudence factors and concepts foreign to any other area of the law has been the subject of extensive discussion by this author. See Twerski, *To Where Does One Attach the Horses*, 61 Ky. L.J. ____ (1973).

Interestingly enough, the altruism theme was apparently a Currie afterthought. In his earlier discussions on the unprovided for case he suggested four alternative solutions to this problem. Currie, *supra* note 9, at 153. This bears out my argument that these kinds of interests are often pulled out of the hat to fit the particular occasion.

15. Sedler, *Weintraub's Commentary on the Conflict of Laws: The Chapter on Torts*, 57 Iowa L. Rev. 1219, 1229 (1972); Weintraub, *supra* note 13, at 234; see also Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner*, this volume. In response to a challenge that he had not adequately solved the unprovided for case, Professor Weintraub analyzed this strange phenomenon in Weintraub, *Response to the Critiques of Professors Sedler, Twerski, and Walker*, 57 Iowa L. Rev. 1219, 1258, 1260-61 (1972). But it appears that as a true interester he is willing to recognize that there may indeed be cases where no state has any policy preference.

16. For an analysis of the common policy approach in contract choice of law, see Twerski, *Choice-of-Law in Contracts—Some Thoughts on the Weintraub Approach*, 57 Iowa L. Rev. 1219, 1239 (1972).

remove this host-guest exception from the picture one must argue that the purpose of the host-guest statute is to protect Ontario domiciliaries or Ontario insurers only. This approach is fraught with problems. It is premised on the belief that host-guest statutes are domiciliary oriented: that they are designed to protect only some persons or class of persons of Ontario origin. The domiciliary bias discussed earlier has returned to haunt us. It may be that there exist rules of law that are clearly designed to protect domiciliaries but by and large this entire approach to interpretation of both statutory and common law policy is naive and simplistic. Perhaps it is true that Ontario passes statutes primarily for the protection of Ontario domiciliaries but it does so because it believes that justice will best be furthered by the implementation of its host-guest policy. Thus, for example, even if the purpose of the host-guest rule was to protect against insurance collusion, Ontario is taking a strong position on the phenomenon of insurance fraud. Could not Ontario also be legitimately concerned that its plaintiffs not be given the opportunity to be defrauders? It hardly seems legitimate to read the interests in the narrow sense which the interest analysts advocate.

The great flaw, however, lies in the belief that rules of law are domicile oriented. There is a tendency to look at the major motivational factor¹⁷ which may have pushed a legislature or court to adopt a certain policy and equate that with the policy of the statute or common law rule itself. The two, of course, are not the same. Thus, it may well be that, absent the desire to protect Ontario domiciled insurance companies, host-guest statutes would not have been passed. But, once the statute is in force, the ramifications of its existence may far surpass the primary motivational factor. The statute in actual operation becomes a strong moralizing statement to the populace of Ontario, and indeed perhaps to all those who pass through Ontario, that Ontario views insurance collusion with great distaste and that as a state it reacts negatively to the possibility of its occurrence. This statement can legitimately be made by Ontario to its plaintiffs, defendants or visitors involved in auto accidents in Ontario. It is legitimately debatable how far and to which persons Ontario should address itself (that is the choice of law question); but its interests can be and undoubtedly are directed to more than its domiciliaries.

The problem of pinning down statutory purpose to determine

17. Judge Breitel, in his concurring opinion in *Neumeier*, referred to the method of the late Brainerd Currie as being "deeply engaged in probing the psychological motivation of legislatures of other states in enacting statutes restricting recoveries in tort cases." 31 N.Y.2d at 131, 286 N.E.2d at 459, 335 N.Y.S.2d at 72.

the true governmental interest has another troubling aspect to it which is very well demonstrated by the development of host-guest statutes.¹⁸ Assume for the moment that it could be conclusively proved that the primary motivation for passing host-guest statutes was to protect insurance companies. How would an Ontario court deal with a purely domestic host-guest case where the defendant was an uninsured motorist? Or, as in the facts of *Neumeier* where suit was being conducted by the representatives of the two estates, since both parties were killed in the crash, how is it that in a pure domestic setting host-guest applies? In both of the above instances the collusion purpose vanishes. Yet, for better or worse, host-guest applies. Perhaps the courts and legislatures were unwise in extending the application of the policy to an area where it does not serve its primary purpose. There has indeed been heavy scholarly criticism that the patchwork of exceptions that has been engrafted onto the host-guest statutes does not further the statutory purpose of preventing collusion against insurance companies.¹⁹ Be that as it may the facts are that a complex decisional network of cases exists in the host-guest area. If at the domestic level it becomes impossible to reconcile the case law or indeed the statute itself with the supposed statutory purpose how do the "interesters" propose to accomplish this feat in the context of an interstate conflicts case? It is impossible to impose a simplistic interest analysis on any common law policy or any fully interpreted statutory scheme. The jurisprudential insights of the interest analysts were valuable. But, they oversold their product. When the hard cases began to roll in, the courts became aware that it was not what it was cracked up to be. Little wonder that the court in *Neumeier* said:²⁰

18. Professor Rosenberg's strong statement on this topic remains to this day un-rebutted by the interest analysts. In commenting on *Kell v. Henderson*, 26 App. Div.2d 595, 270 N.Y.S.2d 552 (3d Dep. 1966), he said:

Searching for governmental interests presupposes that the purposes behind substantive rules are so clear, so singular, so univocal that we can hope to discover them with some certainty and some consensus. This is at odds with reality. Even the simple rules that raise rights and duties with regard to personal injuries are a composite of thrusts and counter-thrusts of many kinds. For instance there are many substantive rules favoring recovery for negligent injuries; but contributory negligence, assumption of risk, workmen's compensation exclusions and other rules are opposed to recovery. To try to bring all the huffing and puffing together into a policy that runs clearly in one direction and that has a measurable intensity that permits comparing it with some contrary policy is, in my judgment, pure fantasy.

Rosenberg, *Two Views on Kell v. Henderson, An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 464 (1967).

19. See, e.g., Comment, *Judicial Nullification of Guest Statutes*, 41 S. CAL. L. REV. 884 (1968); PROSSER, *THE LAW OF TORTS* (4th ed.) at 186 (1971).

20. 31 N.Y.2d at 127, 286 N.E.2d at 457, 335 N.Y.S.2d at 69.

[I]t is frequently difficult to discover the purposes or policies underlying the relevant local law rules of the respective jurisdictions involved. It is even more difficult, assuming that these purposes or policies are found to conflict, to determine on some principled basis which should be given effect at the expense of others.

B. *Testing the Neumeier Analysis*

Neumeier is a difficult case to read. Although conflicts literature had identified the *Neumeier* type case as the "unprovided for case"²¹ the court did not clearly acknowledge that *Neumeier* fit this category. In fact, the court did something very curious. After stating with great clarity that New York had no interest in applying its compensatory policy, since the plaintiff was not a New Yorker, it intimated that by applying Ontario law it was fulfilling an Ontario interest by denying the plaintiff recovery under the Ontario act. The court stated:²²

It is clear that, although New York has a deep interest in protecting its own residents, injured in a foreign state, against unfair or anachronistic statutes of that state, *it has no legitimate interest in ignoring the public policy of a foreign jurisdiction—such as Ontario—and in protecting the plaintiff guest domiciled and injured there from legislation obviously addressed, at the very least, to a resident riding in a vehicle traveling within its borders* (emphasis added).

If the court was correct on its interest analysis the decision should have closed with the above-stated quote. If New York had no interest and Ontario had an interest, then the case was a false conflict and should have posed no serious problem to a court so well-schooled in conflicts law. Why then did the court go on to express its dissatisfaction with its ability to discover and evaluate interests? Others may take the position that the court was seeking to get to the rule-making stage of the case so that the Fuld rules could finally be set in type in a majority opinion. I should like to take a less cynical view and applaud the court's methodology. To understand why the court was unwilling to decide the case solely on the basis of the Ontario interest, it will be helpful to take a close look at another landmark New York case: *Intercontinental Planning Co. v. Daystrom, Inc.*²³

21. See Currie, *supra* note 9.

22. 31 N.Y.2d at 125-26, 286 N.E.2d at 456, 335 N.Y.S.2d at 68.

23. 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969).

Although *Neumeier* is the first clear case which falls in the unprovided for category, it is arguable that *Daystrom* was just such a case. The court in *Daystrom* was faced with the question of whether to apply the New York Statute of Frauds—which requires brokerage contracts to be in writing—against a New York plaintiff. The defendant was a New Jersey corporation which could not seek the protection of New Jersey law since the New Jersey Statute of Frauds did not require brokerage contracts to be in writing. Is this not the unprovided for case?²⁴ The state willing to enforce the contract has no compelling reason to do so since plaintiff is not a domiciliary of New Jersey. New York, the domicile of the plaintiff-broker, might have an interest in enforcing the contract but its statute requires the contract to be in writing and would thus deny enforcement. Thus, neither state had any compelling interest either to enforce or not enforce the contract. If anything, an argument could be made that both states have a subsidiary goal of enforcing contracts and that New York's exception to that goal is not applicable since the defendant is not a New York domiciliary.

The New York Court of Appeals did not follow traditional analysis in *Daystrom*. The court reasoned that New York had an interest in attracting business to the state since it is the commercial center of the United States. As such, it wanted businessmen to know that New York does not enforce oral brokerage contracts. This *tour de force* was completed by finding that New Jersey had no opposing interest if New York would give protection to New Jersey corporations against New York plaintiffs. This kind of interest manipulation is highly questionable. If there is to be no limit to the imagination which courts can bring to bear on interest analysis then perhaps *Daystrom* is acceptable. Are we to believe that the New York Court of Appeals got caught up in fanciful unrealistic reasoning? I think not. The facts in *Daystrom* drove the court to a common sense result that had little to do with interest analysis. If one views the facts in *Daystrom* with any sense of objectivity it is clear that the "center of gravity" of the contract was truly New York. The contract was almost entirely negotiated in New York. The court viewed the

24. Professor Cavers has taken the position that certain laws are not domiciliary oriented (*i.e.*, designed to protect persons) but rather are directed toward governing transactions. He then concludes that territorial considerations are important in deciding a statute of frauds case like *Daystrom*. Cavers, *The Value of Principled Preferences*, 49 TEXAS L. REV. 211, 222 (1971). The ensuing analysis is considerably to the right of Professor Cavers. To the degree that Professor Cavers seeks support in the New York statute of frauds, for the court's territorial thinking, this author is in substantial disagreement. The territorial thinking of the court dominated the discussion. The statutory purpose was, in my opinion, totally contrived.

contract as a "New York contract." The court detailed at great length the heavy territorial involvement of New York in this contractual agreement.²⁵ Let it be noted that we are not now focusing on any single event, such as the place of signing or other isolated event, but a broad range of contacts over a prolonged period of time centering in and around New York.

The court then found itself in a predicament. True, all these territorial contacts centered around New York; but contacts and a continued course of action are not interests within the methodology of interest analysis. Under traditional analysis only the interests of New York domiciliaries were protected by the New York Statute of Frauds and there was no New York domiciliary in need of protection. Instead of recognizing that the territorial dimensions of the case had become predominant and governed the case, the New York court decided to manipulate the interests. The judges sat back and conjured up a deterrent interest—to prevent businessmen who come to New York from entering into oral brokerage contracts even when their home states would enforce such contracts against them. This juggling of interests in order to provide for a sound territorial result is something that the New York court had done prior to *Daystrom*. It cannot in the long run hold up as satisfactory methodology.

All this is by way of introduction to the *Neumeier* analysis. The court in *Neumeier*, as pointed out earlier, began its analysis by negating New York's interest and affirming that Ontario had a legitimate interest in applying its law to deny recovery to an Ontario guest who took a ride in Ontario. Chief Judge Fuld did not elaborate on what was the true nature of that Ontario interest. At one point he alluded to the "ungrateful guest"²⁶ concept as one of

25. The court listed the territorial contacts in the following manner:

It is clear that the instant dispute has sufficient contacts with New York to give our State a substantial interest in applying its policy. Plaintiff is a New York corporation and its international finder's business centers in this State. Moreover, plaintiff's representation of Rochar derived from a New York meeting with Rochar's president. Plaintiff solicited Daystrom's interest in Rochar through an advertisement placed in a New York newspaper, and Mr. Jakob introduced the presidents of the two original principals (Rochar and Daystrom) at a meeting in a New York restaurant. At this New York meeting the principals agreed to compensate plaintiff with a finder's fee if a business relationship was concluded between Rochar and Daystrom. The remaining contacts leading up to the execution of the written finder's fee agreement involve letters and telephone calls emanating from plaintiff's New York office and the New Jersey office of Daystrom. It is therefore clear that the services for which plaintiff claims compensation were substantially rendered in New York, and that our State has a substantial relationship with the formation and negotiation of the finder's fee agreement.

24 N.Y.2d at 384, 248 N.E.2d at 583, 300 N.Y.S.2d at 827.

26. 31 N.Y.2d at 124, 286 N.E.2d at 455, 335 N.Y.S.2d at 67.

the prime purposes of the statute. To the degree that Ontario believes that ungrateful guests should not bring suit for ordinary negligence there is every reason for Ontario to have an interest in Ontario "ungrateful guests" being denied the right to sue. Had the court stopped at this point it would have reaffirmed the domiciliary-oriented approach to interest analysis. It would have done so by juggling interests to accomplish a result which it believed to be fair and just. Yet, the methodology would not have reflected the true reason behind the decision. The decision would have been *Daystrom* revisited.

Happily, the court took a different and more honest route to its decision. The court first looked at the interests and found that this was a case where interest analysis could provide precious little in the way of guidance. The court then went on to state rather clearly that it could not see how it could rationally refuse to apply Ontario law to an Ontario guest for an accident taking place in Ontario.²⁷ The court frankly acknowledged a territorialist bias. Having advocated a territorialist orientation to choice-of-law, *Neumeier* in a sense bore out my prediction that courts would soon tire of simplistic interest analysis and would begin paying attention to the territorial dimensions of fact-patterns coming before them.²⁸ Although much of this happened in *Neumeier* it happened in a peculiar fashion. The court did recognize the severe limitation of interest analysis and did express territorial leanings. Alas, the method for accomplishing the recognition of territorialism were the Fuld rules. It is at this point that I must part company with the court. With all due deference to Chief Judge Fuld's rules, they are neither fish nor fowl; they pay allegiance to two systems—interest analysis and *lex loci delicti*. And it is here that I throw up my hands in despair because I can make no principled sense out of choice-of-law methodology—New York style.

II. THE HOST-GUEST RULES: THE NATURAL LAW OF THE TRIBAL COMMUNITY

The rules proposed by Chief Judge Fuld provide as follows:²⁹

1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the

27. The court stated that it was applying Ontario law which was "obviously addressed . . . to a resident riding in a vehicle traveling within its borders." 31 N.Y.2d at 126, 286 N.E.2d at 456, 335 N.Y.S.2d at 68. There was, of course, nothing obvious about the result under interest analysis. The result is only obvious under a territorial analysis.

28. Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 347, 373 (1971).

29. 31 N.Y.2d at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70.

law of that state should control and determine the standard of care which the host owes to his guest.

2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.

3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.

The court throughout the *Neumeier* opinion was terribly troubled by *Tooker v. Lopez*.³⁰ It will be recalled that the tragic events of that case arose entirely in the state of Michigan. Plaintiff's and defendant's deceased daughters, both New York residents, were co-eds attending Michigan State University. They and a third fellow student, Miss Susan Silk, who was a Michigan resident, embarked on a local Michigan trip which ended in the death of the two New Yorkers. The students were all in residence at the University and the trip was "intrinsically and exclusively a Michigan trip, concerned only with Michigan places, roads and conditions." The choice-of-law problem arose because New York has no host-guest rule and Michigan denies recovery in host-guest cases in the absence of "gross negligence or willful misconduct" on the part of the defendant. The court in *Tooker* found that there was a false conflict in a case between a New York plaintiff versus a New York defendant. Michigan had no interest in applying its law denying recovery when the defendant was a New Yorker.

Following *Tooker* reasoning and pure interest analysis, *Neumeier* must be recognized as an unprovided for case. If Michigan has no interest in applying its host-guest rule when the defendant is a New Yorker why, pray, should Ontario have an interest in applying

30. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

its host-guest rule when the defendant is a New Yorker? The only out is to fall back on the *Neumeier* argument that Ontario had an interest in applying its host-guest rule against an Ontario plaintiff. But, as we noted earlier, the court never explicitly cited that as an interest. Furthermore, the court in *Neumeier* expressed harsh judgment on its ability to identify and evaluate interests. Finally, if we determine that Ontario has an interest in applying its law against an Ontario plaintiff it is hard to justify a rationale that would cut out an Ontario plaintiff and not address itself to an out-of-state plaintiff as well. The denial of recovery does not arise from a desire to deprive plaintiff of recovery but rather from a strong dislike of insurance fraud. As Professor Rosenberg has astutely pointed out, that interest is a "moralizing" one that could address itself to all accidents arising within Ontario.³¹

It is difficult to find a way out of the dilemma. If the interests as set forth in *Tooker* are to be taken seriously then *Neumeier* was incorrectly decided. If *Neumeier* is correct in saying that one must take the interests with a rather heavy dose of salt and pay attention to the territorial contacts and relationships, then *Tooker* was incorrectly decided. It is no answer that in *Tooker* there was a common domicile and in *Neumeier* the domiciles of the parties were disparate. The domicile factor is important for one of two reasons: (1) the parties' domicile creates an interest or (2) it denotes a relationship between the parties in the domicile state. *Neumeier* put to rest the idea that it is inappropriate to give a non-domiciliary defendant the benefit of a protective law which he would not have in his own home state. Thus even where the defendant's domicile does not protect him he may be protected by the law of the state of injury. Very simply, under pure interest analysis it is the defendant's domicile as his protector which creates the interest—not the common nature of the domicile between defendant and plaintiff. The relationship between plaintiff and defendant could be important to a court which placed heavy emphasis on territorial contacts but the court in *Tooker* eschewed that approach. There is one ace in the hole. New York will disregard both conflicting interests and territorial contacts that are heavily weighted against New York in every situation in which New York has a compensatory interest. This approach would reconcile both *Tooker* and *Neumeier*, since in *Tooker* the plaintiff was a New Yorker and in *Neumeier* the plaintiff was from Ontario.

31. See Rosenberg, *supra* note 18, at 463. Professor Rosenberg addressed himself to the anti-ingrate purpose. The same analysis could be made for the insurance collusion interest as well.

The explanation is engaging but will not hold up under scrutiny. Chief Judge Fuld's second rule provides rather clearly that New York will not protect a member of its tribe at all costs. Where defendant is driving in his home state he will be protected from a New York plaintiff's claim if the defendant's home state gives him the protection of host-guest. To defend that result one must be prepared to take the position that where the conduct and domicile of the defendant coincide in his home state, that law applies. But if one is about to destroy a New York interest on the grounds that a defendant acted within a territorial framework from which legitimate expectancies arose then I suggest that *Tooker* makes no sense. The territorial framework was every bit as clear in *Tooker*. If there were a right to expectancies from the territorial contacts then they were such that Michigan law would apply.

The purpose of the above analysis is not to suggest that the Fuld rules are logically inconsistent. One can put together the technology without doing violence to Aristotelian logic. There is, however, a need to project a general philosophical position which emphasizes priorities in choice-of-law. The Fuld rules suffer from a basic inconsistency at this level. The first rule projecting common domicile as the controlling factor puts down territorial considerations completely. This is consistent only with pure interest analysis of the Currie variety. The second and third rules emphasize territorialism with the vengeance of the First Restatement by applying the *lex loci delicti* even in the face of strong opposing interests.

The criticism of the Fuld rules as partaking of First Restatement philosophy is not lightly made. A recent Kentucky conflicts case, *Foster v. Leggett*,³² demonstrates the rigidity of these rules quite dramatically. *Foster* was a host-guest case involving John Leggett and Helen Stringer, close friends who had been dating for a long time. They were both divorced and both worked for several years in the same office for the C&O Railroad in Russell, Kentucky. Helen Stringer lived in Kentucky all her life. John Leggett on the other hand split his allegiance between Kentucky and Ohio. He made his home and technical domicile in Portsmouth, Ohio. But his connections with Kentucky were strong. Not only did he work in Kentucky but he rented a room in Russell, Kentucky, at the YMCA and would stay there anywhere from two to five nights a week. The day before the fatal accident John and Helen got together for a game of golf. At that time they planned for the morrow a day in the big city,

32. 484 S.W.2d 827 (Ky. 1972).

Columbus, Ohio, some 100 miles north of both Russell, Kentucky, and Portsmouth, Ohio. In order to get an early start the next day, John spent the night in his room at the YMCA. The next morning he picked up Helen at her home and they proceeded on U.S. Highway No. 23 to Columbus. They had planned that John would transact some business and Helen would do some shopping. They would then get together for dinner, go to the show or the races, and then return to Russell the night of the same day. On the way John attempted to pass another car. It was raining and the roads were wet. In the process of passing, John lost control of the car, crossed the median and collided with a south-bound vehicle on the highway. Helen Stringer was killed in the collision.

In a suit brought by Carole Foster as administratrix for the estate of Helen Stringer the problem faced by plaintiff was that under the law of Ohio, the locus of the accident, she could not recover. The defendant, Leggett, was guilty at most of ordinary negligence. Under the Ohio host-guest statute there could be no recovery by the guest against the host unless plaintiff could prove that the defendant was guilty of wanton and willful misconduct.³³ The Kentucky rule sets up no such obstacle—ordinary negligence will suffice. The Kentucky court applied Kentucky law permitting the plaintiff recovery against the Ohio defendant with proof of ordinary negligence being held sufficient.

In a recent symposium discussion of *Foster*, Professor Willis Reese, a strong supporter of Chief Judge Fuld's rules, indicated that *Foster* would have been decided the other way had Kentucky adopted the proposed rules.³⁴ Rule Two provides:³⁵

When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile.

At first blush this rule seems eminently just and fair. One ought not to be held liable while acting within his home state merely because a plaintiff from another state has intruded on the defendant's domain.³⁶ This rule envisaged a situation which was highly territorial and when such a situation arises the result reached by the rule is

33. OHIO REV. CODE ANN. § 4515.02 (1965).

34. Reese, *Comments on Foster v. Leggett*, 61 Ky. L.J. ____ (1973).

35. 31 N.Y.2d at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70.

36. See Twerski, *supra* note 28.

fair. But *Foster* is not a case which is territorially dominated by Ohio. The plaintiff in *Foster* did not come to Ohio to be driven around the block by the defendant in his home town. The contrary is true. The defendant in *Foster* came to Kentucky and took the plaintiff on a trip that was to begin in Kentucky and was to end in Kentucky. The defendant himself was highly Kentucky-oriented in that he both worked and spent a good deal of his leisure time in Kentucky. Viewing the factual setting of the *Foster* case the immediate reaction is to categorize it as a rather clear *Kentucky* case. From a territorialist point of view, Kentucky facts dominate the case. It should be noted that what I am advocating is an overall territorial view of the case rather than a focus on the locus of the accident. Territorial thinking has suffered in the past from a heavy emphasis on isolated events rather than an evaluation of the overall factual pattern. By and large juridical events tend to be rather heavily centered in one jurisdiction or another. This is true in the vast majority of conflicts cases. The reason for this phenomenon is that people tend to orient their lives towards central focal points. Where the center of a juridical event is clearly defined in one jurisdiction then the law of that state ought generally to govern. This is not the territorialism of the First Restatement which seeks out a locus of a particular event. It is the "enlightened territorialism" of such foes of the First Restatement as Professor David Cavers³⁷ and the drafters of the Restatement (Second) of Conflict of Laws.

The disturbing feature of the Fuld rules is the return to an isolated event as a crucial factor in deciding choice-of-law cases. In *Foster* the second Fuld rule chooses the law of Ohio because the defendant was domiciled in Ohio and the accident happened there. This result occurred in spite of the very clear territorial preponderance of the case towards Kentucky. This illogic is heightened by the very sharp difference between the first Fuld rule, which pays little attention to the territorial aspects of the case but rather is interest analysis oriented, and the second Fuld rule. It is quite a feat to put First Restatement principles and pure interest analysis together in one set of rules but that seems to have materialized in *Neumeier*.

III. CHOICE-OF-LAW—RULES OR APPROACH—A SUGGESTED ANSWER

The academic and judicial critics of *ad hoc* interest analysis have raised a problem of considerable moment. They argue with vigor

37. See Cavers, *supra* note 9, at 139-203.

that it is wrong for every choice of law case to have to wind its way to the court of last resort in every state.³⁸ Since evaluating the interests is such a difficult and highly subjective process they contend that the courts should develop well defined and narrow rules to deal with recognizable categories of cases. If now and then the rules work an injustice, it is a necessary price to pay for the certainty and predictability of a rule.

Having attacked the Fuld rules as being philosophically unsound it seems only right to suggest an alternative to *ad hoc* decision-making in choice-of-law. Before making that venture I should like to suggest why it was that the courts found *ad hoc* interest analysis so ephemeral and unpredictable. Interest analysis as expounded by the late Professor Currie and his disciples did not suffer from inexactness and unpredictability. That is a myth. The opposite is true. In another forum I have examined the high degree of rigidity of the pure interest analysts in their approach to conflicts cases.³⁹ If indeed courts are willing to read interests in the simplistic fashion that characterizes the works of the interesters there will be few cases to take to the courts of appeal. One need only trot out the charts which the interest theologians have developed and one will discover very quickly whether one is faced with a true or false conflict. If one is willing to go all the way with Currie then one need only determine whether the forum has a legitimate interest and the game is over.⁴⁰ The problem, as I see it, is that courts have been unwilling to buy the arguments of the pure interest analysts. For a brief, fleeting moment in time it seemed that Judge Keating in *Tooker* brought the New York Court of Appeals to pure interest analysis. But it is now evident that the court as a whole has decided against the pure interest analysis approach. If the court has turned its back on the pure, pristine form of interest analysis it is not because of lack of predictability. It is rather because the courts did not like where pure interest analysis was taking them. The results dictated by interest analysis were unacceptable.

The thesis just set forth is not a difficult one to prove. It is clear

38. See, e.g., Reese, *supra* note 6.

39. Twerski, *supra* note 14. See also Peterson, *Developments in American Conflict of Laws: Torts*, 1969 U. ILL. L.F. 289, 308 (1969).

40. B. CURRIE, NOTES ON METHODS AND OBJECTIVES IN THE CONFLICTS OF LAWS, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, 177, 184 (1963). Currie's position was that if a state had a legitimate interest it must apply its own law. Although Professor Currie later modified his position somewhat, see Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 757-58 (1963), and admitted that a state might well interpret its own state interest in a "moderate or restrained" fashion, it is still quite predictable how a Currie-type analysis will result.

that the court was unwilling on the facts in *Neumeier* to apply any law other than that of Ontario. It is also clear that pure interest analysis did not give the court a solid theoretical framework to accomplish that result. It is clear that pure interest analysis would lead the court to a result contrary to Rule Two. Yet, it is clear that the court felt that when a defendant is acting solely within his home state he should not be subjected to a standard of liability or recovery imposed by the plaintiff's state. Interest analysis would have called that situation a true conflict and would find for the plaintiff if the plaintiff were litigating in his home state.⁴¹ It is clear that the court felt that when a plaintiff is injured in his home state the defendant who acted in the plaintiff's domicile should not be permitted to raise the defense peculiar to his home state. Yet it is rather clear that under the Currie variety of interest analysis, if the case were litigated in the defendant's domicile, the court would be bound to give him the benefit of that defense.⁴² The court in all these instances was not opposed to the *ad hoc* nature of interest analysis. They were opposed to the methodology that would have led them to a bad result.

The obvious next question is: Why? For this author the reason is rather elementary. The courts never have been willing to divest themselves of the anti-territorial thinking that was required by interest analysis.⁴³ Thus, a very peculiar syndrome became evident. Where the territorial considerations became substantial in any given case the courts began inventing interests to support the results they felt would be just.⁴⁴ Thus pure interest analysis gave way to *ad hoc* interest analysis. But, if what was behind the creation of *ad hoc* interest analysis was in truth territorial considerations, it was only a matter of time before the truth would out. *Neumeier v. Kuehner* is just such a case. The court acknowledged that the facts were Ontario oriented and applied Ontario law.

If one is willing to recognize a territorial bias, must one fashion

41. B. CURRIE, CONFLICT, CRISIS AND CONFUSION IN NEW YORK, in SELECTED ESSAY ON THE CONFLICT OF LAWS 690, 705; Baade, *Judge Keating and the Conflict of Laws*, 36 BROOKLYN L. REV. 10, 30 (1969).

42. *Id.*

43. Another leading conflicts court has indicated that it too is unwilling to dismiss territorial considerations. In *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970), the defendant driver was a resident of Delaware (host-guest state) who was driving the Pennsylvania plaintiff back home to Pennsylvania (common-law state). The accident occurred in Delaware. The majority, in finding that the Delaware host-guest statute applied, relied heavily on Professor Cavers' territorially oriented principles of preference.

44. *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), and *Intercontinental Planning Co. v. Daystrom*, 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969) are prime examples of this kind of interest manipulation.

rules in order to gain predictability? Again, I emphasize that the territoriality advocated here is not that of the First Restatement. Rather it is an attempt to view a juridical event in its total factual context to locate the vortex of that event. Admittedly there may be close cases that will be difficult of decision. But the vast majority of cases will fall neatly in place. This approach to choice-of-law would not be radically different from the methodology used by appellate courts to deal with concepts such as proximate cause and the reasonable man. To be sure, with all of these concepts there is a gray area that causes some difficulty. But the core concept is both workable and predictable. Taking the New York host-guest cases as examples, there would be no difficulty under the proffered territorial analysis in predicting the application of New York law in *Babcock v. Jackson*⁴⁵ and *Macey v. Rozbicki*.⁴⁶ The host-guest rule would have clearly been applied in *Tooker v. Lopez*,⁴⁷ *Dym v. Gordon*,⁴⁸ *Kell v. Henderson*,⁴⁹ and *Neumeier v. Kuehner*.⁵⁰

What role will interests play in this choice of law process? It will depend on whether the given policy at issue is so clear and unmistakable that the court feels comfortable with negating territorial considerations in favor of the interests. By and large courts have felt uncomfortable with negating important territorial considerations.⁵¹ The time has come to make peace with reality. For this author the turn to territorial considerations is a welcome development. But

45. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 749 (1963).

46. 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966). Utilizing a general territorial analysis rather than a *lex loci* approach it would be evident that New York law should apply. All parties were New York domiciliaries who lived in the same city, Buffalo, N.Y. Plaintiff was a sister of the defendant driver and came to Ontario for a short summer vacation with the defendant at her summer cottage. The center of the relationship between the parties was clearly New York. Professor Rosenberg has correctly criticized the "seat of the relationship" test as unworkable in the *Macey* setting. Rosenberg, *supra* note 18. Unlike the "seat of the relationship" test this author is suggesting a general territorial orientation to choice of law. This would permit the courts to evaluate all the factual contacts and also assess the interests. Where the two reinforce each other it makes the outcome of the case all the easier to predict.

47. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

48. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

49. 26 App. Div.2d 595, 270 N.Y.S.2d 552 (3d Dept. 1966).

50. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

51. After considerable soul searching even Professor Cavers was forced to conclude that his territorial principles of preference were not only tools for the resolution of true conflicts but helped determine whether a conflict is false or avoidable. Cavers, *supra* note 24, at 221. Although Professor Cavers was discussing his third principle of preference I have suggested that his analysis and support of *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965) in CAVERS, THE CHOICE OF LAW PROCESS, APPENDIX (1964), is also dependent on his territorial principles rather than the ephemeral interests suggested by the court in *Dym*. See Twerski, *supra* note 28, at 373, 380.

even for those who disagree it should be clear that few courts have been willing to buy pure interest analysis. To the degree that they have temporized with territorial considerations and masked them in interest language the cases have lacked both coherence and a persuasive quality. If enlightened territorialism is to carry the day then *Neumeier v. Kuehner* may indeed be the seminal conflicts case of the seventies. But it will take a clearer and more definitive statement by the courts that they are in fact taking territorial considerations seriously. When they do this they will have to evaluate their past work product and face up to the fact that in the process of developing the new choice-of-law methodology, decisions were made that cannot be reconciled in spirit with their new found theory.⁵² This task is now before the New York Court of Appeals. The rules and the theory have yet to mesh. A challenging decade lies ahead.⁵³

52. It is already clear that the New York Court of Appeals will have difficulty reconciling *Neumeier* with *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968). In *Miller*, a resident of New York embarked on a short business trip to Brunswick, Maine, where his brother resided and where they had mutual business interests. Two days after his arrival he went for a ride in a car owned by his sister-in-law and driven by his brother. Mr. Miller was killed when the vehicle suddenly swerved off the road and crashed into a bridge railing. Some *three months after the accident* the decedent's brother and sister-in-law, who had been Maine residents, returned to reside in New York. The defendants raised as a partial defense the \$20,000 wrongful death limitation in effect in Maine at the time of the accident. New York law permitted unlimited liability in wrongful death cases.

The Court of Appeals, indulging in pure interest analysis, applied New York law. Following the pattern set forth by Chief Judge Fuld in Rule Two, it would be only logical to conclude that a defendant acting within his home state is protected by the home state's law. The only possible distinction that could be made is that the court did pay considerable attention to the post-transaction change in domicile of the defendant. It is, however, hard to believe that the court decided the case in favor of the New York plaintiff based on that ground alone. See Sedler, *Weintraub's Commentary on the Conflict of Laws: The Chapter on Torts*, 57 IOWA L. REV. 1219, 1229 (1972).

53. On February 13, 1973 the Second Circuit decided *Rosenthal v. Warren*, 169 N.Y.L.J. 40, p. 1, col. 7 (Feb. 28, 1973). A New York physician, Dr. Rosenthal, went to Boston to be treated by Dr. Warren. Following surgery Dr. Rosenthal died. A wrongful death action alleging malpractice was brought against Dr. Warren. Under New York law plaintiff would be entitled to unlimited recovery. Massachusetts law permitted a maximum of \$50,000. The issue is whether New York would apply its own law based on nothing more than the fact that the plaintiff (decedent) was a New York resident. The majority found that New York *would* apply its own law. What is crucial is the gross misreading of *Neumeier*. The court differentiated *Neumeier* on the grounds that in *Neumeier* the court made a strong point of the fact that New York had no interest since the plaintiff was an Ontario resident. The Second Circuit paid no attention whatsoever to the second Fuld rule: that a defendant acting solely within his home state should not be subjected to liability if that state does not cast him in liability simply because the victim's state provides for liability. This is the very situation involved in *Rosenthal*. It is disturbing that the Second Circuit failed to discover the significant shift in theory that *Neumeier* portends. If *Neumeier* indeed has shifted choice of law theory the New York court will have to set it forth with greater clarity. Otherwise we are destined to face meaningless distinction after distinction with rules and theory opposing each other and competing for supremacy.