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CHOICE OF LAW IN PRODUCT LIABILITY ACTIONS: ORDER FOR THE PRACTITIONER IN A REIGN OF CHAOS

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> The law on "choice of law" in the various states and in the federal courts is a veritable jungle, which, if the law can be found out, leads not to a "rule of action" but a reign of chaos dominated in each case by the judge's "informed guess" as to what some *other* state than the one in which he sits *would* hold *its* law to be.[1]

Products move today in streams of commerce which cross state, and often international, boundaries. When litigation concerning the liability for injury or damage caused by these products follows, choice of law plays a crucial role in determining the rights, remedies, and defenses available to the parties. In this article, the authors identify the issues which plaintiffs and defendants should consider in multi-jurisdictional product liability actions and set forth the basic rules for tort and contract choice of law.

I. INTRODUCTION

Unique and complex choice of law issues are arising frequently in product liability lawsuits due to the increased activity of manufacturing

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1. *In re* Paris Air Crash, 399 F. Supp. 732, 739 (C.D. Cal. 1975) (emphasis in original). Other courts and scholars have echoed this sentiment. For example, in Forsyth v. Cessna Aircraft Co., 520 F.2d 608 (9th Cir. 1975), Judge Kilkenny prefaced his opinion by writing that "[t]his appeal presents a classic example of the wilderness in which courts sometimes find themselves when searching for solutions to problems arising under the judicial nightmare known as Conflict of Laws." *Id.* at 609. Dean Prosser articulated the oft-quoted witticism that "[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in strange and incomprehensive jargon. The ordinary court, or lawyer, is quite lost when engulfed or entangled in it." Prosser, *Interstate Publication,* 51 MICH. L. REV. 959, 971 (1953).

firms in various markets.[2] Typically, a legal action seeking redress because of a defective product is potentially maintainable in one of several jurisdictions. For example, in *Foster v. Day & Zimmermann, Inc.*,[3] the United States Court of Appeals for the Eighth Circuit grappled with the question of which state's law applied to an action brought in Iowa by an Oregon resident who, though a Washington resident at the time his hand was injured in a grenade explosion, was stationed at Ft. Benning, Georgia, where the injury occurred. The grenade had been assembled in Texas by one defendant, though it contained a fuse which had been manufactured in Iowa by the other defendant.[4]

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2. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971) defines its subject matter as "that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state." The RESTATEMENT specifies the reason for choice of law: "[t]he world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution." *Id.* § 1.
3. 502 F.2d 867 (8th Cir. 1974).
4. The Eighth Circuit concluded that Iowa law applied. Inasmuch as the product liability law of two arguably relevant jurisdictions, Georgia and Iowa, differed significantly, this decision might have determined the outcome of the case. Defendants argued that Georgia law should apply because the injury occurred there. Georgia had not adopted strict liability at the time of initiation of the lawsuit. Plaintiff claimed that the law of Iowa, which had adopted strict liability, applied. The court reached its choice of law decision by applying Iowa conflict of laws rules, as it was required to do by virtue of the Supreme Court's decision in Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (discussed *infra* note 32 and accompanying text). At that time, Iowa adhered to the significant relationship concept as its conflicts rule. The Eighth Circuit found that Iowa, both as the forum state and, more importantly, as the situs of the manufacture of the fuse, had an interest in the litigation which outweighed any interests entertained by other, arguably relevant, jurisdictions.

Choice of law issues are assuming an international character as well. In Reyno v. Piper Aircraft Co., 479 F. Supp. 727 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981), the courts wrestled with state law and the law of a foreign country. This product liability case involved wrongful death claims arising out of the crash of a small private airplane in Scotland. The airplane had been assembled in Pennsylvania, and its propeller was manufactured and designed in Ohio. The plane had been owned, operated, and maintained throughout both the United States and the United Kingdom. The plaintiff-personal representative was a citizen of the United States and a resident of California, while those killed in the crash, including the pilot, were Scottish citizens. The action was instituted in a California state court, removed to a California federal court, and then transferred to a federal court in Pennsylvania.

The Pennsylvania district court dismissed the action on grounds of forum non conveniens, albeit on the condition that defendants abide by their stipulation to submit to the jurisdiction of the courts of Scotland and to waive the Scottish statute of limitations. The court found in its analysis of the factors to consider in forum non conveniens cases: (1) that significant evidence and witnesses were located in Scotland and accordingly beyond the reach of compulsory process of a federal court; (2) that there was a related action pending in a court in the United Kingdom; and (3) that the law of Scotland would be applicable to certain aspects of the suit.

The Third Circuit reversed and remanded, finding, *inter alia*, that the district

The potential maintainability of a product liability action in one of several jurisdictions is, however, only part of the difficulty. Diverse laws both with respect to choice of law and the other substantive aspects of product litigation present seemingly insurmountable obstacles to choice of law determinations. Yet, inasmuch as a judicial decision on a choice of law issue can be and often is outcome-determinative, the rules are of crucial tactical significance for all parties involved in product liability lawsuits.

For the plaintiff, his counsel must first identify, given venue and jurisdiction restrictions, those forums in which an action can be filed. Counsel must then determine the choice of law rules utilized by those jurisdictions and what substantive law would control, under the applicable choice of law rules, for each potential forum. Based on that determination, the most favorable forum can be selected.

Defendants can employ a similar methodology. Though the plaintiff initially selects the forum, defendants should remember that a transfer opportunity may be available. This removal possibility can be tactically advantageous.[5]

Upon reaching an understanding of a plaintiff's legal theories, defendants must then ascertain, from statute or case law, the choice of law rule applicable to the causes of action being posited. Based on that determination, defendants may be in a position to argue that the forum's choice of law rules require the application of the substantive law of a more favorable jurisdiction.

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court had erred in its determination that Scottish law would govern a substantial part of the case. 630 F.2d at 171.

The Supreme Court reversed the Third Circuit. The Court held that the appellate court had erred in basing its decision, at least in part, on the ground that forum non conveniens dismissal is barred automatically when the law of the alternative forum (Scotland) is less favorable to the plaintiff than the law of the forum chosen by the plaintiff (California). The Supreme Court emphasized that the possibility of an unfavorable change in law should not, by itself, bar dismissal. 454 U.S. at 254. Given its reasoning, the Supreme Court did not reach the issue of choice of laws, other than to say that the district court had not otherwise abused its discretion.

5. Reyno v. Piper Aircraft Co., 479 F. Supp. 727 (M.D. Pa. 1979), *rev'd,* 630 F.2d 149 (3d Cir. 1980), *rev'd,* 454 U.S. 235 (1981), is a particularly telling example of effective tactical use by a defendant of the transfer provision in a choice of law context. The action was instituted against Piper Aircraft Company, the airplane manufacturer, and Hartzell Propeller, Inc., the propeller manufacturer, in a California state court. The defendants removed the action to a California federal court, and Hartzell then moved to transfer the action to Pennsylvania pursuant to 28 U.S.C. § 1404(a) (1976) (venue). The California district court granted the transfer motion as well as Hartzell's motion to quash service of process based on the due process considerations set out in International Shoe Co. v. Washington, 326 U.S. 310 (1945). Piper did not challenge service of process. However, the California district court did not dismiss the action against Hartzell since valid service against it was possible in Pennsylvania. Thus, as to defendant Piper, the Pennsylvania court applied the choice of law rules of California. As to Hartzell, it applied the choice of law rules of Pennsylvania. 479 F. Supp. at 734-35.

This article is intended to highlight choice of law issues frequently arising in product liability actions, as well as to discuss the general rules for choice of law determination currently employed in the various American jurisdictions. Discussion is limited to the three traditional product liability theories of recovery: negligence, warranty, and strict liability, as well as to a comparative newcomer, misrepresentation.[6]

II. IMPLICATIONS OF CHOICE OF LAW TO PLAINTIFF AND DEFENDANT

Typically, a plaintiff in a product liability case will premise his action on strict liability, negligence, and warranty theories. If the forum state characterizes an action for breach of warranty as sounding in tort, then tort choice of law rules will apply to all issues in the case. However, if the jurisdiction characterizes a warranty action as sounding in contract, or if it applies the choice of law rule contained in the Uniform Commercial Code[7] in a manner that differs from its application of tort choice of law rules, then the rules of different states might apply to different issues in the case. The law of one state might govern the tort counts, and the law of another the warranty counts.[8] For example, in *Firestone Tire & Rubber Co. v. Cannon,*[9] a plaintiff sought to recover profits lost while damage caused to his commercial tractor-trailer as a result of a tire blowout was being repaired. The tire was purchased in Maryland, but the accident occurred in Arizona. The Maryland trial court applied Maryland law to the warranty counts, and Arizona law to the negligence and strict liability counts.[10]

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6. *See* RESTATEMENT (SECOND) OF TORTS § 402B (1965); *see also infra* note 24.
7. U.C.C. § 1-105 (1978).
8. "Depecage" is the process of applying rules of different states on the basis of the precise issue involved. Professor Reese has stated:

> Choice of the applicable law should frequently depend upon the issue involved. The search in these instances is not for the state whose law will be applied to govern all issues in a case; rather it is for the rule of law that can most approximately be applied to govern the particular issue. . . .
>
> It also seems probable that greater use of depecage will be an inevitable by-product of the development of satisfactory rules of choice of law. In contrast to the broad rules that have been tried and found wanting, the new rules, if we are indeed to develop such rules, are likely to be narrow in scope and large in number.
>
> In short, a willingness to make a liberal use of depecage would seem a prerequisite to the satisfactory development of narrow rules of choice of law.

Reese, *Depecage: A Common Phenomenon in Choice Of Law,* 73 COLUM. L. REV. 58, 58-60 (1973).

9. 53 Md. App. 106, 452 A.2d 192 (1982), *aff'd per curiam,* 456 A.2d 930 (1983).
10. Inasmuch as choice of law was not an issue on appeal, the fact that the court applied Arizona law to the tort counts is not apparent on the face of the opinion. Defendant decided to rely on Arizona law on the tort counts because at the time of trial there were reported Arizona decisions prohibiting economic loss recovery in negligence or strict liability. There were no decisions on point in Maryland

Choice of law rules may affect the substantive standard of liability applicable to an action, as well as defenses which may be asserted. Not all jurisdictions recognize strict liability in tort,[11] and among those that do not all have adopted the particular elements of the *Restatement (Second) of Torts.*[12] Additionally, defendant's ability to shift and distribute a loss on comparative fault theories[13] and on theories of contribution

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appellate courts. After filing its notice of intention to rely on Arizona law, defendant moved for and was granted partial summary judgment on this issue. The appeal concerned only the warranty count, which was governed by Maryland law.

11. Delaware, Massachusetts, North Carolina, and Virginia do not have strict liability in tort. *See, e.g.,* Cline v. Prowler Indus. of Md., Inc., 418 A.2d 968 (Del. Super. Ct. 1980) (UCC provisions on sales of goods preempt the field, thus preventing the extension of the doctrine of strict liability in tort to the law of sales); Back v. Wickes Corp., 375 Mass. 633, 378 N.E.2d 964 (1978) (Massachusetts warranty recovery is coextensive with the strict liability recovery which is permitted in other states); Coffer v. Standard Brands, Inc., 30 N.C. App. 134, 226 S.E.2d 534 (1976) (court declined to adopt strict liability).

12. RESTATEMENT (SECOND) OF TORTS § 402A (1965) specifies:

> § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Not all jurisdictions require that the plaintiff prove that the defective condition was "unreasonably dangerous." *See, e.g.,* Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 459 (1972); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979). Though Pennsylvania technically has retained the "unreasonably dangerous" requirement, its courts prohibit a jury charge on this element. Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978).

13. The modern comparative fault doctrine has taken a variety of forms, some fashioned by the courts, Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979), and others drawn by state legislatures. ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); C.Z. CODE tit. 4, § 1357 (1963); COLO. REV. STAT. § 13-21-111 (1973); CONN. GEN. STAT. ANN. § 52-572h (West 1980); GA. CODE ANN. § 51-11-7 (1982); HAWAII REV. STAT. § 663-31 (1976); IDAHO CODE § 6-801 (1979); KAN. STAT. ANN. § 60-258a (1976); LA. CIV. CODE ANN. art. 2323 (West Supp. 1980); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MASS. GEN. LAWS. ANN. ch. 231, § 85 (West Supp. 1981); NEB. REV. STAT. § 25-1151 (1979); NEV. REV. STAT. § 41-141 (1979); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1979); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1981); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); N.D. CENT. CODE § 9-10-07 (1975); OHIO REV. CODE ANN. § 2315.19

and indemnity may be affected.[14] Some states have abolished joint and several liability,[15] and not all states permit contribution on the same basis.[16]

Choice of law decisions may affect the identity of proper parties to a product liability action.[17] Though the Uniform Commercial Code is nearly universal,[18] some jurisdictions still require privity of contract,[19] and some do not extend warranty protection to bystanders.[20]

(Page 1981); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1980); OR. REV. STAT. § 18.470 (1977); R.I. GEN. LAWS § 9-20-4 (Supp. 1980); S.D. COMP. LAWS ANN. § 20-9-2 (1979); TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1980); UTAH CODE ANN. § 78-27-37 (1953); VT. STAT. ANN. tit. 12, § 1036 (1973); V.I. CODE ANN. tit. 5, § 1451 (1979); WASH. REV. CODE ANN. § 4.22.010 (Supp. 1980); WIS. STAT. ANN. § 895.045 (West Supp. 1981); WYO. STAT. § 1-1-109 (1977).

14. *See infra* notes 15-16.
15. *See, e.g.,* KAN. STAT. ANN. § 60-258a(d) (1976); OHIO REV. CODE ANN. § 2315.19 (A)(2)(Page 1981).
16. *Compare* MD. ANN. CODE, art. 50, §§ 16-24 (1978) (*pro rata* basis) *with* FLA. STAT. ANN. § 768.31(3) (West 1979) (degree of fault basis).
17. Regardless of plaintiff's theory, there is no difficulty with standing if the one who is injured or damaged is a purchaser or user of the product. There may be problems if the potential plaintiff is a bystander. *See infra* note 20.

    There is a large class of potential defendants, though not all jurisdictions allow suits against all of them. The chain of distribution may include the manufacturer, wholesaler, distributor, importer, and retailer. Additionally, potential defendants might include component manufacturers, commercial purchasers, licensors, bailors, used-product sellers, repairers, putative owners, endorsers, and successor manufacturers.
18. The UCC has been enacted by every state except Louisiana, by the District of Columbia, and by the Virgin Islands. *See generally* 1 R. ANDERSON, UNIFORM COMMERCIAL CODE xi (1981).
19. Most jurisdictions have eliminated the privity requirement in warranty actions under the UCC. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), followed in the majority of jurisdictions, extended a manufacturer's liability to remote purchasers and forseeable users.

    The UCC acknowledges the trend to abrogate the privity requirement but neither approves nor disapproves of the *Henningsen* rule. It specifies:

    > This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

    UCC § 2-313, comment 3 (1978).

    The privity requirement still exists in some states. *See, e.g.,* Miles v. Bell Helicoptor Co., 385 F. Supp. 1029 (N.D. Ga. 1974); Hardesty v. Andro Corp.-Webster Div., 555 P.2d 1030 (Okla. 1976). Some states which retain the privity requirement make an exception when food, drink, drugs, or a dangerous instrumentality is involved. Isaacson v. Toyota Motor Sales, Inc., 438 F. Supp. 1 (E.D.N.C. 1976); Marrillia v. Lyn Craft Boat Co., 271 So. 2d 204 (Fla. Dist. Ct. App. 1973). Some states require privity in economic loss cases only. Addressograph-Multigraph Corp. v. Zink, 273 Md. 277, 329 A.2d 28 (1974); Hole v. General Motors Corp., 83 A.D.2d 715, 442 N.Y.S.2d 638 (1981).
20. The standing of an injured party to assert a claim for breach of warranty depends upon which version of section 2-318 of the UCC has been adopted by the state whose law controls. The UCC drafters provided three alternatives. A bystander would normally be excluded under alternative A ("[a]ny natural person who is in

Choice of law may make a difference in the amount of recovery as well. The type and amount of damages recoverable under wrongful death and survival statutes vary among jurisdictions.[21] In addition, while the negligence theory of recovery is universal, jurisdictions differ on the types of injuries for which they will permit recovery.[22] Moreover, as with the negligence theory, not all jurisdictions which have adopted some form of strict liability permit recovery for the same types of damages.[23]

Finally, the law of a particular jurisdiction may provide theories of recovery other than the traditional theories of negligence, warranty, and strict liability. Among these theories are misrepresentation,[24] mar-

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the family or household of his buyer or who is a guest in his home"), but appears included within the ambit of alternative B or C ("[a]ny natural person who may reasonably be expected to . . . be affected by the goods. . ."). It is important to note that alternatives A and B both require that the claimant suffer personal injury to have standing, but that alternative C does not.

Jurisdictions which have adopted strict liability in tort exhibit a clear trend toward granting a bystander standing to sue. *See, e.g.,* Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (en banc) (vehicle veered across center line of the highway and collided head-on with plaintiff); Annot., 33 A.L.R.3d 415 (1970) (compendium of bystander cases).

21. *See, e.g.,* Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974). In *Turcotte,* a Rhode Island resident instituted a diversity action in the United States District Court for Rhode Island to recover damages for the alleged wrongful death of his son. The son was killed when the vehicle in which he was a passenger was struck by another vehicle in Massachusetts. The owner of the vehicle in which the decedent was riding was a Rhode Island resident, and the vehicle had been purchased in Massachusetts. The driver of the other vehicle involved in the accident was a Massachusetts resident. At that time damages under the Rhode Island wrongful death statute were quasi-compensatory in nature and there was no ceiling on recovery. On the other hand, damages under the Massachusetts wrongful death statute were measured by a punitive standard and there was a $50,000 limit on recovery.

    The First Circuit held that the trial court had correctly applied Rhode Island's interest weighing approach to tort choice of law questions. Rhode Island, the court found, had a strong interest in insuring adequate compensation for a wrongful death. *See also* Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656 (5th Cir. 1968) (under Florida law, Illinois limit on wrongful death damages would apply).

22. *See infra* note 23.

23. States differ as to negligence and strict liability recovery for economic loss. The majority of jurisdictions which have considered the issue have not permitted economic loss recovery under these tort theories. *See, e.g.,* Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978). However, a minority of jurisdictions permit such recovery. *See, e.g.,* West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976).

24. The misrepresentation theory is encompassed in the RESTATEMENT which specifies:

    > One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is sub-

ket share liability,[25] alternative liability,[26] enterprise liability,[27] and concert of action liability.[28]

A trend towards uniformity in the substantive bases of liability imposed for defective products which cause death, personal injury, property damage, or economic loss is emerging. However, this trend has not reached the point where such uniformity exists. Thus, for the plaintiff, assuming the existence of personal jurisdiction and proper venue, the substantive law that will apply to the action may dictate the choice of the forum. For the defendant, the applicable choice of law rule may determine whether the law of another, more favorable, jurisdiction may also arguably be applicable. Indeed, success or failure may hinge

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ject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402B (1965).

Many jurisdictions have adopted this additional theory of recovery. *See, e.g.,* American Safety Equip. Corp. v. Winkler, 640 P.2d 216 (Colo. 1982) (en banc); Klages v. General Ordinance Equip. Co., 240 Pa. Super. 356, 367 A.2d 304 (1976).

25. *See* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied,* 449 U.S. 912 (1980). *See generally* Note, *Market Share Liability: An Answer to the DES Causation Problem,* 94 HARV. L. REV. 668 (1981); Note, *Industry-Wide Liability,* 13 SUFFOLK U. L. REV. 980 (1979).

26. *See* Borel v. Fiberboard Paper Prods., 493 F.2d 1076 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974); Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (en banc). RESTATEMENT (SECOND) OF TORTS § 433B(3)(1965) is an exception to the general rule of section 433B(1) which places on a plaintiff the burden of proving causation:

(3) Where the conduct of two or more actors is tortious, and it is proved that the harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

Id. § 433B(1).

27. *See* Hall v. E. I. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972), *aff'd,* 519 F.2d 715 (6th Cir. 1975); Namn v. Charles C. Frost & Co., 178 N.J. Super. 19, 427 A.2d 1121 (1981); Davis v. Yearwood, 612 S.W.2d 917 (Tenn. App. 1980); *see also* Comment, *DES and a Proposed Theory of Enterprise Liability,* 46 FORDHAM L. REV. 963 (1978). *See generally* Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981).

28. In regard to the concert of action liability theory RESTATEMENT (SECOND) OF TORTS § 876 (1979) provides:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

See generally Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied,* 449 U.S. 912 (1980); Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20 (1979).

on making the right selection.[29]

III. THRESHOLD DETERMINATION: SUBSTANCE OR PROCEDURE?

Both federal courts exercising diversity jurisdiction[30] and state courts distinguish between substantive and procedural matters for purposes of determining which law to apply. In *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[31] the Supreme Court held that a state's choice of law rules are substantive rather than procedural.[32] Thus, fed-

29. Most jurisdictions require a party intending to rely on nonforum substantive law to provide both court and counsel with timely notice of his intention to do so. In Maryland, a party intending to rely on the law of a foreign jurisdiction must give timely notice by filing a notice of intention to so rely:

> A party may also present to the trial court any admissible evidence of foreign laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken of it, reasonable notice shall be given to the adverse parties either in pleadings or by other written notice.

MD. CTS. & JUD. PROC. CODE ANN. § 10-504 (1980) (part of the UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT).

The Court of Appeals of Maryland has stated that if no unfair surprise would result, notice of intention to rely on foreign law may be filed at any time up to the start of trial. Frericks v. General Motors Corp., 274 Md. 288, 336 A.2d 118 (1975). Such situations are rare; the prudent course is to provide notice well in advance of trial.

Absent such notice the trial court is not required to take judicial notice of the law of the relevant state, other than to presume that it is like Maryland's. *See* Frericks v. General Motors Corp., 274 Md. 288, 336 A.2d 118 (1975); Von Frank v. Hershey Nat'l Bank, 269 Md. 138, 306 A.2d 207 (1973); Coppage v. Resolute Ins. Co., 264 Md. 261, 285 A.2d 626 (1972); Gebhard v. Gebhard, 253 Md. 125, 252 A.2d 171 (1969); Leatherbury v. Leatherbury, 233 Md. 344, 196 A.2d 883 (1964). However, in its discretion, a court may take judicial notice of foreign law even when the statutory requirement of notice was not given and proof of the foreign law was not presented. Frericks v. General Motors Corp., 274 Md. 288, 336 A.2d 118 (1975).

30. A plaintiff may file his product liability suit in federal court pursuant to the diversity jurisdiction which exists by virtue of 28 U.S.C. § 1332 (1976) if there is the requisite diversity of citizenship between the parties, and if the amount in controversy, exclusive of interest and costs, exceeds ten thousand dollars. Additionally, a defendant may remove such an action from the state court in which it was originally filed to federal court pursuant to 28 U.S.C. § 1441 (1976).

31. 313 U.S. 487 (1941).

32. *Id.* at 496. Reaffirming *Klaxon,* the Supreme Court has noted that "[a] federal court in a diversity case is not free to engraft on to those state [conflict of law] rules exceptions or modifications which may commend themselves to the state in which the federal court sits." Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4 (1975).

There is an exception to the rule that a federal court exercising diversity jurisdiction must apply the substantive law, including choice of law rules, of the forum in which it sits: transfer of an action between federal courts pursuant to 28 U.S.C. § 1404(a) (1976). In Van Dusen v. Barrack, 376 U.S. 612 (1964), the Supreme Court held that when a diversity action is so transferred, the transferee district court is obligated to apply the state law that would have been applied had there been no change of venue. The Court wrote:

eral courts will utilize the conflicts rules of the state in which it sits.

State courts employ a test which distinguishes between substantive and procedural matters on the basis of whether a rule concerns the manner and means by which a right to recover is enforced.[33] If the rule is procedural, the law of the forum will be applied.[34] If a state determines a particular rule to be substantive, it will apply the law of a jurisdiction determined by application of the forum's choice of law rules.[35]

At the state level this substantive/procedural determination is not made on the basis of whether a particular rule will affect the outcome of the litigation. The classic examples are limitations statutes. Traditionally, the common law recognized statutes of limitations as procedural and thus applied the law of the forum.[36] The theory was that

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> [a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms. . . .
>
> . . . .
>
> Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.

Id. at 638, 639 n.38 (quoting Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941)). *See also* Loughan v. Firestone Tire & Rubber Co., 624 F.2d 726, 729 (5th Cir. 1980); Schreiber v. Allis-Chalmers Corp., 611 F.2d 790, 792-93 (10th Cir. 1979); Rocky Mountain Helicopters, Inc. v. Bell Helicopter Co., 491 F. Supp. 611, 614 (N.D. Tex. 1979); Sibley v. KLM-Royal Dutch Airlines, 454 F. Supp. 425, 426-27 (S.D.N.Y. 1978).

The rationale for this exception is to avoid substantial prejudice to plaintiffs. The section might otherwise become a forum shopping instrument and courts would be reluctant to grant transfers, despite considerations of convenience, if to do so would prejudice the claim of a plaintiff who initially had selected a permissible forum.

33. State courts in product liability actions do not simply serve as neutral forums, as do federal courts. Since state courts are not limited by Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), or the Rules of Decision Act, 28 U.S.C. § 1652 (1976), they are free to choose what they feel to be the preferable rule rather than to determine what is imposed upon them by another sovereign.

34. The *lex fori* (law of the forum) principle rests on considerations of convenience, practicality, and efficiency. The courts of the forum cannot be expected to constantly familiarize themselves with the procedural rules of diverse jurisdictions "involving purely procedural matters such as discovery techniques, calendar practice, service of papers and other 'housekeeping' rules." 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 38.02 (1982).

35. *See, e.g.,* Doughty v. Prettyman, 219 Md. 83, 148 A.2d 438 (1959).

36. See Morton v. Texas Welding & Mfg. Co., 408 F. Supp. 7 (S.D. Tex. 1976), a product liability action for personal injuries caused by the explosion of a propane gas tank manufactured by the defendant. Plaintiffs brought their action on theories of negligence and warranty. The defendant moved to dismiss, claiming that both actions were barred by limitations. Noting that under Texas conflicts rules a limitations statute is procedural, the court applied the Texas tort limitations period to bar the negligence action, but held that the warranty counts were not barred by the four year limitations period. *Id.* at 9, 11; *see also* Brown v. Morrow Mach. Co., 411 F. Supp. 1162 (D. Conn. 1976).

Pursuant to 28 U.S.C. § 1404(a) (1976), a federal transferee court must apply the law that the transferor court would have applied, including its limitations statute. In Schreiber v. Allis-Chalmers Corp., 611 F.2d 790 (10th Cir. 1979), a prod-

statutes of limitations bar the remedy, not the right, in the state where they are applied. However, it is clear that statutes of limitations can be, and are, factors in forum shopping.[37]

In response, a majority of states have enacted borrowing statutes.[38] Under these laws limitations statutes from another jurisdiction are borrowed by the forum to discourage forum shopping. Typically, the statutes apply to nonresidents only, and the statute borrowed is from the jurisdiction where the cause of action arose or accrued.

Stafford v. International Harvester Co.[39] is representative of the types of problems that arise in the application of a borrowing statute. Plaintiff, a New Jersey resident, brought a product liability action in a federal court in New York for injuries incurred in Pennsylvania when the steering mechanism on an International Harvester truck failed. International Harvester is a Delaware corporation. Its principal place of business is not in New York. Eastco Truck Sales, Inc., a New York corporation with its principal place of business in New York, was also a defendant. Eastco had repaired the steering mechanism on the truck shortly before the accident occurred.

Pennsylvania had a two year limitations statute, New York a three year one. The action was brought between two and three years after

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uct liability action transferred from Mississippi to Kansas, the lower court applied the Kansas two-year limitations statute to dismiss the action. The limitations period of the transferor forum, Mississippi, was six years, which would have allowed the action. The Tenth Circuit reversed, holding that the Kansas court was not free to predict that the Mississippi court would not have applied its own *lex fori* rule.

In a number of federal decisions, the traditional rule that statutes of limitations are procedural has been rejected. *See, e.g.,* Henry v. Richardson-Merrell, Inc., 508 F.2d 28 (3d Cir. 1975), where the Third Circuit applied the conflicts rules of New Jersey as established in Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973). The court found that the governmental or state interest approach to choice of law questions applies to procedural matters as well as substantive law. *See also* Farrier v. May Dept. Stores Co., 357 F. Supp. 190 (D.D.C. 1973).

37. *See* Schreiber v. Allis-Chalmers Corp., 611 F.2d 790 (10th Cir. 1979).

38. *See* ALA. CODE § 6-2-17 (1975); ALASKA STAT. § 09.10.220 (1973); ARIZ. REV. STAT. ANN. § 12-506(a) (1982); CAL. CIV. PROC. CODE § 361 (West 1982); COLO. REV. STAT. § 13-80-118 (1973); DEL. CODE ANN. tit. 10, § 8121 (1974); D.C. CODE ANN. § 12-307 (1981); FLA. STAT. ANN. § 95.10 (West 1982); HAWAII REV. STAT. § 657-9 (1976); IDAHO CODE § 5-239 (1979); ILL. REV. STAT. ch. 83, § 21 (1973); IND. CODE ANN. § 34-1-2-6 (Burns 1971); IOWA CODE § 614.7 (1962); KAN. STAT. ANN. § 60-516 (1976); KY. REV. STAT. § 413.330 (1962); LA. CIV. CODE ANN. art. 3532 (West 1953); ME. REV. STAT. ANN. tit. 14, § 866 (1980); MASS. GEN. LAWS ANN. ch. 260, § 9 (West 1959); MICH. COMP. LAWS. § 600.5861 (1968); MISS. CODE ANN. § 15-1-65 (1972); MO. REV. STAT. § 516.190 (Supp. 1983); MONT. CODE ANN. § 27-2-104 (1982); NEB. REV. STAT. § 25-215 (1979); NEV. REV. STAT. § 11.020 (1979); N.Y. CIV. PRAC. LAW § 202 (McKinney 1972); N.C. GEN. STAT. § 1-21 (1969 & Supp. 1979); OR. REV. STAT. § 12.260 (1981); 12 PA. CONS. STAT. ANN. § 39 (Purdon 1980); R.I. GEN. LAWS § 9-1-18 (1956); TENN. CODE ANN. § 28-1-112 (1980); TEX. REV. CIV. STAT. ANN art. 5542 (Vernon 1958); UTAH CODE ANN. § 78-12-45 (1953); WASH. REV. CODE ANN. § 4.16.290 (1960); W. VA. CODE § 55-2-13 (1981); WYO. STAT. § 1-3-117 (1977).

39. 668 F.2d 142 (2d Cir. 1981).

the accident. New York's borrowing statute provided that if a cause of action accrued outside of New York in favor of a nonresident a New York court would apply that state's statute of limitations, if to do so would bar the action.[40] In *Stafford,* the issue was whether the cause of action accrued in New York or Pennsylvania for purposes of the borrowing statute.

The court held that the New York statute could not be applied to bar the action against the New York corporation, since the New York corporation would not have been amenable to suit in Pennsylvania.[41] However, since the Delaware corporation could have been sued in Pennsylvania, the statute barred the action against it.

In arriving at this decision, the court first had to decide whether to apply the traditional *lex loci delicti* rule, or the modern grouping of contacts rule,[42] to determine where the cause of action accrued. Since the issue was then undecided by the New York state courts, the court took a conservative view and applied the place of injury rule.[43]

But the court's inquiry did not stop there. It was troubled by the fact that, since plaintiff could not have sued the New York corporation in Pennsylvania initially, the anti-forum shopping purpose of New York's borrowing statute would not be promoted if it were to bar plaintiff's action as to the Delaware corporation. The court therefore held that a cause of action under New York's borrowing statute could not have accrued as to a particular defendant in a state which could not exercise jurisdiction over that defendant.[44]

Even in those jurisdictions which have not enacted borrowing statutes, the applicable limitations statute of the state whose law otherwise applies may bar the *right* itself, not just the *remedy.* This happens when, for example, a limitations statute is contained within a statute creating the plaintiff's cause of action. The statute is interpreted as substantive,[45] and the action usually will not be permitted by the forum

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40. New York's borrowing statute is typical of most in the United States. It provides:
> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

N.Y. CIV. PRAC. LAW § 202 (McKinney 1972).

41. *Stafford,* 668 F.2d at 154.

42. *See infra* notes 72-78 and accompanying text.

43. 668 F.2d at 149-50.

44. *Id.* at 152-53.

45. In a product liability context, there are three frequent situations in which a limitations statute is contained within a statute creating plaintiff's cause of action. First, the jurisdiction may have enacted a product liability statute which contains its own limitations period. *See, e.g.,* ARIZ. REV. STAT. ANN., §§ 12-542, 12-551 (1982). Second, wrongful death statutes frequently contain limitations provisions. *See, e.g.,* WIS. STAT. ANN. § 893.205(2) (West 1976). Finally, UCC § 2-725 (1978) contains a limitations provision for warranty actions.

jurisdiction.[46]

IV. SELECTION OF THE SUBSTANTIVE LAW IN TORT

Once it has been determined that an issue is substantive, the question in a multi-jurisdictional product liability action is which states' law will apply. A variety of philosophical methods of analysis have been developed and adopted by different jurisdictions. It is therefore essential for the parties to know what method, or rule, has been chosen by the forum state, and why. The particular factual pattern must be interpreted according to the rule of the forum jurisdiction in order to persuade the court which substantive law appropriately controls.

A. The Lex Loci Delicti Commissi Rule

The traditional rule of law by which conflict decisions were made in tort cases, favored by virtually every American jurisdiction prior to the early 1960's, was the *lex loci delicti* rule.[47] The substantive rights of litigants were determined by the law of the place of the wrong. This view, which was espoused by the first *Restatement of Conflict of Laws,*[48] had its conceptual foundation in the "vested rights" doctrine. This doctrine provided that the law of the place of the wrong gave rise to a claim for recovery, which was considered a property right.[49] This pre-existing right accompanied the plaintiff into the forum, and the forum court was asked, as a matter of comity, merely to vindicate existing rights.[50]

Though the rule itself may have been universal, there was no uniformity in determining the place of the "wrong"; that is, determining which state "the last event necessary to make an actor liable for an alleged tort takes place."[51] This was interpreted by most jurisdictions

46. *See generally* 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 38.02 (1982). This approach is endorsed by the RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 142, 143 (1971).

47. *See, e.g.,* Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743 (Fla. 1967); Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d 137 (1969). *See generally* 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 38.05[1] (1982).

48. The original RESTATEMENT OF CONFLICT OF LAWS (1934) was superseded in its entirety by the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). Under the first RESTATEMENT, with minor exceptions, all substantive questions relating to the existence of a tort claim were governed by the local law of the "place of wrong." RESTATEMENT OF CONFLICT OF LAWS § 376 (1934).

49. The "vested rights" theory was explained by the Supreme Court in Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120 (1904): "[t]he theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio,* which, like other obligations, follows the person, and may be enforced wherever the person may be found." *Id.* at 126.

50. *See generally* 2 J. BEALE, TREATISE ON THE CONFLICT OF LAWS (1935); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (2d. ed. 1941).

51. This was described in section 377 of the original RESTATEMENT as "the state where the last event necessary to make an actor liable for an alleged tort takes place." Since a tort is the product of wrongful conduct and of resulting injury,

to mean the state where the injury occurred.[52] But a small minority held the place of injury to be where the product was either manufactured or maintained.[53]

Maryland is one of the few jurisdictions that continues to adhere to the traditional *lex loci delicti* choice of law rule for tort actions. In *Hauch v. Connor,*[54] the Court of Appeals of Maryland affirmed the conservative rule, rejecting the most significant relationship approach to choice of law posited by section 145 of the *Restatement (Second) of Conflict of Laws.*[55] The court gave as reasons for its decision the principle of *stare decisis* and the predictability and certainty which the rule provides.[56] The court also noted the rule's "recogni[tion of] legitimate

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and since the injury follows the conduct, the state of the "last event" is the state where the injury occurred.

52. *See* Babcock v. Maple Leaf, Inc., 424 F. Supp. 428 (E.D. Tenn. 1976); Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288 (S.D. Tex. 1976); *see also* Prashker v. Beech Aircraft Corp., 258 F.2d 602 (3d Cir.), *cert denied,* 358 U.S. 910 (1958); Brooks v. Eastern Air Lines, Inc., 253 F. Supp. 119 (N.D. Ga. 1966); La Prelle v. Cessna Aircraft Co., 85 F. Supp. 182 (D. Kan. 1949); Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743 (Fla. 1967).

53. *See, e.g.,* Bender v. Hearst Corp., 263 F.2d 360 (2d Cir. 1959); Killpack v. Nat'l Old Line Ins. Co., 229 F.2d 851 (10th Cir. 1956); Vrooman v. Beech Aircraft Corp., 183 F.2d 479 (10th Cir. 1950).

54. 295 Md. 120, 453 A.2d 1207 (1983). Plaintiffs and defendant were Maryland residents. At the time of the accident, all were employed by Hertz Corporation. Plaintiffs were passengers in their employer's vehicle, which, while being driven by defendant, was on a round trip from Baltimore-Washington International Airport in Maryland to Dover, Delaware to pick up rental vehicles. The accident occurred in Delaware. Delaware's Workmen's Compensation Act prohibits co-employee suits under these circumstances; Maryland's Workmen's Compensation Act does not.

Defendant, relying on the *lex loci delicti* principle, contended that Delaware law, which precluded the suit, was dispositive. Plaintiff argued that the Maryland court should abandon *lex loci delicti* for the RESTATEMENT SECOND'S most significant relationship test. In the alternative, plaintiff argued that the Maryland act applied because the General Assembly did not intend to preclude co-employees from suits of this nature.

The Court of Appeals of Maryland held *lex loci delicti* still to be the viable choice of law rule in Maryland for tort actions. *Hauch,* 295 Md. at 123, 453 A.2d at 1209. However, the rule was not dispositive in the case. The conflicting law was workmen's compensation, not tort. *Id.* at 125, 453 A.2d at 1210. The court noted that both plaintiff and defendant made claims under the Maryland Workmen's Compensation statute, both lived in Maryland, and the employer was a Maryland corporation. Therefore, the court concluded those "greater Maryland interests" determined the threshold question of the right to bring suit in Maryland. *Id.* at 133-34, 453 A.2d at 1214.

55. *See infra* notes 79-90 and accompanying text.

56. *Hauch,* 295 Md. at 125, 453 A.2d at 1210; *see, e.g.,* Billingsley v. Lincoln Nat'l Bank, 271 Md. 683, 320 A.2d 34 (1974); Vernon v. Aubinoe, 259 Md. 159, 269 A.2d 620 (1970); Brady v. State Farm Mut. Ins. Co., 254 Md. 598, 255 A.2d 429 (1969); Hutzell v. Boyer, 252 Md. 227, 249 A.2d 449 (1969); Joffre v. Canada Dry Ginger Ale, Inc., 122 Md. 1, 158 A.2d 631 (1960); Doughty v. Prettyman, 219 Md. 83, 148 A.2d 438 (1959); Cunningham v. Baltimore & Ohio R.R. Co., 25 Md. App. 253, 334 A.2d 120 (1975).

In White v. King, 244 Md. 348, 223 A.2d 763 (1965), the court of appeals

interests which the foreign state has in the incidents of the act giving rise to the injury."[57] Finally, it noted that when wrongful conduct occurs in a foreign state, "it poses a direct threat to persons and property in that state."[58]

Previously, the Court of Appeals of Maryland had specifically held that *lex loci delicti* is the applicable choice of law rule in product liability actions. In *Frericks v. General Motors Corp.*,[59] a passenger alleged that the injuries he sustained in a North Carolina automobile accident were caused and enhanced by defects in the vehicle, which had been purchased in Maryland. The court held that under the rule of

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addressed the merits of the *lex loci delicti* rule at some length and indicated that change should come from the legislature. *Id.* at 355, 223 A.2d at 767. At the same time, however, the *White* court was able to avoid what might have been perceived as a "harsh" result under *lex loci delicti* by finding that the trial court had erred in its determination that there was insufficient evidence of gross negligence to send the case to the jury. *Id.* at 362, 223 A.2d at 771.

57. *Hauch,* 295 Md. at 125, 453 A.2d at 1210. The court specified the nature of those interests: "[t]he foreign state's resources in the form of police protection, medical assistance and highway maintenance, to mention a few, are expended whenever an automobile collision occurs within its borders." *Id.*

58. *Id.; see also* Gibson v. Fullin, 172 Conn. 407, 374 A.2d 1061 (1977) (no compelling reason presented to abandon *lex loci delicti).*

59. 278 Md. 304, 363 A.2d 460 (1976) (*Frericks II); see also* Frericks v. General Motors Corp., 274 Md. 288, 336 A.2d 118 (1975) (*Frericks* I). Both *Frericks* decisions arose out of the same set of facts. Plaintiff, who was a passenger in the vehicle, was seriously injured when the driver apparently fell asleep at the wheel and the car left the road and overturned. The accident occurred in North Carolina, but the vehicle had been purchased in Maryland. Plaintiff and his father filed suit against the manufacturer and the dealer in Maryland; the trial court sustained defendants' demurrers to the negligence and warranty counts. The Court of Appeals of Maryland reversed except as to the negligence count against the dealer.

With respect to the negligence counts, the court of appeals in *Frericks* I declined to take notice of North Carolina law because defendants did not give notice of intention to rely on it. Instead, it followed Maryland law, which did recognize a cause of action in negligence on a "crashworthy" theory. Thus, it held that the negligence count did state a cause of action against the manufacturer, but not as to the dealer against whom no specific acts of negligence were alleged. *Frericks* I, 274 Md. at 306, 336 A.2d at 128.

The court of appeals applied Maryland law to evaluate the sufficiency of the warranty counts because the vehicle had been sold there. It found that plaintiffs had stated a cause of action for breach of warranty against both defendants. *Id.*

On remand to the circuit court, both defendants filed general issue pleas, and the manufacturer gave notice of intention to rely on North Carolina law. Both defendants then moved for summary judgment. The manufacturer contended, with respect to the negligence count, that plaintiffs failed to state a cause of action under North Carolina law. Both defendants contended, with respect to the warranty counts, that plaintiffs were barred from warranty recovery by their failure to give the notice required by UCC § 2-607(3)(a)(1978).

The trial court granted both motions for summary judgment. The Maryland court of appeals, in *Frericks II,* reversed. The court held first that third-party beneficiaries such as the injured plaintiff are not required to give notice under section 2-607(3)(a). 278 Md. at 316, 363 A.2d at 466. It then concluded that the negligence count was sufficient to state a cause of action under North Carolina law. *Id.* at 319, 363 A.2d at 468.

lex loci delicti, North Carolina's product liability law governed the tort cause of action, which sounded in negligence. Though Maryland had not yet adopted strict liability at the time of the *Frericks* decision, the court of appeals has since defined a strict liability action as an action in tort.[60] There is little doubt that if presented with the specific issue, the court of appeals would apply the *lex loci delicti* principle to a strict liability cause of action.[61]

The virtues of the traditional rule are obvious. It is simple to apply, its implications are clear, and its results are predictable.[62] However, the rule is being increasingly discredited.[63] It relies on a single fortuitous circumstance to determine which law applies. This inflexibility leaves no room for the policy considerations often involved in product liability actions.[64] Too rigidly applied, the rule leads to unjust results which ignore the expectations of the parties and the interests of the states involved.

In the leading decision of *Babcock v. Jackson,*[65] Justice Fuld of the Court of Appeals of New York summarized the problems with the *lex loci delicti* rule:

> Although espoused by such great figures as Justice Holmes and Professor Beale, the vested rights doctrine has long since been discredited because it fails to take account of underlying policy considerations in evaluating the significance to be ascribed to the circumstance that an act had a foreign situs in determining the rights and liabilities which arise out of that act. "The vice of the vested rights theory," it has been aptly stated, "is that it affects to decide concrete cases upon generalities which do not state the practical considerations involved." More particularly, as applied to torts, the theory ignores the interest which jurisdictions other than that where the tort oc-

60. *See* Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976).

61. Other courts have not hesitated to characterize a strict liability action as an action in tort for purposes of determining whether to apply choice of law principles for tort. *See, e.g.,* Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 293-94 (S.D. Tex. 1976).

62. *See, e.g.,* Bishop v. Florida Specialty Paint Co., 389 So. 2d 999, 1000 (Fla. 1980) ("this rule promotes our interest in consistency and stability by application of a stable and objective standard for choice of law determinations"); *see also* Hauch v. Connor, 295 Md. 120, 125, 453 A.2d 1207, 1210 (1983).

63. Scholars have increasingly attacked the *lex loci delicti* rule. *See, e.g.,* Currie, *Conflict, Crisis and Confusion in New York,* 1963 DUKE L.J. 1; Currie, *Survival of Actions: Adjudication versus Automation In the Conflict of Laws,* 10 STAN. L. REV. 205 (1958); Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws,* 58 MICH. L. REV. 637 (1960); Reese, *Choice of Law: Rules or Approach,* 57 CORNELL L. REV. 315 (1972); Stumberg, *"The Place of the Wrong" Torts and the Conflict of Laws,* 34 WASH. L. REV. 388 (1959).

64. One of the earliest pieces criticizing the *lex loci* rule was Cavers, *A Critique of the Choice-Of-Law Problem,* 47 HARV. L. REV. 173, 198 (1933). Cavers criticized the mechanical application of a rule which ignored the facts of each case as well as the respective purposes of the conflicting laws.

65. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

curred may have in the resolution of particular issues.[66]

To varying degrees these sentiments have been echoed by the jurisdictions which have abandoned the *lex loci delicti* rule in favor of analysis which would consider all relevant interests or contacts, as well as their relative significance.[67]

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66. *Id.* at 478, 191 N.E.2d at 281, 240 N.Y.S.2d at 746-47.

67. In another leading decision abandoning the *lex loci delicti* rule, Chief Justice Traynor, in Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967) stated:

> Ease of determining applicable law and uniformity of rules of decision, however, must be subordinated to the objective of proper choice of law in conflict cases, *i.e.*, to determine the law that most appropriately applies to the issues involved. Moreover, as jurisdiction after jurisdiction has departed from the law of the place of the wrong as the controlling law in tort cases, regardless of the issue involved, that law no longer affords even a semblance of the general application that was once thought to be its great virtue.

Id. at 555, 432 P.2d at 730, 63 Cal. Rptr. at 34 (citations omitted); *see also* Gutierrez v. Collins, 583 S.W.2d 312, 317 (Tex. 1979).

At least twenty-five states and the District of Columbia have rejected the place of injury rule and adopted one of several "multiple factors" theories: Armstrong v. Armstrong, 441 P.2d 699 (Alaska 1968); Schwartz v. Schwartz, 193 Ariz. 562, 447 P.2d 254 (1968); Moore v. Montes, 22 Ariz. App. 562, 529 P.2d 716 (1974); Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 550 S.W.2d 453 (1977) (en banc); Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); First Nat'l Bank v. Rostek, 152 Colo. 437, 514 P.2d 314 (1973) (en banc); Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980); Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593 (1970); Zeman v. Canton State Bank, 211 N.W.2d 346 (Iowa 1973); Fuerste v. Bemis, 156 N.W.2d 831 (Iowa 1968); Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Jagers v. Royal Indemnity Co., 276 So. 2d 309 (La. 1973); Beaulieu v. Beaulieu, 265 A.2d 610 (Me. 1970); Pevoski v. Pevoski, 371 Mass. 358, 358 N.E.2d 416 (1976); Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969) (en banc); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972); Brickner v. Gooden, 525 P.2d 632 (Okla. 1974); Casey v. Manson Constr. & Eng'r Co., 247 Or. 274, 428 P.2d 898 (1967); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Busby v. Perini Corp., 110 R.I. 49, 290 A.2d 210 (1972); Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917, *cert. denied,* 393 U.S. 957 (1968); Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979); Johnson v. Spider Staging Corp., 87 Wash. 2d 577, 555 P.2d 997 (1976) (en banc); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). In addition, federal courts in the following jurisdictions predicted abandonment of the *lex loci delicti* concept. Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968); Williams v. Rawlings Truckline, Inc., 357 F.2d 581 (1965); Merchants Nat'l Bank & Trust Co. v. United States, 272 F. Supp. 409 (D.N.D. 1967).

For a detailed treatment of the *lex loci delicti* rule and its relationship to modern choice-of-law methodologies, see Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism,* 40 MO. L. REV. 407 (1975).

Finally, at least one court has taken a middle position. In Sexton v. Ryder Truck Rental Inc., 413 Mich. 406, 320 N.W.2d 843 (1962), the Supreme Court of Michigan rejected *lex loci delicti,* but declined to adopt any other methodology,

Even in those jurisdictions that did not abandon the *lex loci delicti* rule, devices have been created to avoid its application in "difficult" cases.[68] Since under the traditional common law rule *lex fori* applied to all procedural matters, a disfavored feature of the relevant jurisdiction's substantive law can conveniently be characterized as procedural. The forum law, rather than the *lex loci delicti,* would apply on that issue.[69] Additionally, if a jurisdiction has different conflicts rules for torts and contracts, an issue may be characterized as contractual in nature, thereby both avoiding application of *lex loci delicti* and permitting the application of the more favored substantive law.[70] Finally, in the most straight forward manner of avoiding the *lex loci delicti* rule, some courts have flatly refused to apply a feature of the otherwise controlling law because it is against the public policy of the forum.[71]

B. The Grouping of Contacts Rule

Many credit the Court of Appeals of New York with having started a revolution[72] in the conflict of laws field by its decision in 1963 in *Babcock v. Jackson.*[73] The court replaced the *lex loci delicti* rule with a grouping of contacts or center of gravity approach.[74] In *Babcock,* a New York resident sued the driver of a vehicle in which the plaintiff was injured when the defendant lost control of his automobile while driving through Ontario. At that time, Ontario had a guest statute which immunized owners or drivers of noncommercial vehicles from suit for bodily injury or death suffered by passengers in the vehicle. Relying on this statute, which applied as the *lex loci delicti,* the trial court dismissed the action on defendant's motion and the appellate division reversed.

The Court of Appeals of New York reversed the appellate divi-

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holding that when residents of Michigan are involved in an accident in another state, the forum will apply its own law.

68. *See* 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 38.03[1] (1982).

69. *Id.*

70. *Id.*

71. Plaintiffs in Upgren v. Executive Aviation Servs. Inc., 326 F. Supp. 709 (D. Md. 1971), a product liability action, unsuccessfully sought to invoke this public policy exception, previously recognized by the Court of Appeals of Maryland in Henderson v. Henderson, 199 Md. 449, 87 A.2d 403 (1952). Under *lex loci delicti* Minnesota law, as the place of the injury, applied—including its damage limit of $35,000 under the state's wrongful death statute. There was no monetary limit in Maryland's wrongful death statute. Defendants sought to reduce the ad damnum, and plaintiff argued that to do so would be repugnant to the public policy of Maryland. The court failed to find a public policy sufficient to justify the proposed course of action.

72. For example, in Chance v. E.I. Du Pont De Nemours & Co., 371 F. Supp. 439 (E.D.N.Y. 1974), Judge Weinstein stated that *Babcock* "marked the beginning of a new era in choice-of-law analysis in the tort area." *Id.* at 444.

73. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

74. *See* Comment, *Babcock v. Jackson: The Transition from the Lex Loci Delicti Rule to the Dominant Contacts Approach,* 62 MICH. L. REV. 1358 (1964).

sion.[75] Noting that the vested rights doctrine which had formed the conceptual foundation of the *lex loci delicti* rule had long since been discredited, the court stated: "[j]ustice, fairness and 'the best practical result'. . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."[76] Applying its newly adopted approach, the court held that the concern of New York was unquestionably the greater and more direct, and that the interest of Ontario was, at best, minimal.

This particular grouping of contacts or center of gravity approach to determining the substantive tort law applicable to a given case quickly devolved into an exercise in the mere counting of contacts without an evaluation of the significance of each.[77] Courts failed to evaluate the quality of those contacts or the interest of the particular jurisdictions involved in the controversy. It became as rigid and inflexible a rule as was the displaced *lex loci delicti* concept. For this reason, it has not been widely followed. However, New York courts continue to adhere to it as their choice of law rule. [78]

C. Most Significant Relationship Test

In those jurisdictions that have reconsidered their rules on conflict of laws in tort actions, the *Restatement (Second) of Conflict of Laws* approach has been the favored alternative.[79] Choice of law is to be determined under the *Restatement (Second)* approach according to which jurisdiction has the most significant relationship to the occur-

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

76. *Id.* at 478, 191 N.E.2d at 281, 240 N.Y.S.2d at 746. The court noted that this approach had been adopted in the then most recent revision of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS in the field of torts.

77. *See* Tooker v. Lopez, 24 N.Y.2d 569, 301 N.E.2d 519 (1969).

78. *See, e.g.,* McCarthy v. Coldway Food Express Co., 90 A.D.2d 459, 454 N.Y.S.2d 837 (1982); Able Cycle Engines, Inc. v. Allstate Ins. Co., 84 A.D.2d 140, 445 N.Y.S.2d 469 (1981).

79. *See, e.g.,* Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980); Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593 (1970); Adams v. Buffalo Forge Co., 443 A.2d 932 (Me. 1982); Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973); Casey v. Manson Constr. & Eng'r Co., 247 Or. 274, 428 P.2d 898 (1967).

Herbert Wechsler, then Director of the American Law Institute, noted that the RESTATEMENT (SECOND) constitutes a "fresh treatment" of the subject which takes into account "enormous change in dominant judicial thought respecting conflicts problems" that took place in the years preceding publication of the Official Draft: "[t]he essence of that change has been the jettisoning of rigid rules in favor of standards of greater flexibility, according sensitivity in judgment to important values that formerly were ignored. . . . The result presents a striking contrast to the first Restatement in which dogma was so thoroughly enshrined." RESTATEMENT (SECOND) OF CONFLICT OF LAWS vii (1971). Despite this change, all ties with the past have not been destroyed. See *infra* notes 81-82 and accompanying text.

rence and to the parties.[80] A black letter rule of law secondarily states which law the courts will usually apply to a given subject.[81] The most significant relationship test thus ensures "the dynamic element in choice of law adjudication without losing the degree of guidance past decisions may afford."[82]

This approach to choice of law is aptly illustrated by the *Restatement (Second)'s* rule for tort choice of law problems. In light of section six's broad choice-of-law principles, the general principle for torts is as follows:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, *with respect to that issue,* has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
> (2) *Contacts to be taken into account* in applying the principles of § 6 to determine the law applicable *to an issue* include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.[83]

There are then secondary rules for personal injuries,[84] injuries to tangi-

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

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

81. *See, e.g., id.* § 145.
82. *Id.* vii.
83. *Id.* § 145 (emphasis added).
84. *Id.* § 146 (local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship, under the principles stated in section six, to the occurrence and the parties).

ble things,[85] fraud and misrepresentation,[86] and death actions.[87]

In commenting on the position taken by the original *Restatement,*[88] the Reporters specifically stated that the last event rule did not always work well, because situations arise where the state of the last event (place of injury) bears only a slight relationship to the occurrence and the parties with respect to the particular issue.[89] Therefore, they rejected the vested rights approach in favor of an approach which takes into account the tort's relationship to a particular case.[90]

D. The Governmental Interest Analysis

Though the governmental interests and policies of the jurisdictions involved are merely factors in the *Restatement (Second) of Conflicts of Law* approach to choice of law problems,[91] a methodology has developed where they predominate. The governmental interest analysis, first comprehensively developed by Professor Brainerd Currie,[92] has been adopted by the California courts as their choice of law rule under a refinement termed the comparative impairment analysis.[93] This ap-

85. *Id.* § 147 (local law of the state where the injury occurred).

86. *Id.* § 148 ((1) when the plaintiff's action in reliance took place in the state where the false representations were made and received, the local law of the state determines the rights and liabilities of the parties; and (2) when the plaintiff's action in reliance took place in whole or in part in a state other than that where the false representations were made, forum to consider contacts present in the particular case in determining the state which, with respect to the particular issue, has the most significant relationship).

87. *Id.* § 175 (local law of the state where the death occurred).

88. *Id.* § 377.

89. *Id.* § 145 introductory note.

90. *Id.*

91. Under the RESTATEMENT (SECOND), factors relevant to the choice of the applicable rule of law include the relevant policies of the forum and of other interested states, and the relative interests of those states in the determination of the particular issue. *Id.* § 6 (2).

92. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); *see also* Currie, *The Constitution and Choice of Law: Governmental Interests and the Judicial Function,* 26 U. CHI. L. REV. 9 (1958). In Bernhard v. Harrah's Club, 16 Cal. 3d. 313, 546 P.2d 719, 128 Cal. Rptr. 215 (en banc), *cert. denied,* 429 U.S. 859 (1976), the California court called Professor Currie the "father of the governmental interest approach." *Id.* at 320, 546 P.2d at 722, 128 Cal. Rptr. at 218.

93. The governmental interest analysis was spawned and matured in a trilogy of non-product liability cases. The Supreme Court of California first articulated its use of the approach in Justice Traynor's opinion in Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). This wrongful death action arose out of an automobile collision in Missouri. Defendant was a California resident and plaintiff's wife, the operator of the other vehicle, was killed and his two sons were injured. Plaintiff and his family, Ohio residents at the time of the collision, were on their way to California. California was the state of plaintiff's residence at the time of suit. At that time, Missouri limited wrongful death recovery to $25,000; Ohio and California did not.

Justice Traynor applied Ohio law, rejecting the *lex loci delicti* approach to choice of law. He found that California law had no interest on plaintiff's behalf since the plaintiff was not a California resident on the date of the occurrence, and

proach has not been as widely received as the *Restatement (Second)* approach, though it is popular among scholars.

In *Offshore Rental Co. v. Continental Oil Co.*,[94] the Supreme Court of California described the general steps required by the comparative impairment analysis. First, the court must examine the substantive law of each jurisdiction having contact with a transaction to determine if their laws differ as applied to the transaction. If they do not, then the court is presented with a "false conflict," and no choice is required.[95] Second, if the substantive law does differ, the court must determine

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no interest on defendant's behalf since it had no recovery limit. He therefore dismissed California from consideration. As between Missouri and Ohio, he found no substantial Missouri interest which conflicted with Ohio's interest in fully compensating survivors.

In Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974) (en banc), the court further refined its analysis and decided that California, as the forum state, would apply its own measure of damages in a wrongful death action by Mexican citizens against California residents. The suit arose out of a California accident in which a Mexican citizen was killed. Mexico, the court held, had no interest in the application of its limitation of damages rule in the case.

Finally, in Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (en banc), *cert. denied*, 429 U.S. 859 (1976), the court held that Nevada tavern owners who actively solicited California business were liable for injuries proximately caused by the sale of alcoholic beverages to intoxicated patrons. Despite the fact that Nevada did not recognize such a cause of action, when a California resident was injured in an automobile accident occurring in California recovery was permitted.

94. 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978) (en banc). In *Offshore Rental* the issue was whether the trial court appropriately determined that Louisiana law, not California law, governed the right to bring suit for loss of a key employee. In affirming, the court noted that Louisiana has a significant interest in regulating the avoidance of extended financial hardship to their citizens. The court reasoned that the burden to obtain insurance for these types of actions is better borne by California employers.

95. Occasionally, what would appear initially to be a conflict of law problem may, on further examination, reveal that no choice need be made; hence, it is termed a "false" conflict. Courts and commentators, while they agree that such a thing exists, disagree as to what it is.

All do agree that if the laws of the relevant states are the same, and would produce the same result, there is no conflict requiring a choice. For example, in Alaska Airlines, Inc. v. Lockheed Aircraft Corp., 430 F. Supp. 134 (D. Alaska 1977), plaintiff brought an action to recover damages for economic loss because of wing crack defects in four aircraft purchased from the defendant. Defendant moved to dismiss the strict liability claim. Three states—Alaska, Washington, and Georgia—had contacts with the transaction. The court examined the law of each, and found that this theory of recovery was not available on the facts in any of the interested jurisdictions. At that time, neither Alaska nor Washington permitted recovery for economic loss on a strict liability theory. In Georgia, the theory of strict liability was not available to a corporate entity such as the plaintiff. It therefore dismissed the strict liability count and avoided the conflict issue. *See also* Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288 (S.D. Tex. 1976); Paoletto v. Beech Aircraft Corp., 464 F.2d 976 (3d Cir. 1972).

False conflicts of this type, making choice of law academic, are more likely to present themselves in product actions premised on warranty theories than those premised on negligence or strict liability theories. Since the warranty provisions

whether each jurisdiction has an interest in having its law applied. If only one jurisdiction has such an interest, then its law will apply because there is no "true conflict." Finally, when there is a "true conflict" the court proceeds under the comparative impairment approach to determine which jurisdiction's interest would be more impaired if its policy were subordinated to the policy of the other.[96] The conflict is resolved by applying the law of the jurisdiction whose interest would be more impaired if its laws were not applied.[97]

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of Article 2 of the UCC have been adopted in 49 states, it will be infrequent that a product action will have contacts with a non-Code state.

On a different level, some courts and scholars maintain that the "governmental interest" behind the law of each state involved must be examined. If there is not a substantial conflict between the jurisdictions' policies or interests in the particular factual context in which the question arises then the conflict is false or avoidable. *See generally* Currie, *The Disinterested Third State,* 28 LAW & CONTEMP. PROBS. 754 (1963); Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience,* 68 CALIF. L. REV. 577 (1980).

This type of "false conflict" is aptly demonstrated in two nonproduct decisions which were previously discussed. In Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974) (en banc), Mexico's interest in its damage limit for wrongful death was to protect defendants from excessive financial burdens or exaggerated claims. Since the defendants were California residents, Mexico had no interest in applying its damage limits. Thus, there was no true conflict between governmental interests which would require a court to choose between them. Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (en banc), *cert. denied,* 429 U.S. 859 (1976), involved a true conflict between the Nevada interest in protecting tavern owners from excessive liability and California's interest in compensating victims of intoxicated drivers.

96. The Supreme Court of California in *Offshore Rental* elaborated on the manner in which this determination is to be made:

> As Professor Horowitz has explained, this analysis does not involve the court in "weighing" the conflicting governmental interests "in the sense of determining which conflicting law manifest[s] the 'better' or the 'worthier' social policy on the specific issue. An attempted balancing of conflicting state policies in that sense . . . is difficult to justify in the context of a federal system in which, within constitutional limits, states are empowered to mold their policies as they wish."
>
> . . . .
>
> In sum, the comparative impairment approach to the resolution of true conflicts attempts to determine the relative commitment of the respective states to the laws involved. The approach incorporates general factors for consideration: the history and current status of the states' laws and the function and purpose of those laws.

Offshore Rental, 22 Cal. 3d at 165-66, 583 P.2d at 726-27, 148 Cal. Rptr. at 872-73 (citations omitted).

97. California has exhibited a definite pro-forum tendency in its disposition of choice of law problems under the *Reich* analysis. The *Hurtado* court endorsed this tendency:

> [g]enerally speaking, the forum will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state. In such event, he must demonstrate that the latter rule of decision will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply to the case before it.

11 Cal. 3d at 581, 522 P.2d at 670, 114 Cal. Rptr. at 110.

Though adopted, developed, and refined in a series of nonproduct liability cases, the government interest analysis has been utilized consistently in product liability cases applying California choice of law rules.[98] *Browne v. McDonnell Douglas Corp.*[99] is a particularly instructive example of the analysis required under this approach. *Browne* involved wrongful death claims arising out of the midair collision of a Hawker Siddley Trident 3 and a McDonnell Douglas DC-9 near Zagreb, Yugoslavia. At the time of the collision, both planes were under "positive control" by the air traffic control center at Zagreb. Plaintiffs' allegations of defectiveness related to the visibility aspects of the design of the cockpit for the DC-9. The DC-9 was manufactured in California, but owned and operated by a Yugoslavian airline. The Trident 3 was owned and operated by British Airways. Crews and passengers of both were nationals from Yugoslavia, England, Turkey, West Germany, and Australia. Plaintiffs were heirs of passengers from England, Germany, Australia, and Turkey. Though McDonnell Douglas was the sole defendant in this action, there were several actions pending in Yugoslavia.[100]

Plaintiff argued that California law applied to the substantive issues of liability and damages, and that California's rule imposing joint and several liability also applied. Defendants claimed that Yugoslavian law governed the strict liability and joint and several liability issues, and that the substantive law of the various plaintiffs' domiciles governed the issue of damages.[101] The court held that Yugoslavia's law of proportionate liability was to be applied to the claim against McDonnell Douglas, but that California law would apply to the remaining issues of strict liability and wrongful death recovery.[102]

The court first found no compelling reason to displace California's law of strict liability. The plane had been manufactured and designed there, and the fact that it could have been resold in the United States gave California a continuing interest in the soundness of its design. Moreover, Yugoslavia recognized a cause of action for "objective liability," which was similar to strict liability. Therefore, a choice between the two was not necessary. Finally, the court found that the plaintiffs' states of domicile had no interest in recovery for their residents against nonresident defendants.[103]

On the issue of joint and several liability the court found that since none of the plaintiffs were California residents, California's interest in providing maximum recovery for its residents was not implicated. Yu-

98. *See, e.g., In re* Air Crash Disaster Near Chicago, Ill., 644 F.2d 594 (7th Cir. 1981); Gee v. Tenneco, Inc., 615 F.2d 857 (9th Cir. 1980); Rocky Mountain Helicopters, Inc. v. Bell Helicopter Co., 491 F. Supp. 611 (N.D. Tex. 1979).
99. 504 F. Supp. 514 (N.D. Cal. 1980).
100. *Id.* at 519.
101. *Id.* at 516.
102. *Id.*
103. *Id.* at 518.

goslavian law differed from California's in its adherence to the proportionate liability principle under which a defendant is held to pay only that portion of the damages for which he is responsible. Since California had no interest in applying its own law of proportionate liability, and the interests of Yugoslavia would be advanced, the court utilized Yugoslavia's law.[104]

The California courts continue to follow the governmental interest analysis approach to choice of law issues. Though it has not been widely followed by other jurisdictions, it continues to be popular in the literature,[105] and a few courts have applied their own modified version of it.[106]

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104. *Id.*

105. *See, e.g.,* Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience,* 68 CALIF. L. REV. 577 (1980).

106. In Sibley v. KLM-Royal Dutch Airlines, 454 F. Supp. 425 (S.D.N.Y. 1978), the Southern District of New York, as transferee court from a Massachusetts federal court, applied Massachusetts' governmental interest analysis rule. The Massachusetts Wrongful Death Act, which provided for punitive damages, was held not to apply in this diversity action to recover damages for the death of a Massachusetts domiciliary killed in a collision between the aircraft in which he was riding and a Dutch aircraft in Spain. Citing the purpose of punitive damages as deterrence and punishment, the court said that no significant interest of Massachusetts would be promoted because the allegedly tortious conduct of the Dutch defendant occurred in Spain, not in Massachusetts. *Id.* at 429.

Derivative local theories of the major tort choice of law rules continue to be generated. For example, Rhode Island has rejected the *lex loci delicti* rule in favor of "interest weighing." This modern approach is a hybrid consisting of aspects of the RESTATEMENT (SECOND)'S most significant relationship approach and California's governmental interest analysis. The approach has also been called a choice-influencing considerations approach. Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U. L. REV. 267 (1966). In Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917, *cert. denied,* 393 U.S. 957 (1968), the Supreme Court of Rhode Island summarized the interests to be considered under the approach: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. *Id.* at 299, 243 A.2d at 923, *cert. denied,* 393 U.S. 957 (1968).

Advancement of the forum's governmental interest was the determinative factor in the First Circuit's application of the choice influencing considerations rule in Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1977). Decedent, a Rhode Island resident, was killed in an automobile accident in Massachusetts when the vehicle in which he was riding was struck by another vehicle, operated by a Massachusetts resident. Plaintiff was a Rhode Island resident; the vehicle was purchased in Massachusetts. Massachusetts imposed a $50,000 limit on wrongful death recovery; Rhode Island did not. Additionally, the court assumed that strict liability would be a permissible theory of recovery in Massachusetts; however, it would be inappropriate in Rhode Island.

The court affirmed the trial courts' application of Rhode Island law to both issues. On the damage issue, it held that Rhode Island had a strong interest in assuming adequate compensation for its citizens for wrongful death. Inasmuch as Ford was not a Massachusetts corporation, this did not harm interstate order. The court found the remaining three factors inconclusive. On the strict liability issue, the court found that Rhode Island had a strong interest in strict liability as a

V. SELECTION OF THE SUBSTANTIVE LAW IN CONTRACT

Plaintiffs typically premise product liability actions on both tort and warranty theories. Though there exists a uniform statutory choice of law rule for warranty actions, some jurisdictions continue to ignore this directive and apply a variety of choice of law rules to warranty actions.[107] In either event, a result of differing choice of law rules for tort and warranty actions is the applicability of different substantive law to different issues in the same case.

A. The Warranty Action Dimension

Choice of law problems in actions premised in whole or in part on theories of breach of express and implied warranties have been greatly ameliorated by the general enactment of the Uniform Commercial Code. The Code provisions, particularly those of Article Two, have been enacted in all American states, except Louisiana, in the District of Columbia, and in the Virgin Islands.[108] The old Uniform Sales Act had no provision for dealing with choice of law issues when a transaction involved the law of more than one jurisdiction. These issues were resolved in a multi-step process. A court would first characterize a product liability action premised on a warranty theory as sounding in tort or contract, and then apply the relevant traditional choice of law rule to that determination.[109]

Though these difficulties have been ameliorated, they have not ceased to exist. When modern commercial activity is international, the law of foreign non-Code jurisdictions is involved in disputes. Even in national or regional product liability litigation, not all states have enacted the uniform version of Article Two.[110] Furthermore, among those states with the uniform version, different sections have been subject to differing judicial interpretations.[111] Recent product liability de-

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means to protect its citizens from defective products. Application of Rhode Island law, the court determined, would not offend Massachusetts law or policy.

107. *See infra* notes 121-26.

108. *See supra* note 18.

109. *See, e.g.,* Bilancia v. General Motors Corp., 538 F.2d 621 (4th Cir. 1976); Prashker v. Beech Aircraft Corp., 258 F.2d 602 (3d Cir.), *cert. denied,* 358 U.S. 910 (1958).

110. In his treatise on the UCC, Anderson writes:

> The most likely source of interstate conflict as to rules of law would arise where one or some of the states involved have adopted a later Code amendment that was not adopted by the other states involved. Here there will be a conflict of Code versions and the choice of law will be significant when there is an actual substantive difference between the Code versions. When the later amendment involved merely clarifies the earlier version of the Code or codifies decisions thereunder, it is more likely that there will in fact be a true uniformity that makes a choice of law academic. Even though all states having any contact with the transaction have adopted the same version of the Code, the choice of law may retain importance when it is necessary to resort to the pre-Code law.

1 R. ANDERSON, UNIFORM COMMERCIAL CODE § 1-105:8 (1981).

111. The notice requirement of section 2-607(3)(a) is an example of a uniform statute

cisions confirm the continued existence of choice of law problems in the warranty area.[112]

B. U.C.C. Section 1-105

Contrary to the disparate and confusing choice of law rules which pervade the tort field, there exists a single statutory directive by which choice of law issues are to be resolved under the Uniform Commercial Code. The principle is contained in Article One of the Code, which sets forth rules of construction applicable to all transactions grounded in the Code. It therefore applies to the warranty provisions as well as to other Code articles. Section 1-105(1) provides in relevant part:

> Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.[113]

Since all fifty-one jurisdictions have enacted this provision in essentially the same form, it is virtually a uniform rule of choice of law.[114]

The first significant feature of the section is its affirmative recogni-

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that has been subject to differing judicial interpretations. The section provides as follows: "(3) Where a tender has been accepted: (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." UCC § 2-607(3)(a) (1978).

The majority of jurisdictions that have considered the issue have held that the word "seller" as used therein refers only to the buyer's immediate seller. *See, e.g.,* Goldstein v. G.D. Searle & Co., 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1978); Carson v. Chevron Chemical Co., 6 Kan. App. 2d 776, 635 P.2d 1248 (1981); Firestone Tire & Rubber Co. v. Cannon, 53 Md. App. 106, 452 A.2d 192 (1982), *aff'd per curiam,* 456 A.2d 930 (1983); Vintage Homes, Inc. v. Coldiron, 585 S.W.2d 886 (Tex. Civ. App. 1979).

Several courts, however, have concluded or assumed that section 2-607(3)(a) does require timely notice to a "remote seller." *See, e.g.,* Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976); Western Equip. v. Sheridan Iron Works, 605 P.2d 806 (Wyo. 1980).

112. *See, e.g.,* Delhomme Indus., Inc. v. Houston Beechcraft, Inc., 669 F.2d 1049 (5th Cir. 1982) (validity of choice of law provision in contract for the sale of an airplane); Teel v. American Steel Foundries, 529 F. Supp. 337 (E.D. Mo. 1981) (privity and limitations issues in a warranty action); Sellon v. General Motors Corp., 521 F. Supp. 978 (D. Del. 1981) (characterization issues).

113. U.C.C. § 1-105(1)(1978).

114. *See* 1 R. ANDERSON, UNIFORM COMMERCIAL CODE § 1-105 (1981). The only significant local variation of section 1-105 is in Mississippi. Mississippi adds the following paragraph at the end of subsection (1):

> Provided, however, the law of the State of Mississippi shall always govern the rights and duties of the parties in regard to disclaimers of implied warranties of merchantability or fitness, limitations of remedies for breaches of implied warranties of merchantability or fitness, or the necessity for privity of contract to maintain a civil action for breach of implied warranties of merchantability or fitness notwithstanding any

tion of the right of parties to a transaction to choose their own law. They are subject to the rules stated in the sections listed in subsection (2), but none of them affect section 1-105 insofar as a product liability action is premised on a warranty theory. The transaction also is required by the section to bear a "reasonable relation" to the chosen jurisdiction.[115] From a product liability perspective, however, it is unlikely that parties to the typical sales transaction will specify the law which is to govern. This provision is more likely to be invoked under Code transactions that contemplate a future course of dealings between the parties.[116]

Absent an agreement between the parties, section 1-105(1) provides that the forum's UCC applies to transactions bearing an "appropriate relation" to that state. If a transaction takes place in its entirety in a particular jurisdiction, that jurisdiction's Code will apply. However, comment 3 indicates that when a transaction has significant contacts both with a state which has enacted the Code and with other jurisdictions, the question of what relation is "appropriate" is left to judicial

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agreement by the parties that the law of some other state or nation shall govern the rights and duties of the parties.

MISS. CODE ANN. § 75-1-105 (1972).

115. The UCC provides:

> 1. Subsection (1) states affirmatively the right of the parties to a multistate transaction or a transaction involving foreign trade to choose their own law. That right is subject to the firm rules stated in the six sections listed in subsection (2), and is limited to jurisdictions to which the transaction bears a "reasonable relation." In general, the test of "reasonable relation" is similar to that laid down by the Supreme Court in Seaman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927). Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen.

UCC § 1-105 comment 1 (1978).

The question in *Seaman* was whether the Pennsylvania or New York usury statute would govern a loan transaction between a New York borrower and a Pennsylvania lender. The loan agreement did not specify the law which was to apply. The parties signed the contract in Pennsylvania, and it provided for performance in that state. This was done so that Pennsylvania's usury law would apply; the agreement was unenforceable under New York's usury law. In applying Pennsylvania law, the Court said the loan would be upheld if it was valid either at the place of making or at the place of performance. The Court did add a good faith limitation and a requirement of "normal relation" between the transaction and the stipulated land. 274 U.S. at 408.

116. Occasionally, however, parties to a "one-shot" sales transaction do specify controlling law. In R&L Grain Co. v. Chicago Eastern Corp., 531 F. Supp. 201 (N.D. Ill. 1981), the parties to a contract of sale of a grain storage bin expressly agreed that the contract would be governed by Illinois substantive law. Plaintiff later sued for property damage and damages for economic loss sustained when the roof of the bin collapsed. Finding that the "appropriate relation" to Illinois existed because the defendant resided there and the contract was executed there, the court enforced the parties' agreement to make Illinois law binding. *Id.* at 206.

determination.[117]

Generally, the "appropriate relation" test of the Uniform Commercial Code has been considered the equivalent of modern conflict of law concepts.[118] Courts thus determine whether a jurisdiction bears an appropriate relation by evaluating the relationship of a particular transaction to the relevant jurisdictions.[119] For example, in *Owens-Corning Fiberglas v. Sonic Development Corp.*,[120] an action for breach of warranty was brought against the manufacturer of three air compressors. The Kansas court found that an appropriate relation existed between the transaction and the State because defendant had shipped the air compressors into Kansas, they had been used in Kansas, and the breach, if any, occurred in Kansas.

Maryland is one of many jurisdictions that does not use section 1-105 as its choice of law rule in a warranty context. The Court of Appeals of Maryland has stated that the law of the place of sale determines the extent and effect of the warranties which arise.[121] This place of sale rule has been applied specifically in product liability actions premised, in part, on warranty theories. In *Volkswagen of America, Inc. v. Young*,[122] the allegedly defective vehicle was purchased in Alabama and the Court of Appeals of Maryland stated:

> The general rule, to which we adhere is that "the law of the place of the sale determines the extent and effect of the war-

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117. The UCC provides:

> [t]he mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the code.

UCC § 1-105 comment 2 (1978).

118. "[T]he Code does not define what constitutes an appropriate relation of a transaction to a state and therefore general principles of conflict of laws will be applied in such cases." 1 R. ANDERSON, UNIFORM COMMERCIAL CODE § 1-105 (1981).

119. *See, e.g.*, Wentworth v. Kawasaki, 508 F. Supp. 1114, 1115 (D.N.H. 1981); Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 290-91 (S.D. Tex. 1976); Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982).

120. 546 F. Supp. 533 (D. Kan. 1982).

121. Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (1974). The United States District Court for the District of Maryland had earlier predicted, in Upgren v. Executive Aviation Servs., Inc., 326 F. Supp. 709 (D. Md. 1971), that if confronted with the issue, the state court of appeals would apply the *lex loci delicti* rule to an implied warranty action, on the grounds that it bears such a close relationship to one based in tort. *Id.* at 716.

Even after the court of appeals proved the *Upgren* prediction incorrect as to the *lex loci delicti* rule, it has been successfully argued that warranty is nonetheless akin to tort for other purposes. In Loh. v. Safeway Stores, Inc., 47 Md. App. 110, 422 A.2d 16 (1980), the Court of Special Appeals of Maryland concluded that an action in warranty can be a claim in tort for purposes of the Uniform Contribution Among Joint Tortfeasors Act, MD. ANN. CODE art. 50, §§ 16-24 (1979).

122. 272 Md. 201, 321 A.2d 737 (1974).

> ranties which attend the sale." Since the Volkswagen was purchased in Alabama, the law of that State determines whether a cause of action for breach of warranty was alleged.[123]

In *Frericks v. General Motors Corp.*[124] Maryland law was applied to determine the sufficiency of the warranty counts because the vehicle had been sold in Maryland.[125]

None of the referenced Maryland decisions have cited or relied on section 1-105 of the UCC.[126] The *lex loci contractus* rule, if rigidly and consistently applied, would controvert the intention of the express statutory directive contained in the UCC. Section 1-105 contemplates that when a transaction has significant contacts with more than one jurisdiction, the question as to which law should apply is left to judicial decision. Appropriateness of law should be the basis for the choice in any given factual pattern. A hard and fast rule like *lex loci contractus* ignores contacts which a transaction may have with jurisdictions other than those in which the sale occurred, and ignores the interests of the involved jurisdictions.

VI. CONCLUSION

Absent uniformity in the substantive premises of product liability, choice of law questions will persist. Since uniformity is not likely soon, it is important to be able to resolve choice of law questions. For the practitioner, it is even more significant to be able to make affirmative tactical use of applicable choice of law rules.

In the tort area, the choice of law rule which is most compatible with modern product liability law is the most significant relationship approach. It is flexible yet structured, and the concerns addressed by other modern theories are incorporated in its general principles and black letter rules.

The *Restatement (Second)'s* most significant relationship approach has a dimension not present in the grouping of contacts principle. Both approaches necessarily involve a consideration of relevant contacts with a particular jurisdiction. However, the *Restatement (Second)* approach requires consideration of the quality of the contacts, not just their quantity.

The earlier, near universal following of the *lex loci delicti* rule, and

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123. *Id.* at 220, 321 A.2d at 747 (citations omitted). Interestingly, the cases cited by the court for support were pre-UCC cases from other jurisdictions.

124. 274 Md. 288, 336 A.2d 118 (1975).

125. *Id.* at 299, 336 A.2d at 125.

126. Other courts have also applied the place of sale rule, without discussing the application of UCC section 1-105 or the appropriate relation rule. *See, e.g.,* Begley v. Ford Motor Co., 476 F.2d 1276 (2d Cir. 1973); Stubblefield v. Johnson-Fagg, Inc., 379 F.2d 270 (10th Cir. 1967); Handy v. Uniroyal, Inc., 327 F. Supp. 596 (D. Del. 1971).

the consequent uniformity which it produced, is gone. With less than half of the states continuing to adhere to it, the trend is clearly towards its abandonment. *Lex loci delicti's* rigid adherence to a single fortuitous circumstance is at loggerheads with the policy considerations of emerging product liability law. Courts have engrafted exceptions upon it, and engaged in strained analyses because of its rigidity. The rule's uniformity and predictability have therefore been undermined.

However, governmental interest analysis swings the pendulum too far. It requires a court to focus solely on those interests and policies instead of on the facts. The result is often a decision holding that the law of the forum applies. Moreover, it is a rule that provides little, if any, predictability.

The *Restatement (Second)* approach provides both the flexibility which the *lex loci delicti* rule lacks, and the predictability which the governmental interest analysis rule cannot provide. It specifies the law which is to apply to a given tort action, and at the same time makes clear that the directive can be ignored if another jurisdiction has a more significant relationship to the events giving rise to the litigation.

In the contract area, the UCC specifies that an appropriate relation test is to govern choice of law decisions in breach of warranty actions. In those jurisdictions which adhere to this rule in the warranty area and the most significant relationship test in the tort area, the same choice of law rule is applied to all causes of action in a given product liability lawsuit, whether sounding in tort or contract. This produces a uniformity in the applicable law which does not exist in jurisdictions with differing rules.

Presently, the substantive law of product liability varies from jurisdiction to jurisdiction. Therefore, choice of law decisions can be outcome determinative. In order to take advantage of these differences, the practitioner must educate himself on the relevant choice of law rules to be able to use them to his tactical advantage.