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Louisiana Conflicts Law: Two “Surprises”

Symeon C. Symeonides*

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I. SURPRISE # 1:

LOUISIANA HAS ALWAYS HAD CHOICE-OF-LAW LEGISLATION

The above statement is, of course, not new. Although it may be surprising to some out-of-state lawyers, it should not be surprising to any Louisiana lawyer.

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The latter knows that, unlike many states of the United States, Louisiana has always provided statutorily for problems of conflict of laws. As early as 1808, Louisiana followed the civil-law tradition and included choice-of-law rules in the Preliminary Title of its first civil code, the Digest of 1808.¹ With several amendments and rearrangements, these articles remained in effect until January 1, 1992, when they were replaced by a set of comprehensive articles described later in this paper.² These articles were supplemented by conflicts rules found in the Revised Statutes, such as the Insurance Code,³ the Commercial Code,⁴ the Worker's Compensation Act,⁵ the Consumer Credit and Consumer Protection statutes,⁶ and the Lease of Movables Act.⁷ Together with Civil Code Article 15 of the Civil Code of 1870, which contained choice-of-law rules on the form and effect of contracts, testaments, and other juridical acts, marital property, and liberative prescription,⁸ these statutes provided a fairly extensive, though not complete, network of choice-of-law rules.

Yet, many Louisiana conflicts cases, including cases decided during the survey period,⁹ are decided as if these rules did not exist. For tort conflicts, this phenomenon is understandable. Before 1992, the only statutory provision that had a bearing on tort conflicts was Article 14 of the Civil Code, which provided that "[t]he law is obligatory upon all inhabitants of the State indiscriminately [and that] the foreigner, whilst residing in the State . . . [is] subject to the laws of the State."¹⁰ This highly territorialist article was simultaneously overbroad and elliptical. It was overbroad to the extent it purported to subject to Louisiana law *all* events occurring or persons found therein. It was elliptical in that it did not expressly designate the law that should apply to events occurring or persons

1. See Articles 9 and 10 of the Preliminary Title of the Digest of the Civil Laws Now in Force in the Territory of Orleans (1808). These rules were expanded by the Civil Code of 1825 and were reproduced in the Civil Code of 1870 as Articles 9 and 10 of that code. In 1978, Article 10 was expanded further by the addition of other choice-of-law rules transferred from other parts of the Civil Code. In 1987, the two articles were renumbered as Articles 14 and 15 respectively and remained in effect until January 1, 1992. They continue to apply to actions filed before that date. See *infra* notes 40-41.

2. See *infra* text accompanying notes 28-224.

3. See La. R.S. 22:611 *et seq.* (1978 & Supp. 1993).

4. See, e.g., La. R.S. 10:1-105 (1993); La. R.S. 10:9-103 (1993).

5. See La. R.S. 23:1035.1 (1975).

6. See, e.g., La. R.S. 9:3511 (1991); La. R.S. 51:1418 (1987).

7. See La. R.S. 9:3302 *et seq.* (1991). See also La. R.S. 9:2778 (Supp. 1993), and La. R.S. 38:2196 (Supp. 1993) on public contracts, and La. R.S. 9:2779 (Supp. 1993) on construction contracts.

8. For a detailed discussion of the history, meaning, and application of Article 15 of the 1870 Civil Code (corresponding to Article 10 of the 1808 Digest), see Symeon C. Symeonides, *Exploring the "Dismal Swamp": Revising Louisiana's Conflicts Law on Successions*, 47 La. L. Rev. 1029, 1038-42, 1055-56, 1076-86 (1987).

9. The survey period is from January 1, 1992 to October 1, 1993, the time of this writing. This paper focuses on cases decided under the new conflicts law. Cases rendered after January 1, 1992, but decided under the old law, are discussed only in a limited manner.

10. La. Civ. Code art. 14 (effective until Jan. 1, 1992, repealed by 1991 La. Acts No. 923).

found outside Louisiana. The excessiveness and incompleteness of this article, and the fact that it was not *expressly* geared for tort conflicts, may explain why it has been virtually ignored by Louisiana courts in tort conflicts.

From the beginning, Louisiana courts assumed a lack of statutory authority on this matter and proceeded to develop jurisprudential rules, borrowed mostly from sister states. For more than a century and a half, Louisiana courts adhered to the rule of *lex loci delicti*, that is, applying the law of the place of the tort, for both Louisiana and foreign torts. This rule was abandoned in the 1973 case of *Jagers v. Royal Indemnity Co.*,¹¹ in which the Louisiana Supreme Court refused to apply Mississippi law to an action arising out of a traffic accident in Mississippi that involved two members of a Louisiana family. *Jagers* held that Mississippi "had no interest" in applying its law to the particular issue, intrafamily immunity, before the court, and that Louisiana was instead the only "interested" state.¹² Using the prevailing conflicts jargon, the court described this case as presenting a "false conflict," that is, a case in which only one of the two involved states, here Louisiana, "had an interest" in applying its law.¹³ The supreme court's reference to "state interests" and "false conflicts" between them was a clear indication that the court was thinking in terms of a methodology known as "governmental interest analysis." First advanced by Professor Brainerd Currie,¹⁴ this methodology has since been followed by many American courts. Although this inference was strengthened by the court's citations to Currie's works, the court also cited the *Restatement (Second) of Conflict of Laws*,¹⁵ thus giving mixed signals as to the particular methodology it was inclined to follow in the future. In the absence of supreme court guidance, lower courts have speculated, improvised, and eventually ended up with a combination of interest analysis and the Restatement Second.¹⁶ This jurisprudence has for all practical purposes filled the perceived vacuum of statutory authority for tort conflicts in Louisiana. It is too late and would serve no purpose to argue that this vacuum

11. 276 So. 2d 309 (La. 1973).

12. For a thoughtful discussion of *Jagers*, see Harvey Couch, *Louisiana Adopts Interest Analysis: Applause and Some Observations*, 49 Tul. L. Rev. 1 (1974).

13. 276 So. 2d at 311-12. In American conflicts jargon, a "false conflict" is a multistate case in which only one of the involved states is "interested" in having its law applied because the policies embodied in that law would be promoted by that law's application in the particular case. When more than one state is interested in having its law applied, the resulting conflict is characterized as a "true conflict." When no state is interested in having its law applied, the case is characterized as an "unprovided-for" case because no solution was provided for such cases by the methodology that developed this jargon, namely Brainerd Currie's governmental interest analysis. See Brainerd Currie, *Selected Essays on the Conflict of Laws*, 175-187 *passim* (1963). For the utility of the above labels in modern choice-of-law methodology, see Symeon C. Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is there a Middle Ground?*, 46 Ohio St. L.J. 549, 564-66 (1985).

14. See generally Currie, *supra* note 13.

15. Restatement (Second) of Conflict of Laws (1971) [hereinafter Restatement Second].

16. For a thorough discussion of Louisiana jurisprudence in tort conflicts before the new law, see James J. Hautot, *Choice of Law in Louisiana: Torts*, 47 La. L. Rev. 1109 (1987).

was more apparent than real.¹⁷ Thus, in tort conflicts actions which were filed before January 1, 1992, and which were therefore governed by this jurisprudence, it was accurate to say that Louisiana choice-of-law rules were derived from a combination of interest analysis and the Restatement Second. Several cases decided during the survey period fit in this category.¹⁸

However, the same is not true for other conflicts, such as contract conflicts or insurance conflicts, which were expressly provided for by Louisiana legislation, such as Civil Code Article 15 or the Insurance Code.¹⁹ These provisions may be too simplistic or rigid to be satisfactory today, but they are also too specific to be replaced through judicial fiat by interest analysis, the Restatement Second, or, for that matter, any academic theory. Nevertheless, many Louisiana courts and federal courts sitting in diversity have done just that.²⁰ Cases decided during the survey period have done the same.²¹ Inci-

17. Despite its many shortcomings, Article 14 of the Civil Code of 1870 (effective until Jan. 1992, repealed by 1991 La. Acts No. 923) could provide the basis for at least a unilateral *lex loci delicti* rule; that is, a rule authorizing the application of Louisiana law to Louisiana torts. The rule could then be "bilateralized" by judicial fiat to a rule that authorized the application of the law of the place of the tort to torts occurring outside Louisiana. This is exactly how a similar article of the Code Napoleon has been interpreted in France. Article 3 of the Code Napoleon, taken from Article 4 of Title IV of the French *Projet du Gouvernement* of 1800, which was also the source of the Louisiana article, provides in part that "[t]he laws of police and public safety obligate all those inhabiting the territory." This article was used by French courts as the basis for applying the *lex loci delicti* to both French and foreign torts. See 1 H. Batiffol & P. Lagarde, *Droit international privé* 321-36 (7th ed. 1981). Needless to say, it is just as well that Louisiana courts did not follow this path. Although the *lex loci delicti* rule was the rule adopted by Louisiana courts, it was purely a jurisprudential creation based on common-law authorities, and thus it could be abandoned much more easily than a rule based on a Civil Code article.

18. See, e.g., *Franz v. Iolab, Inc.*, 801 F. Supp. 1537 (E.D. La. 1992); *Trosclair v. Walt Disney World Co.*, Civ. A. No. 89-2317, 1993 U.S. Dist. LEXIS 310 (E.D. La. Jan. 11, 1993); *Popeyes, Inc. v. Tokita*, Civ. A. Nos. 87-3011, 90-1179, 1993 U.S. Dist. LEXIS 13295 (E.D. La. Sept. 21, 1993).

19. For a good discussion of the conflicts provisions of the Insurance Code and the jurisprudence applying them, see Michael W. Mengis, Note, *Conflict of Laws: Insurance*, 47 La. L. Rev. 1213, 1219-20 (1987).

20. See, *inter alia*, *Sandefor Oil & Gas v. AIG Oil Rig of Texas, Inc.*, 846 F.2d 319 (5th Cir. 1988); *Wickham v. Prudential Ins. Co.*, 366 So. 2d 951 (La. App. 1st Cir. 1978); *Sutton v. Langley*, 330 So. 2d 321, 327-328 (La. App. 2d Cir.), *writ denied*, 332 So. 2d 805, 820 and 333 So. 2d 242 (La. 1976).

21. See, e.g., *Francis v. Travelers Ins. Co.*, 581 So. 2d 1036 (La. App. 1st Cir. 1991), an insurance conflicts case that contains no reference to Article 15 or the Insurance Code, but does contain a long quotation from the Restatement Second. The quotation is preceded by the following statement: "Rigid application of the *lex loci contractus* rule of conflicts of laws has ceased in Louisiana. . . . [T]he intent of the Restatement (Second) . . . to accomplish this result is evidenced by the [Restatement's] Introductory Note." *Id.* at 1041 (emphasis added). Unlike *Francis*, other cases, such as *Baker v. Lazarus*, Civ. A. No. 91-2463, 1992 U.S. Dist. LEXIS 7083 (E.D. La. May 13, 1992), *Ankum v. White Consol. Indus., Inc.*, Civ. A. No. 91-2990, 1992 U.S. Dist. LEXIS 16203 (E.D. La. Oct. 19, 1992), and *Radiophone Inc. v. PriCellular Corp.*, Civ. A. No. 91-4306, 1992 U.S. Dist. LEXIS 17007 (E.D. La. Nov. 4, 1992), show more sensitivity to Louisiana's hierarchy of sources of law. In these cases, the court cites Civil Code article 15 but considers itself bound by Fifth Circuit decisions, especially *Sandefor*, 846 F.2d 319 (5th Cir. 1988), which have construed away

dentally, even the Restatement itself recognizes this principle and requires a court to obey any statutory choice-of-law "directive" found in the forum's law and to resort to the Restatement only in the absence of such directive.²² Yet, one Louisiana case decided during the survey period found in the Restatement an intent to replace Louisiana's statutory rule of *lex loci contractus*.²³ Such an open disregard for statutory provisions is of course inappropriate in any state that adheres to the principle of legislative supremacy. What is appropriate is to interpret and "update" a dated statutory provision with the aid of modern academic theories. Great jurists like Judges Tate and Rubin have demonstrated how this can be done without offending the principle of legislative supremacy.²⁴

Equally troublesome is the tendency of some courts to go through the whole choice-of-law discussion without any reference to any statutory authority, whether it be Civil Code Article 15 or more specific statutes containing conflicts provisions, such as the Insurance Code.²⁵ The tendency of some law clerks to rely exclusively on cases may also be responsible for the fact that at least one case decided during the survey period refers to an article of the civil code that was repealed five years before the decision was rendered and well before the action was filed.²⁶ When a clerk relies on cases only, and the cases are old

Article 15. *Baker* states that "Louisiana courts . . . have either (1) totally ignored article 15 and applied the interest analysis, or (2) interpreted article 15 in such a fashion that it amounted to interest analysis."

22. See Restatement Second, *supra* note 15, § 6, which provides in part: "A court . . . will follow a statutory directive of its own state on choice of law. . . . When there is no such directive, the factors relevant to the choice of the applicable law include . . ."

23. See *Francis*, 581 So. 2d 1036. This idea was inspired from another notorious case, *Sutton v. Langley*, 330 So. 2d 321 (La. App. 2d Cir. 1976), which was relied upon heavily by the *Francis* court.

24. See *Bell v. State Farm Mut. Auto. Ins. Co.*, 680 F.2d 435 (5th Cir. 1982); *Stickney v. Smith*, 693 F.2d 563, 565 (5th Cir. 1982). For Judge Tate's contribution to the development of Louisiana conflicts law, including the abandonment of the *lex loci delicti*, see Symeon C. Symeonides, *Louisiana Conflicts Jurisprudence, A Student Symposium: Introduction*, 47 La. L. Rev. 1105, 1106-07 (1987).

25. See *Peavey Co. v. M/V ANPA*, 971 F.2d 1168 (5th Cir. 1992) (insurance conflict; no reference to La. Civ. Code art. 15 or the conflicts provisions of the Louisiana Insurance Code; finding a false conflict under interest analysis); *Mac Sales, Inc. v. E.I. Du Pont de Nemours & Co.*, Civ. A. No. 89-4571, 1992 U.S. Dist. LEXIS 5378 (E.D. La. Apr. 14, 1992) (insurance conflict; no reference to La. Civ. Code art. 15 or the Louisiana Insurance Code; quoting Restatement Second, *supra* note 15, § 188); *Facility Management v. American Sign & Indicator, Inc.*, Civ. A. No. 91-0609, 1992 U.S. Dist. LEXIS 9530 (E.D. La. June 17, 1992) (contract case); *Ashland Chem. v. Lombardino*, Civ. A. No. 92-2434, 1993 U.S. Dist. LEXIS 13736 (E.D. La. Sept. 23, 1993) (choice of law clause in anti-competition agreement).

26. *Farrell Constr. Co. v. Jefferson Parish*, Civ. A. No. 86-4242, 1992 U.S. Dist. LEXIS 12795 (E.D. La. Aug. 19, 1992), contains the statement that "Louisiana's conflicts of laws rule is contained in LSA CC Art. 10." Yet, since January 1, 1988, La. Civ. Code art. 10 contains nothing of this sort; instead, Article 10 contains a rule of how to interpret ambiguous statutes. The correct reference should have been to Article 15 of the Louisiana Code of 1870 which replaced former Article 10 in 1988 and was eventually repealed by 1991 La. Acts No. 923.

ones, the information contained therein may be outdated; neither LEXIS nor Westlaw are likely to catch such details.

Finally, nothing is more lamentable than the phenomenon of ignoring completely the choice-of-law question. The tendency of overburdened courts to want to avoid the complexities of the choice-of-law discussion with the concomitant possibility of having to apply a foreign law is perfectly understandable. In an adversary system, the court should not be expected to argue the parties' case. If neither party raises the choice-of-law issue, most courts will not raise it either.²⁷ Less understandable, however, is the reason for which some attorneys fail to raise this issue when it is in their interest to do so, such as when the foreign law is more favorable to their client. Although in some cases this practice may be explained by tactical reasons, sometimes it is the result of the attorney's unfamiliarity with conflicts law. Unfortunately, the price of this unfamiliarity is paid by the client.

II. SURPRISE # 2:

LOUISIANA HAS A NEW COMPREHENSIVE LAW ON CHOICE OF LAW

A. *The New Law*

As of January 1, 1992, Louisiana has a new comprehensive conflicts codification.²⁸ Since this is a relatively recent occurrence, it would be understandable if the above statement surprises some readers.²⁹ Such a surprise, however, is preferable to a surprise in the courtroom. The new law was drafted under the auspices of the Louisiana Law Institute during the years 1984-88, and

27. See, e.g., *Trask v. Peak*, Civ. A. No. 91-4199, 1993 U.S. Dist. LEXIS 7024, at *5 (E.D. La. May 17, 1993) ("Inasmuch as the parties detect no conflict of law issues, neither shall the court."); *Peterson v. State Farm Ins. Co.*, Civ. A. No. 92-2135, 1993 U.S. Dist. LEXIS 14440, at *3 n.1 (E.D. La. Oct. 13, 1993) ("The court will not undertake an extensive conflict of law analysis. . . . [D]efendant . . . , who bears the burden of proof here, has not undertaken any choice of law analysis. . . . Without such discussion, the court will assume that Louisiana law applies."). There are, however, certain commendable exceptions. See, e.g., *Dugger v. Upledger Inst.*, 795 F. Supp. 184 (E.D. La. 1992), in which Judge Mentz notes that two of the parties "appear to ignore the [choice-of-law] matter entirely. The Court cannot so blithely dismiss the conflicts question at hand, however." *Id.* at 186; *Naquin v. Prudential Assur. Co.*, Civ. A. No. 92-3189, 1993 U.S. Dist. LEXIS 6015 (E.D. La. May 3, 1993), in which Judge Sear orders the parties to submit "briefs addressing the issue of conflict of laws." *Id.* at *4; *First Alabama Bank v. Baber*, Civ. A. No. 92-1662, 1992 U.S. Dist. LEXIS 13977 (E.D. La. Sept 15, 1992), discussed *infra* at text accompanying notes 121-128, a case in which one of the parties, a non-lawyer, appeared *pro se*, and in which the same judge makes the best out of an incomplete record.

28. 1991 La. Acts No. 923, § 1 (effective Jan. 1, 1992).

29. Although the new law has already been translated into several foreign languages and has received national and international attention, see *infra* notes 32, 35, 44, it has yet to attract the attention of the average Louisiana lawyer. For a comprehensive discussion of the new law in the field of tort conflicts, see Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 Tul. L. Rev. 677 (1992).

was adopted unanimously by the House of Representatives and by the Senate during the 1991 legislative session.³⁰ It is the first comprehensive attempt at conflicts codification in the United States and the first one in Louisiana since 1825. It draws from the vast laboratory of American conflicts experience and codifies, updates, and streamlines Louisiana conflicts jurisprudence.

The new law replaced the two conflicts articles in the Preliminary Title of the Louisiana Civil Code of 1870 with thirty-six new articles. The first of these articles is placed in the Preliminary Title of the Civil Code, as Article 14, while the remaining thirty-five articles are placed in a newly formed Book IV of the Civil Code and are numbered from 3515 to 3549. Article 14 functions as a cross-reference for the users of the code who were accustomed to looking for its conflicts provisions in the Preliminary Title. The article also delineates the scope of Book IV by providing that “[u]nless otherwise expressly provided by the law of this state, cases having contacts with other states are governed by the law selected in accordance with the provisions of Book IV of this Code.” Thus, Book IV applies to all multistate cases or “cases having contacts with other states,” whether these contacts pertain to the domicile of the parties, the transaction or the occurrence giving rise to the dispute, or the location of its object or subject matter. These “foreign” contacts may implicate the laws of the involved foreign states in a way that raises the potential of a conflict between their laws and the law of Louisiana. Book IV establishes the principles for determining whether such a conflict actually exists in a given case, and, if so, how it should be resolved.

Moreover, through its introductory phrase “[u]nless otherwise expressly provided by the law of this state,” Article 14 establishes the residual character of Book IV vis-a-vis other more specific provisions of Louisiana legislation. Book IV is not intended to supersede more specific conflicts rules contained in other Louisiana statutes, such as those found in the Insurance Code, the Commercial Code, the Consumer Credit or Consumer Protection statutes, and the Lease of Movables Act.³¹ When applicable, those rules, being more specific, will prevail over the provisions of Book IV of the Civil Code.

Book IV is subdivided into eight titles with headings that are indicative of their general scope: Title I is entitled General Provisions;³² Title II,

30. Representatives Randy Roach and Allen Bradley and Senator Sidney B. Nelson were the sponsors of the bill in the Louisiana House of Representatives and Senate, respectively. This author had the privilege of drafting the bill as Reporter for the Louisiana State Law Institute. David Conroy, Harvey Couch, James L. Dennis, Cordell H. Haymon, Harry T. Lemmon, Howard W. L'Enfant, Andrew Rinker, Jr., Ray J. Rabalais, Katherine S. Spaht, and A.N. Yiannopoulos served as members of the Advisory Committee.

31. See *supra* notes 3-7.

32. See La. Civ. Code arts. 3515-3518. These articles are discussed in Symeon C. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, 57 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 460, 463-83 (1993) [hereinafter Symeonides, *The Louisiana Experience*]; Symeon C. Symeonides, *Les grands problèmes de droit international privé et la nouvelle codification de Louisiane*, 81 *Revue critique du droit international*

Status;³³ Title III, Marital Property;³⁴ Title IV, Successions;³⁵ Title V, Real Rights;³⁶ Title VI, Conventional Obligations;³⁷ Title VII, Delictual and Quasi-Delictual Obligations;³⁸ and Title VIII, Liberative Prescription.³⁹

According to section 4 of Act 923 of 1991, the new law "shall apply to all

privé 223, 233-81 (1992) [hereinafter cited as Symeonides, *Les grands problèmes*]; Symeonides, *supra* note 29, at 685-696; Symeon C. Symeonides, *Synchones Kodikopoitikes Technikes sto Idiotiko Diethnes Dikaio*, 13 *Revue hellénique de droit européen* (forthcoming 1994). The above articles, as well as the new law in general, are also discussed in the following American and foreign publications: Eugene F. Scoles & Peter Hay, *Conflict of Laws* 599 (2d ed. 1992); Gonzalo Parra-Arranguren, *Curso General de Derecho Internacional Privado (Problemas Selectos)* 247-50 (1991); Erik Jayme, *Neue Kodifikation des Internationalen Privatrechts in Louisiana*, 13 *Praxis des Internationalen Privat- und Verfahrensrechts [IPRax]* 56 (1993-1); D. Kokkini-Iatridou & K. Boele-Woelki, *Opmerkingen Over De "Schets Van Een Algemene Wet Betreffende Het IPR"*, 10 *Nederlands Internationaal Privaatrecht* 477, 478, 498, 509-10, 512 *passim* (1992); D. Kokkini-Iatridou & K. Boele-Woelki, *De Adoptieregeling Van De IPR-Schets In Rechtsvergelijkend Perspectief*, 11 *Nederlands Internationaal Privaatrecht* 365, 368 *passim* (1993); Gonzalo Parra-Arranguren, *Las recientes codificaciones del Derecho internacional privado en el hemisferio Americano*, 43 *Revista de la Facultad de Derecho, Universidad Católica Andrés Bello* 361, 393-94, 404-06, 414-15 (1991); Gonzalo Parra-Arranguren, *General Course of Private International Law*, *Academy of International Law*, 210 *Recueil des cours* 9, 192-194 (1988-III); Gonzalo Parra-Arranguren, *Recent Developments in Private International Law in the Americas*, 39 *Neth. Int'l L. Rev.* 229, 233-34, 237-38 (1992); Frank Vischer, *General Course on Private International Law*, *Academy of International Law*, 232 *Recueil des cours* 9, 59-63 *passim* (1992-1).

33. See La. Civ. Code arts. 3519-3522. These articles are discussed in Symeonides, *The Louisiana Experience*, *supra* note 32, at 483-86.

34. See La. Civ. Code arts. 3523-3527. A 1987 Draft of these articles is discussed in Carol S. Bruch, *Codification of Conflicts Law: The Louisiana Draft*, 35 *Am. J. Comp. L.* 255 (1987); William Reppy, *Viewpoint: Louisiana's 'Hybrid' Quasi-Community Property Statute Could Cause Unfairness*, 13(3) *Comm. Prop. J.* 1 (1986); Symeon C. Symeonides, *In Search of New Choice-of-Law Solutions to Some Marital Property Problems of Migrant Spouses: A Response to the Critics*, 13(3) *Comm. Prop. J.* 11 (1986); Symeon C. Symeonides, *Louisiana's Draft on Successions and Marital Property*, 35 *Am. J. Comp. L.* 259, 266-85 (1987) [hereinafter *Louisiana's Draft*]. With few minor differences in language, Articles 3523 to 3527 of the new law correspond with Articles 8 to 12 of the 1987 Draft discussed in these writings. These articles are also discussed in Symeonides, *The Louisiana Experience*, *supra* note 32, at 486-90; and Mike Hays, *Property Rights: Perspectives on Louisiana's Statutes on Conflict of Laws*, 41 *La. Bar J.* 124 (1993).

35. See La. Civ. Code arts. 3528-3534. A 1987 Draft of these articles is discussed in Symeonides, *supra* note 8; and Symeonides, *Louisiana's Draft*, *supra* note 34, at 260-70. Articles 1 to 7 of that Draft correspond to Articles 3528 to 3534 respectively. However, Article 2 of that Draft has been revised so as to include vices of consent. See now Article 3529 of the new law. The new articles are also discussed in Symeonides, *The Louisiana Experience*, *supra* note 32, at 490-92; and Hays, *supra* note 34.

36. See La. Civ. Code arts. 3535-3536. These articles are discussed in Symeonides, *The Louisiana Experience*, *supra* note 32, at 492-495.

37. See La. Civ. Code arts. 3537-3541. These articles are discussed in Symeonides, *The Louisiana Experience*, *supra* note 32, at 495-502, and at text accompanying *infra* notes 115-139.

38. See La. Civ. Code arts. 3542-3548. For a discussion of these articles, see *infra* note 44, and the authorities cited therein.

39. This Title consists of only one article, La. Civ. Code art. 3549, which is discussed in text accompanying *infra* notes 180-224.

actions filed after that date."⁴⁰ The quoted phrase means that the new law: (a) does not apply to actions already in progress on that date;⁴¹ and (b) does apply to actions filed after its effective date even if the events giving rise to these actions have occurred before the above date. In these cases, however, the application of the new law must remain within the confines of the Louisiana and federal constitutions, which prohibit the retroactive application of a law if such an application would deprive someone of vested rights without due process of law.⁴²

The balance of this paper focuses on cases decided under the new law as of the time of this writing,⁴³ and discusses the new law only to the extent necessary to analyze these cases. These cases fall in three categories: torts, contracts, and liberative prescription.

B. Cases Decided Under the New Law

1. Tort Conflicts⁴⁴

a. Issues of Loss Distribution

The first tort conflict to be decided by a Louisiana appellate court under the new law is *Levy v. Jackson*.⁴⁵ *Levy* involved Article 3544 of the new law,

40. 1991 La. Acts No. 923, § 4.

41. However, the new law might well, and should, influence judicial opinion in such actions. See, e.g., *Gulf States Utils. Co. v. NEI Pebbles Elec. Prods.*, 819 F. Supp. 538 (M.D. La. 1993); *Em Nominee Co. v. Arkla Energy Resources, Inc.*, 615 So. 2d 1369 (La. App. 2d Cir. 1993).

42. See generally La. Civ. Code art. 6 and comments thereunder.

43. See *supra* note 9.

44. For a discussion of the tort articles of the new law by this author, see Symeonides, *supra* note 29, at 696-67; Symeon C. Symeonides, *Problems and Dilemmas in Codifying Choice of Law for Torts: The Louisiana Experience in a Comparative Perspective*, 38 Am. J. Comp. L. 431 (1990); and Symeon C. Symeonides, *La Nuova Normativa della Louisiana sul Diritto Internazionale Privato in tema di Responsabilita Extracontrattuale*, 29 Rivista di Diritto Internazionale Privato e Processuale 43 (1993). For discussions by other authors, see Jean-Claude Cornu, *Choice of Law in Tort: A Comparative Study of the Louisiana Draft on Delictual and Quasi-Delictual Obligations and the Swiss Statute on Private International Law (1989)* (LL.M. Thesis on reserve with the LSU Law Library); Scoles & Hay, *supra* note 32, at 635; Peter Hay, *Flexibility Versus Predictability and Uniformity in Choice of Law*, 226 Recueil des cours 281, 387-91 (1991-I); Peter Hay & Robert B. Ellis, *Bridging the Gap Between Rules and Approaches in Tort Choice of Law in the United States: A Survey of Current Case Law*, 27 Int'l Law. 369, 383-86 (1993); John P. Kozyris, *Values and Methods in Choice of Law for Products Liability: A Comparative Comment on Statutory Solutions*, 38 Am. J. Comp. L. 475 (1990); Vischer, *supra* note 32; Russell J. Weintraub, *The Contributions of Symeonides and Kozyris in Making Choice of Law Predictable and Just: An Appreciation and Critique*, 38 Am. J. Comp. L. 511 (1990) [hereinafter *Contributions of Symeonides and Kozyris*]; Russell J. Weintraub, *An Approach to Choice of Law that Focuses on Consequences*, 56 Alb. L. Rev. 701, 715-17 (1993) [hereinafter *Approach to Choice of Law*].

45. 612 So. 2d 894 (La. App. 4th Cir. 1993) (on rehearing). *Levy* arose out of a traffic accident in Louisiana that occurred before the effective date of the new law. The court does not mention the

which deals with conflicts on "[i]ssues pertaining to loss distribution and financial protection,"⁴⁶ such as guest-statutes and other immunities from suit or compensatory damages. This article provides in part that, if at the time of the injury both the injured person and the person who caused the injury were domiciled in the same state, the law of the common domicile applies, even if the conduct and injury occurred in another state, and regardless of whether the state of the common domicile provides for a higher or for a lower standard of financial protection than does the law of the state of conduct and injury.⁴⁷ The operation of this rule has been illustrated elsewhere by the following table.⁴⁸

TABLE 1
(The common-domicile rule of Art. 3544(1))

#	C	I	P	D	Applicable Law
1	-	-	A	A	A
2	-	-	a	a	a

In this table, the second and third columns represent the places of conduct(C) and injury(I) respectively,⁴⁹ the next two columns represent the domicile of the

date of the filing of the action. As explained earlier, this date is important for determining whether the case will be governed directly by the new or the old law. If the action was filed before January 1, 1992, the case would be governed by the old jurisprudence. If the action was filed after January 1, 1992, the case would be governed by the new law. In the event that the new law would produce a different result than the pre-1992 jurisprudence, the defeated litigant would be expected to raise the issue of the potential unconstitutionality of such "retroactive" application of the new law. The *Levy* court decided the case under the new law but preempted any retroactivity issues by carefully explaining how the same result would obtain under the pre-1992 jurisprudence. For tort conflicts cases decided after January 1, 1992, but applying the old law, see *Franz v. Iolab, Inc.*, 801 F. Supp. 1537 (E.D. La. 1992); *Trosclair v. Walt Disney World Co.*, Civ. A. No. 89-2317, 1993 U.S. Dist. LEXIS 310 (E.D. La. Jan. 11, 1993); *Popeyes, Inc. v. Tokita*, Civ. A. Nos. 87-3011, 90-1179, 1993 U.S. Dist. LEXIS 13295 (E.D. La. Sept. 21, 1993).

46. For an explanation of the meaning of this term and detailed discussion, see Symeonides, *supra* note 29, at 699-705.

47. See La. Civ. Code art. 3544, subpar. 1, which provides as follows:

Art. 3544. Issues of loss distribution and financial protection. Issues pertaining to loss distribution and financial protection are governed, as between a person injured by an offense or quasi-offense and the person who caused the injury, by the law designated in the following order:

(1) If, at the time of the injury, the injured person and the person who caused the injury were domiciled in the same state, by the law of that state. Persons domiciled in states whose law on the particular issue is substantially identical shall be treated as if domiciled in the same state.

48. See Symeonides, *supra* note 29, at 718-25.

49. The use of the symbol "-" indicates that the identity of the state represented by the particular column is inconsequential. It may be assumed that the law of that state is the opposite to that of the other state in the same line.

"injured person" or plaintiff(P) and the "person who caused the injury" or defendant(D) respectively, while the last column represents the state whose law is applicable under the first subparagraph of the article. The use of a lower-case letter in a particular column indicates that the state represented by that column has a "lower" standard of financial protection, such as a "guest-statute," an immunity-from-suit rule, or a limit on the amount of compensatory damages, than the other state involved in the conflict. The use of a capital letter indicates that the particular state has a "higher" standard, such as a non-immunity rule or a higher amount of compensatory damages, than the other state involved in the conflict.

Levy v. Jackson fits into pattern # 2 because both the injured person and the person who caused the injury were domiciled in a state, Alabama, whose law barred recovery ("lower standard") and were involved in an accident in another state that provided for recovery ("higher standard"). The injured person was a minor child riding in her father's car when he crossed through a red light and collided with another car driven by a Louisianian in New Orleans, Louisiana. Under Alabama's so-called guest statute, a driver and his insurer are immune from suit by a person injured while riding as a gratuitous guest in the automobile, unless the driver is proven guilty of "willful or wanton misconduct." Since Louisiana has no such statute, the injured passenger was free to sue the driver and his insurer for ordinary negligence. The *Levy* court properly characterized the resulting conflict as one involving an issue of loss distribution and held that, under subparagraph 1 of Article 3544 of the new law, Alabama law was applicable to the dispute between the Alabama host driver and his Alabama guest-passenger.⁵⁰

The court then explained why the result would have been the same under pre-1992 jurisprudence by comparing the case with *Jagers*,⁵¹ the only analogous case from the supreme court, and with *Hanzo v. Liberty Mutual Ins. Co.*,⁵² a case from the same appellate district. In both of these cases the court applied the law of the common domicile of the host-driver and guest-passenger. As in *Levy*, in both *Jagers* and *Hanzo*, the tortfeasor and the victim were domiciled in

50. 612 So. 2d 894, 896 (La. App. 4th Cir. 1993) (on rehearing).

51. *Jagers v. Royal Indem. Ins. Co.*, 276 So. 2d 309 (La. 1973). The issue in *Jagers* was whether members of a Louisiana family could sue each other in tort. Unlike Louisiana, Mississippi had a rule of intra-family immunity that prohibited such suits. The court reasoned that Mississippi's rule was designed to protect Mississippi families from discord, and, since *Jagers* did not involve a Mississippi family, that state's family-protecting policies would not be seriously affected if its law were not applied to this case. The actual language used by the court was that "[i]t would not advance any policy of the place of the tort to apply its law." *Id.* at 313. On the other hand, Louisiana's policy of assuring compensation of injured persons, reflected in the absence of a rule of intra-family immunity, would be seriously affected if Louisiana law were not applied to protect one Louisiana domiciliary who had been injured—albeit in another state—by another Louisiana domiciliary. The court said that not to apply Louisiana law "would defeat the policy the State of Louisiana continues to have—to protect its citizens from damage from the wrongful acts of others." *Id.*

52. 508 So. 2d 928 (La. App. 4th Cir. 1987).

the same state and had an accident in another state. However, unlike *Levy*, the common domicile in both of these cases was in the recovery state ("higher standard"), Louisiana, while the accident was in the non-recovery state ("lower standard"), Mississippi in *Jagers* and Hawaii in *Hanzo*. Thus, both these cases fall within pattern # 1, rather than pattern #2 of the above table. Under interest analysis, the methodology followed in *Jagers*,⁵³ as well as under the Restatement Second,⁵⁴ cases falling within pattern # 1, that is, cases like *Jagers* and *Hanzo* in which both parties are domiciled in a recovery state and have an accident in a non-recovery state, are universally characterized as false conflicts in which only the common-domicile state is interested in having its law applied.⁵⁵

53. *Jagers*, 276 So. 2d at 312-13. See *supra* text accompanying notes 11-14.

54. Before 1992, the approach of Louisiana courts to tort conflicts could be divided into two steps. In the first step, the court would follow interest analysis and would try to determine whether each of the states factually implicated in the dispute was actually "interested" in having its law applied to the issue at hand. The court would do so by identifying for each state the purpose of, or policy embodied in, the substantive rule of law that was claimed to be applicable. The court would then determine whether, in light of the contacts of that state to the parties and the dispute, the identified policy would be promoted by the application of the rule to the particular case. If the answer was affirmative, that state would be deemed "interested." The same analysis would then be repeated with the other state or states. If the other state was "not interested," the conflict would be classified as a false conflict" and would be resolved by applying the law of the "interested" state. If both states were "interested," then the conflict would be classified as a "true conflict." If neither state was "interested," then the case would be classified as an "unprovided-for" case because no solution was provided for it by interest analysis.

In both true conflicts and unprovided-for cases, the court would go through the second step of the process. In this second step, the courts' improvising turned in different directions. Some courts continued to employ governmental interest analysis and simply applied the law of the forum. See, e.g., *Sutton v. Langley*, 330 So. 2d 321 (La. App. 2d Cir.), writ denied, 332 So. 2d 805 and 332 So. 2d 820 (La. 1976). Other courts switched to the Restatement Second which, generally speaking, calls for the application of the law of the state having "the most significant relationship" to the parties and the dispute and provides guidelines for identifying that state. See, *inter alia*, *Sandefer Oil & Gas v. AIG Oil Rig, Inc.*, 846 F.2d 319 (5th Cir. 1988); *Cooper v. American Express Co.*, 593 F.2d 612 (5th Cir. 1979); *Brinkley & West, Inc. v. Foremost Ins. Co.*, 499 F.2d 928 (5th Cir. 1974); *Ardoyno v. Kyzar*, 426 F. Supp. 78 (E.D. La. 1976). At least one case, *Ardoyno* (per Judge Rubin), supplemented the use of the Restatement Second with an additional reliance on "comparative impairment," a methodology advanced by Professor William Baxter and followed by the California courts. See William Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1 (1963).

55. See Symeonides, *supra* note 29, at 715-16, 720. See also the leading American case on this issue, *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963) (allowing a New York guest-passenger to recover damages under New York law from her New York host-driver for injury received in Ontario despite the fact that under Ontario's guest-statute the host-driver would be immune from liability to his guest-passenger). For recent applications of this principle, see *Forsman v. Forsman*, 779 P.2d 218 (Utah 1989) (A California woman was allowed to sue her husband under California law for injuries she sustained in a traffic accident in Utah while riding as a passenger in his car. Unlike California, Utah retains the rule of intra-family immunity.); *Nelson v. Hix*, 522 N.E.2d 1214, (Ill.), cert. denied, 488 U.S. 925, 109 S. Ct. 309 (1988) (Ontario law was applied, allowing recovery for an Ontario woman injured in a traffic accident in Illinois while riding in a car driven by her Ontario husband. At the time of the accident, Illinois, but not Ontario, prohibited interspousal suits.); *O'Connor v. O'Connor*, 519 A.2d 13 (Conn. 1986); *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex.

However, again under interest analysis, cases that present the reverse fact-law pattern (pattern # 2, above), like *Levy*, are not universally characterized as false conflicts. In such cases the interests of the common domicile remains undisputed, but the state of the accident is also considered by some courts as having a certain interest stemming from the fact that its law provides recovery.⁵⁶ Using an automobile accident case as an example, interest analysts contend that the accident/recovery state may have four distinct interests in applying its law: (1) providing recovery for the victims of traffic accidents occurring within the state; (2) ensuring that medical creditors who treated the victim in the accident state will be compensated for their services; (3) deterring negligent driving within its borders; and (4) ensuring that other defendants involved in the accident will not have to shoulder a disproportionate share of liability.

The first interest is rather weak since the victim is not a domiciliary of the accident state and the impact of denial of recovery will not be felt there. The second interest is somewhat stronger, but some courts tend to discount it in cases in which the victim was not hospitalized in the accident state.⁵⁷ The third interest is also discounted on the ground that the absence of a guest statute or other immunity rule in the accident state does not affect the driver's conduct. The degree of care exercised by the average driver does not increase or decrease when that driver enters or exits a state with a guest statute.⁵⁸ Finally, the fourth interest may be present whenever the accident involves other tortfeasors domiciled in the accident state and the contribution law of that state imposes on

1979); *Travelers Indem. Co. v. Lake*, 594 A.2d 38 (Del. 1991).

56. See, e.g., *Sutton*, 330 So. 2d at 327-28 (applying Louisiana law and allowing a Texas guest-passenger to recover from her Texas host-driver and his insurer for injury suffered in a traffic accident in Louisiana despite the fact that the Texas guest-statute would bar recovery); *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973) (following the "better-law approach" and refusing to apply Ontario's guest-statute in a suit by an Ontario guest-passenger against his Ontario host-driver arising out of a traffic accident in Minnesota which did not have a guest statute). See also *Harold L. Korn, The Choice of Law Revolution: A Critique*, 83 Colum. L. Rev. 772, 789-90. But see *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679 (N.Y. 1985) (applying the charitable immunity rule of New Jersey, the state where the plaintiffs and one of the defendants were domiciled, rather than the law of New York, the state where the wrongful conduct occurred, and which did not provide for charitable immunity); *Hataway v. McKinley*, 830 S.W.2d 53 (Tenn. 1992); *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63 (S.D. 1992). The last three cases applied the law of the common domicile even though that state had a "lower standard" than the state of conduct and injury. *Schultz* did so by relying on the first "Neumeier rule" found in *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972). That rule provides for the application of the law of the common domicile of the guest-passenger and the host-driver whether or not that state provides for a higher or a lower standard than the state of injury.

57. See, e.g., *Schultz*, 480 N.E.2d at 686 ("no evidence that there are New York medical creditors").

58. See *Cipolla v. Shaposka*, 267 A.2d 854 n.2 (Pa. 1970) ("that the accident occurred in Delaware is not a relevant conduct because the Delaware statute does not set out a rule of the road"); See also *Schultz*, 480 N.E.2d at 686 ("New York's deterrent interest is considerably less because none of the parties is a resident and the rule in conflict is loss-allocating rather than conduct regulating.").

them the share of damages that would have been paid by the host-driver who is immunized by the application of the foreign guest statute.

Whenever the facts of a case trigger this fourth interest, the case cannot be lightly characterized as a "false conflict," since the accident state does have a certain interest in applying its law. However, this interest must be juxtaposed to the interest of the common domicile whose guest statute may reflect a policy of protecting host-drivers from suits by "ungrateful" guest-passengers; and/or protecting insurers from guest-passengers acting in collusion with host-passengers; and/or protecting insurers from this type of liability in order to keep insurance premiums low. When, as in *Levy*, both the guest and the host are domiciled in that state and the insurance policy was delivered there by an insurer doing business in that state, that state has a legitimate and strong interest in ensuring that its value judgments about loss allocation are followed. Whether this interest should prevail over the interest of the accident state depends in part on the methodology followed by the court. Courts following the Restatement Second or a moderate version of interest analysis will likely apply the law of the common domicile.⁵⁹ Courts that follow the original version of interest analysis purport to avoid a weighing of interests and resort to the application of the law of the forum, whether it be the accident state or the common domicile.⁶⁰

The only Louisiana court that was faced with this type of case was the Second Circuit Court of Appeal in *Sutton v. Langley*.⁶¹ *Sutton*, which was almost identical to *Levy*, arose out of a Louisiana accident involving a host-driver and his guest-passenger from Texas, a state that, like Alabama in *Levy*, had a guest statute. Applying interest analysis, *Sutton* refused to apply the Texas guest statute on the ground that Louisiana's interests "must outweigh the Texas

59. See, e.g., *Schultz*, 480 N.E.2d 679, *Hataway*, 830 S.W.2d 53, and *Chambers*, 488 N.W.2d 63. The *Schultz* court offered the following reasons for applying the law of the common domicile even in cases where that state, unlike the state of injury, denies recovery:

First, it significantly reduces forum-shopping opportunities, because the same law will be applied by the common-domicile and locus jurisdictions, the two most likely forums. Second, it rebuts charges that the forum-locus is biased in favor of its own laws and in favor of rules permitting recovery. Third, the concepts of mutuality and reciprocity support consistent application of the common-domicile law. In any given case, one person could be either plaintiff or defendant and one State could be either the parties' common domicile or the locus, and yet the applicable law would not change depending on their status. Finally, it produces a rule that is easy to apply and brings a modicum of predictability and certainty to an area of the law needing both.

Schultz, 480 N.E.2d at 686-87.

60. See Robert A. Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 Tenn. L. Rev. 975 (1977) and cases cited therein. Professor Sedler summarizes these cases as follows: "When two parties from a nonrecovery state are involved in an accident in a recovery state, the courts are divided, with the majority view being that the forum should apply its law allowing recovery." *Id.* at 1035 (emphasis omitted) (footnote omitted).

61. 330 So. 2d 321, 327-28 (La. App. 2d Cir.), writ denied, 332 So. 2d 805, 820 and 333 So. 2d 242 (La. 1976).

interests."⁶² The court's analysis left much to be desired. For example, the above conclusion of the *Sutton* court was based, at least in part, on the fact that the plaintiffs were "out-of-state residents [who] voluntarily chose Louisiana courts as the forum in which to assert their [claims]."⁶³ To be sure, as any competent plaintiff's lawyer knows, it is a much better strategy to file in a state with favorable law than in a state with unfavorable law. While this is a legitimate consideration for the plaintiff, it is not a permissible consideration for the court's decision of whether to apply forum law. It would be amazing if the plaintiff's unilateral choice of a forum and his self-serving preference for its law were elevated into an independent choice of law factor generating a state interest in applying that law.⁶⁴ Moreover, the *Sutton* court misread Texas' interests when it reasoned that the policy embodied in the Texas guest statute, "protect[ing] liability insurance companies against claims brought by guests in collusion with their host," was "primarily concerned only with suits brought in the guest passenger states . . ."⁶⁵ Surely, however, the strength and pertinence of a state policy cannot depend on where the lawsuit is filed and cannot be neutralized by the mere fact that a plaintiff who does not like that policy has chosen to file his lawsuit outside of that state.

The *Sutton* court was closer to the mark when it assumed that the involvement of certain Louisiana defendants in the same accident might give Louisiana a certain interest in applying its law for their protection. As the *Sutton* court noted, these "Louisiana domiciliaries who are defendants in this case could be adversely affected by the [application of foreign law] by limiting the fund from which plaintiffs claims are to be satisfied."⁶⁶ *Levy* was similar in that, in addition to the Alabama driver, two Louisiana parties and their insurer who were also sued by the Alabama plaintiff. However, as said earlier, it is a different question whether this factor is sufficient to tip the balance in favor of Louisiana law. Although the *Levy* court did not expressly consider this question, its ultimate conclusion to the contrary is consistent with the pre-1992 jurisprudence,

62. *Id.* at 327.

63. *Id.*

64. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820, 105 S. Ct. 2965, 2978-79 (1985) ("[A] plaintiff's desire for forum law is rarely, if ever controlling. In most cases the plaintiff shows his obvious wish for forum law by filing there. 'If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible.'") (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 337, 101 S. Ct. 633, 652 (1981)).

65. *Sutton*, 330 So. 2d at 327.

66. *Id.* at 328. This statement is used by the court in support of its conclusion, also questionable for other reasons, not to apply Texas' automobile insurance law. However, a similar statement also appears in the court's discussion of the Texas guest statute: "Louisiana governmental interest in governing awards of victims of accidents occurring on its highways and, *more importantly*, involving other Louisiana residents, must outweigh the Texas interests . . ." *Id.* at 327 (emphasis added).

with the exception of *Sutton*. It is also consistent with Article 3444 of the new law which adopts a solution contrary to *Sutton*.⁶⁷

Returning to the *Levy* case, the *Levy* court held that, since "there is a genuine issue of material fact whether Levy's [the Alabama host-driver's] misconduct was willful or wanton under Alabama law so as to allow recovery against him by his guest-passenger,"⁶⁸ the insurer's request for a summary judgment was properly denied. Thus, barring an out of court settlement, the issue of whether the Alabama driver's conduct was willful or wanton can be expected to be litigated at the trial court. The above quoted statement might be taken as an instruction to the trial court to apply Alabama law to that issue. Such an instruction, however, should be clarified and qualified.

The question of whether a tortfeasor's conduct raises to a certain level of blameworthiness is an issue "pertaining to standards of conduct and safety" and is therefore governed by Article 3543 of the new law. The driver's conduct of driving through a red light is prohibited by a Louisiana "rule of the road" designed to regulate conduct and safety in Louisiana. Under the first paragraph of Article 3543, the applicable law would be the law of Louisiana, since both the driver's conduct and the passenger's injury occurred in that state.⁶⁹ Alabama has no claim to apply its conduct regulation law to conduct confined exclusively within Louisiana. For example, if one of Alabama's "rules of the road" prohibits a driver from turning right on a red light, but Louisiana's corresponding rule permits him to do so, Alabama would have no claim to apply its rule to driving in Louisiana. Even if failure to follow that rule in Alabama is considered willful and wanton conduct by Alabama courts, such a determination should not be applied to conduct occurring in Louisiana and not considered negligent in Louisiana.

On the other hand, the legal consequences that attach to a factual finding of "willful or wanton conduct" under the law of the place of conduct may well be an issue of loss distribution which is to be governed by Article 3544. For example, if the trial court finds that, under Louisiana law applicable under Article 3543, the Alabama driver's conduct in driving through a red light was tantamount to "willful or wanton conduct," then the consequences of such a finding may be determined under Alabama law, which is applicable to the loss distribution issues of the guest-host dispute under Article 3544.⁷⁰

67. For the reasons, see Symeonides, *supra* note 29, at 721. Nevertheless the question posed in the text is an appropriate one to ask in determining whether to apply the escape clause of Article 3547. See *id.* at 763-66.

68. *Levy v. Jackson*, 612 So. 2d 894, 897 (La. App. 4th Cir. 1993) (on rehearing).

69. See La. Civ. Code art. 3543, ¶ 1, and cases # 1 and # 2 in table 2, *infra* at text following note 76.

70. For a Louisiana case that contains a similar distinction, see *Brown v. DSI Transports, Inc.*, 496 So. 2d 478 (La. App. 1st Cir. 1986). *Brown* arose out of an accident in Alabama involving Texas and Louisiana parties. Applying Alabama law, the lower court found the defendant negligent, but also assigned to the plaintiff a certain percentage of fault. The court of appeal affirmed and approved of that application, saying that, with regard to the issue of the applicable standard of care,

b. Issues of Conduct and Safety

Two federal district court cases decided since the passage of the new law, *Coar v. National Union Fire Insurance Co.*⁷¹ and *Medx, Inc. v. Ranger*,⁷² involve application of Article 3543, which deals with “[i]ssues pertaining to standards of conduct and safety.”⁷³ Based on the premise that the rules that establish these standards are territorially oriented,⁷⁴ Article 3543 discounts the parties’ domicile as a connecting factor and focuses instead on the place of conduct and the place of injury.⁷⁵ The operation of Article 3543 has been explained in detail elsewhere and has been illustrated with the following table.⁷⁶

there was “no conflict” because Alabama was the only interested state and that the other two states could not interject their standard of care rules. However, the court distinguished this issue from the issue of the impact on plaintiff’s recovery of the fault assigned to him under Alabama law. Under Alabama’s contributory negligence rule, any fault by the plaintiff could diminish his recovery to zero, while under Louisiana’s and Texas’ comparative negligence law, the plaintiff’s fault could simply reduce his recovery in proportion to the percentage of his fault. Without using the terminology of loss distribution, the court of appeal recognized that the issue of assigning legal consequences to fault already adjudged under the law of the state of the accident was an issue that concerned the accident state very little, but interested the state where the parties were domiciled very much.

71. Civ. A. No. 92-357, 1992 U.S. Dist. LEXIS 19713 (E.D. La. Dec. 18, 1992).

72. Civ. A. No. 91-3099, 1993 U.S. Dist. LEXIS 850 (E.D. La., Jan. 21, 1993).

73. For an explanation of the meaning of this term, see Symeonides, *supra* note 29, at 699-705. For a slightly narrower definition, see Weintraub, *Approach to Choice of Law*, *supra* note 44, at 715-17.

74. See Symeonides, *supra* note 29, at 703-05.

75. The full text of Article 3543 is as follows:

Article 3543. Issues of conduct and safety. Issues pertaining to standards of conduct and safety are governed by the law of the state in which the conduct that caused the injury occurred, if the injury occurred in that state or in another state whose law did not provide for a higher standard of conduct.

In all other cases, those issues are governed by the law of the state in which the injury occurred, provided that the person whose conduct caused the injury should have foreseen its occurrence in that state.

The preceding paragraph does not apply to cases in which the conduct that caused the injury occurred in this state and was caused by a person who was domiciled in, or had another significant connection with, this state. These cases are governed by the law of this state.

76. See Symeonides, *supra* note 29, at 706. In this table, the second and third columns represent the place of the conduct (C) and the injury (I), respectively. The next two columns represent the domicile of the “injured person” or plaintiff (P) and the “person who caused the injury” or defendant (D), respectively. The use of a capital letter in a particular column indicates that the state represented by that letter prescribes a “higher standard” of conduct than a state represented by a lower-case letter. The symbol “-” indicates that the identity or the law of the state represented by that column is inconsequential. The next column shows the applicable paragraph of Article 3543, while the last shows the law designated as applicable by that article.

TABLE 2
(The application of Art. 3543 to issues of conduct and safety)

#	C	I	P	D	Applicable ¶ of Art. 3544	Applicable Law
1	A	A	-	-	¶ 1	A
2	a	a	-	-	¶ 1	a
3	A	B	-	-	¶ 1	A
4	a	b	-	-	¶ 1	a
5	A	b	-	-	¶ 1	A
6	a	B	-	-	¶ 2	B if "foreseeable"
7	La.	B	-	La.	¶ 3	La.

As illustrated by this table, the first paragraph of Article 3543 subjects to the law of the place of conduct: (a) cases in which the conduct and the injury occurred in the same state (see cases in patterns # 1 and # 2); and (b) cases in which the conduct and the injury occurred in different states, and in which (i) the two states prescribe the same standards of conduct and safety (see patterns # 3 and # 4); or (ii) the state of the injury "does not provide for a higher standard," *i.e.*, it provides for a lower standard than the state of conduct (see pattern # 5). "[A]ll other cases" (*i.e.*, other than those provided by the first paragraph), are cases in which the conduct and injury occur in different states and in which the particular conduct does not violate the "lower" standards of the state of conduct but does violate the "higher" standards of the state of injury (see pattern # 6). For these cases, the second paragraph of Article 3543 authorizes the application of the law of the state of injury, but only if the tortfeasor should have foreseen the occurrence of the injury in that state. However, the application of the second paragraph is negated by the third paragraph of the Article in those cases in which the injurious conduct occurred in Louisiana and was engaged in by "a person who was domiciled in, or had another significant connection with [Louisiana]."⁷⁷ In such cases, the third paragraph authorizes the application of Louisiana law to such a conduct, even when the injury caused by it occurs in another state whose law imposes a "higher standard" of conduct. These cases fall within pattern # 7.

*Coar v. National Union Fire Insurance Co.*⁷⁸ arose out of the crash in Alabama of a small airplane owned by L'Express, a Louisiana airline company. Plaintiffs were the parents of an eleven-year-old child who allegedly sustained

77. La. Civ. Code art. 3543, ¶ 3.

78. Civ. A. No. 92-357, 1992 U.S. Dist. LEXIS 19713 (E.D. La. Dec. 18, 1992).

mental distress after witnessing the crash and its immediate aftermath. The place of the conduct that caused the accident was disputed. If the crash was caused by pilot error or similar substandard conduct in the operation of the aircraft just prior to the crash, that conduct would have occurred in Alabama. On the other hand, if the crash was caused by substandard maintenance of the aircraft, that conduct would have occurred in Louisiana, defendant's home base. Quoting the pertinent comment to Article 3543, the court said correctly that the factual issue of which conduct caused the injury should be determined under the causation principles of the law of the forum and reserved judgment on this issue until trial on the merits. However, the court misspoke when it said that "[o]nce it determined which negligent act, if any, caused the accident, the law of the state of that conduct will be applied to the remaining issues in the case."⁷⁹ In fact, the comment from which the court is quoting provides that "[f]ollowing such a determination, the case will be governed by *either the law of the state of that conduct or the law of the state of injury*, depending on which paragraph of this Article [3543] is applicable . . ."⁸⁰

Be that as it may, the plaintiffs in *Coar* asserted three causes of action: (a) emotional distress from viewing injury to another ("bystander recovery"); (b) intentional infliction of emotional distress ("outrage"); and (c) negligent infliction of emotional distress.

On the first cause of action, Louisiana and Alabama law would produce the same result. Louisiana does not provide a cause of action for one who suffers mental anguish as a result of witnessing the physical injury of another, unless the injured person is a close relative of the plaintiff.⁸¹ Alabama does not recognize such a cause of action under any circumstance. Since the plaintiff was not related to any of the victims of the crash, he could not recover under the law of either state. This classic false conflict would fall into pattern # 2, if the injurious conduct occurred in Alabama, or into pattern # 4, if the conduct occurred in Louisiana. In either case, the result on the issue of bystander recovery would be the same.

The same was true with regard to the plaintiff's second cause of action. Although both Louisiana and Alabama provide a cause of action for intentional infliction of emotional distress, the plaintiff could not prevail because there was no indication that L'Express recklessly or intentionally inflicted emotional distress upon him, or that it engaged in behavior to be regarded "as atrocious and utterly intolerable in a civilized society."⁸² Here again, this case would fall into pattern # 1 or pattern # 3, depending on where the critical conduct occurred. Either way, however, the result would be the same. Again, it is immaterial which state law applies to this classic false conflict.

Regarding the plaintiff's third cause of action, negligent infliction of emotional distress, the court quoted from pertinent Louisiana jurisprudence recognizing that

79. *Id.* at *3.

80. La. Civ. Code art. 3543, Reporter's cmt. (h) (emphasis added).

81. La. Civ. Code art. 2315.6.

82. *Coar*, at *5 (citing a Louisiana and an Alabama case).

a person who suffers no physical harm may recover for mental anguish resulting from fear or fright over his own well being only if he is in the "zone of danger" and reasonably believes himself to be in danger.⁸³ The court reserved decision on this factual question until trial on the merits. The court then discussed Alabama law and concluded that such a cause of action is in principle available under that law, but asked the parties to submit briefs describing the conditions and limitations for recovery.⁸⁴ The court also announced its intention to select the applicable law under Article 3543 as follows:

- (1) Alabama law will apply if the conduct causing the injury occurred in Alabama.
- (2) Alabama law will apply if the conduct causing the injury occurred in a state other than Louisiana or Alabama.
- (3) Louisiana law will apply if the conduct causing the injury occurred in Louisiana.⁸⁵

The correctness of these statements, and the very existence of a conflict of laws, depend: (a) on the precise content of Alabama law on the issue of negligent infliction of emotional distress; and (b) on the resolution of certain factual questions, such as whether the injurious conduct occurred in Alabama or Louisiana and whether the victim was in fact within the "zone of danger." In any event, the court's statement (1) is correct. Indeed, since the alleged injury could only occur in Alabama, a finding that the injurious conduct also occurred in that state would mean that the case would fit into pattern # 1 or # 2 of the above table. In such a case, Alabama law will apply under the first paragraph of Article 3543.

The court's statement (3) is also correct. A factual finding that the conduct that caused the injury occurred in Louisiana would mean that the case would fall into any one of patterns # 3-# 5 or pattern # 7 of the above table. Which of these patterns is applicable will depend on the resolution of the legal question of what Alabama law provides on this issue, as well as on the factual question of whether the plaintiff was within the "zone of danger." If Alabama law on this issue is identical to Louisiana's, the case would fall into pattern # 3, and Louisiana law will be applicable under the first paragraph of Article 3543. If Alabama law on this issue provides for a "lower standard" than Louisiana, the case would fall into pattern # 5, and Louisiana law will be applicable under the same paragraph of Article 3543. In both cases, the plaintiff's recovery will depend on whether the plaintiff is found to be "within the zone of danger." Finally, if Alabama law on this issue provides for a "higher standard" than Louisiana, then the case would fall into pattern # 7 because of the defendant's "significant connection"⁸⁶ with Louisiana.

83. *Id.* at *6-7.

84. *Id.* at *8.

85. *Id.* at *6.

86. La. Civ. Code art. 3543, ¶ 3.

In such a case, Louisiana law will be applicable under the third paragraph of Article 3543.

However, the court's statement (2) is partly incorrect. For example, if it turns out that the negligent conduct occurred in a third state, Texas, then, under the first paragraph of Article 3543, the law of Texas, not Alabama, would be applicable to this issue if Texas' standards are either the same or higher than those of Alabama (patterns # 3-# 5). The only case in which Alabama law will apply under this scenario is a case that fits into pattern # 6, covered by the second paragraph of Article 3543; namely, only if Alabama has a higher standard than Texas and it is proven that the defendant should have foreseen the occurrence of the injury in Alabama, will Alabama law apply.

The second case involving Article 3543 is *Medx, Inc. v. Ranger*.⁸⁷ In *Ranger*, a Florida corporation filed suit against two Louisiana domiciliaries and a Texas corporation for tortious interference with contract. Defendants were accused of improperly competing with plaintiff by interfering with plaintiff's contract with a Louisiana domiciliary and attempting to take away some of plaintiff's Louisiana customers. Under the circumstances of this case, such a cause of action would be available to plaintiff under Florida law, but not under Louisiana law. The court assumed without discussion that the applicable conflicts article is Article 3543, applied Louisiana law, and denied the action. The court found that this case "involve[d] conduct occurring in Louisiana which was committed by persons . . . domiciled, or at least having a significant connection with, Louisiana."⁸⁸ If this finding is correct, then the court was also correct in holding that, under Article 3543, Louisiana law would be applicable regardless of whether the plaintiff's injury occurred in Louisiana or Florida. Indeed, if the injury occurred in Louisiana, the case would fall into pattern # 2 of the above table, and the application of Louisiana law would be proper under the first paragraph of Article 3543. If the injury occurred in Florida, the case would fall into pattern # 7, and the application of Louisiana law would be proper under the third paragraph of Article 3543.⁸⁹

c. Products Liability and Punitive Damages

Two almost identical cases decided during the survey period involve the availability of punitive damages in products liability actions under Article 3545 of the new law. Article 3545 provides in part that "[d]elictual and quasi-delictual liability for injury caused by a product, *as well as damages, whether compensatory, special, or punitive*, are governed by the law of this state: (1) when the injury was sustained in this state by a person domiciled or residing in this state."⁹⁰ The application of this article and the history of the italicized phrase, inserted during the

87. Civ. A. No. 91-3099, 1993 U.S. Dist. LEXIS 850 (E.D. La. Jan. 21, 1993).

88. *Id.* at *12.

89. Since the parties apparently did not invoke the escape clause of Article 3547, the court cannot be blamed for not discussing its applicability.

90. La. Civ. Code art. 3545 (emphasis added).

debate on the Senate floor, have been explained in detail elsewhere.⁹¹ *Jefferson Parish Hospital Service District #2 v. W.R. Grace & Co.*⁹² and *Orleans Parish School Board v. United States Gypsum Co.*⁹³ fit precisely within the above quoted part of Article 3544. In both cases, an asbestos-containing product caused injury in Louisiana to a person domiciled in Louisiana. In both cases, the product was manufactured outside Louisiana in states whose law apparently provides punitive damages in such cases. The court applied Louisiana law and denied punitive damages in both cases. This result follows from a straight-forward application of the Article 3545.⁹⁴

The only remaining question is whether these cases are good candidates for applying the escape clause of Article 3547.⁹⁵ This article allows the court to deviate from the result dictated by the application of Articles 3543-3546 if, from the totality of the circumstances of an exceptional case, it is clearly evident under the principles of Article 3542, that the policies of [a] state [other than the one whose law is applicable under these articles] would be more seriously impaired if its law were not applied to the particular issue.⁹⁶ As explained elsewhere, it is perfectly appropriate to invoke this clause in cases such as the ones at hand and, if the clause is found applicable, to award punitive damages under a foreign law in a products case that is otherwise governed by Louisiana law under Article 3545.⁹⁷

91. See Symeonides, *supra* note 29, 749-59.

92. Civ. A. No. 92-0891, 1992 U.S. Dist. LEXIS 9962 (E.D. La. June 30, 1992).

93. Civ. A. No. 89-0070, 1993 U.S. Dist. LEXIS 7792 (E.D. La. June 7, 1993). This case was decided primarily under the old law. However, the court also discussed the new law and concluded that the same result would follow under the new law.

94. The *Jefferson* court properly reserved judgment on whether a different result might obtain if the complaint could be construed to demand punitive damages on any theory apart from product liability. *Jefferson*, 1992 U.S. Dist. LEXIS 9962, at *8 n.3. For an action cumulating contractual and delictual causes of action for damage caused to a product, see *Gulf States Utils. Co. v. NEI Peebles Elec. Prods., Inc.*, 819 F. Supp. 538 (M.D. La. 1993) (concluding that Louisiana law applied under Articles 3537, 3542, and 3545 which govern, respectively, conventional obligations, products liability, and tort actions in general).

95. For a detailed explanation of the meaning and application of this article, see Symeonides, *supra* note 29, at 763-66. For a critique, see Weintraub, *Contributions of Symeonides and Koziris*, *supra* note 44.

96. La. Civ. Code art. 3547. The full text of the article is as follows:

Article 3547. Exceptional Cases. The law applicable under articles 3543-46 shall not apply if, from the totality of the circumstances of an exceptional case, it is clearly evident under the principles of Article 3542, that the policies of another state would be more seriously impaired if its law were not applied to the particular issue. In such event the law of the other state shall apply.

97. See Symeonides, *supra* note 29, at 759.

It should not be forgotten that, like any other clause of Article 3545, the reference to punitive damages contained therein is subject to the escape clause of Article 3547, which, moreover, operates on an issue-by-issue basis. An earlier effort to amend Article 3546 so as to prohibit the award of punitive damages in all products liability cases governed by Louisiana law and to prevent the application of the escape clause of Article 3547 was unsuccessful. When the amendment to Article 3545 was proposed and accepted, it was

In both cases, the plaintiffs invoked the escape clause but were unable to persuade the court that the conditions for the applying the clause were satisfied.

The *Jefferson* court quoted this author's statement that the insertion by the Council of the Law Institute of words "exceptional case" and "clearly evident" in Article 3547 was specifically intended to limit the article's application to "ensure that Article 3547 would not end up swallowing Articles 3543-3546."⁹⁸ However, the court failed to notice that in the next sentence the quoted author states that "'exceptional' need not be confined to extraordinary or statistically rare cases. 'Exceptional' might be any case in which most reasonable people would agree that the policies of one state will be significantly more impaired than those of the state whose law is designated as applicable by Articles 3543-3546."⁹⁹ This of course is a matter for judicial determination,¹⁰⁰ and, on balance, both courts may be correct in concluding that the escape should not apply. However, the reasons advanced for this conclusion call for further discussion.

The *Jefferson* court supported its conclusion by relying on two cases decided under the old law. The first case, *Pittman v. Kaiser Aluminum & Chemical Corp.*,¹⁰¹ recognized that Louisiana's interest in denying punitive damages "lies in the protection of its judicial system, rather than domestic defendants, from what it might consider inherently speculative awards."¹⁰² Indeed, this is a legitimate interest but not one that should *automatically* prevail in every case that comes before a Louisiana court. To begin with, since 1984, this interest in "protecting the judicial system" has been subordinated by the Louisiana Legislature in all cases involving injury caused by the handling of hazardous substances or drunk driving.¹⁰³ Secondly, in conflicts cases decided under the old conflicts law, this interest has been subordinated in as many cases¹⁰⁴ as it has been honored.¹⁰⁵

clear that it would remain subject to the escape clause of Article 3547.

Id.

98. *Jefferson*, 1992 U.S. Dist. LEXIS 9962 (quoting Symeonides, *supra* note 29, at 766).

99. Symeonides, *supra* note 29, at 766.

100. *Id.*

101. 559 So. 2d 879 (La. App. 4th Cir.), *writ denied*, 563 So. 2d 885 (La. 1990).

102. *Id.* at 883, *quoted in Jefferson*, 1992 U.S. Dist. LEXIS 9962 at *6. A similar statement is found in *Orleans Parish Sch. Bd. v. United States Gypsum Co.*, Civ. A. No. 89-0070, 1993 U.S. Dist. LEXIS 7792, *3 (E.D. La. June 30, 1992).

103. See La. Civ. Code arts. 2315.3 and 2315.4, enacted by 1984 La. Acts No. 335, § 1 (amended by 1990 Acts No. 302, § 1) and 1984 La. Acts No. 511, § 1.

104. See *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293 (5th Cir. 1982) (imposing punitive damages on one Louisiana defendant and on three foreign defendants for injury sustained in Mississippi and Kentucky caused by conduct in Louisiana and Mississippi); *Cooper v. American Express Co.*, 593 F.2d 612 (5th Cir. 1979) (awarding punitive damages under Alabama law against a Louisiana defendant who acted in Louisiana and caused intentional injury in Alabama to a plaintiff domiciled there); *Ardoyno v. Kyzar*, 426 F. Supp. 78 (E.D. La. 1976) (imposing punitive damages under Mississippi law on a Mississippi defendant for conduct in Mississippi that caused injury in Louisiana to a Louisiana domiciliary).

105. In addition to *Pittman*, 559 So. 2d 879, see *Lee v. Ford Motor Co.*, 457 So. 2d 193 (La. App. 2d Cir.), *writ denied*, 461 So. 2d 319 (La. 1984); *Commercial Union Ins. Co. v. Upjohn Co.*,

Thirdly, this interest has been expressly subordinated by the Louisiana Legislature by enacting Article 3546 which expressly allows a Louisiana court to award punitive damages in certain cases.¹⁰⁶

In articulating the interest of the state where the product was manufactured, the *Jefferson* court again quoted *Pitman*:

California [the state of manufacture] has an interest in preventing manufacturers within its boundaries from placing defective products in the stream of commerce. California's punitive damage law, if applied in this case, would serve to deter a California manufacturer such as Kaiser from placing defective wiring into the stream of commerce.¹⁰⁷

This is a good articulation of the interest of the state of manufacture and is consistent with the general philosophy of the new law, especially Articles 3543 and 3546.

However, the *Jefferson* court also quotes a conflicting statement from *Ramsey v. Bell Helicopter Textron, Inc.*:¹⁰⁸ "The policy of deterrence reflected in such an award [of punitive damages] ultimately seeks the protection of Texas [the state of manufacture] citizens against injury, and does not automatically translate into an interstate policy designed to punish its own manufacturing citizens for allegedly causing injury elsewhere."¹⁰⁹

409 F. Supp. 453 (W.D. La. 1976). In all three cases, the court applied Louisiana law and denied punitive damages for injury caused by a foreign product in Louisiana to a Louisiana domiciliary. These cases are identical to the two cases discussed in the text and were decided the same way. However, nothing suggests that Louisiana's alleged interest in protecting the integrity of its judicial system from punitive damages is any greater in products cases than in non-product cases. *See infra* text accompanying notes 108-114, discussing *Ramsey v. Bell Helicopter Textron, Inc.*, 704 F. Supp. 1381, 1382-83 (E.D. La. 1989).

106. La. Civ. Code art. 3546 provides as follows:

Article 46. Punitive damages. Punitive damages may not be awarded by a court of this state unless authorized:

(1) By the law of the state where the injurious conduct occurred and by either the law of the state where the resulting injury occurred or the law of the place where the person whose conduct caused the injury was domiciled; or

(2) By the law of the state in which the injury occurred and by the law of the state where the person whose conduct caused the injury was domiciled.

For a detailed discussion of the meaning and application of this article, see Symeonides, *supra* note 29, at 735-49. The *Jefferson* court was correct in concluding that Article 3546 was inapplicable because it was displaced by the more specific article, Article 3545. Indeed, with regard to punitive damages in products cases falling within its scope, Article 3545 is more specific than Article 3546 which applies to punitive damages in non-products cases and in products cases not "disposed of" by Article 3545.

107. *Jefferson Parish Hospital Service District #2 v. W.R. Grace & Co.*, Civ. A. No. 92-0891, 1992 U.S. Dist. LEXIS 9962, *5 (E.D. La. June 30, 1992) (quoting *Pitman*, 559 So. 2d at 883).

108. 704 F. Supp. 1381 (E.D. La. 1989).

109. *Id.* at 1382-83, quoted in *Jefferson*, 1992 U.S. Dist. LEXIS 9962, at *7, and *Orleans Parish Sch. Bd. v. United States Gypsum Co.*, Civ. A. No. 89-0070, 1993 U.S. Dist. LEXIS 7792, at *3 (E.D. La. June 30, 1992).

Although seemingly plausible, this statement is inconsistent with the philosophy of the new law. As evidenced by Articles 3543 and 3546, the new law is based on the assumption that, for matters of conduct and safety in general and for punitive damages in particular, the domicile of the plaintiff is not a relevant factor.¹¹⁰ Moreover, the above statement is inconsistent with another statement found in *Ramsey* and quoted by *Jefferson*: "Louisiana has a clear interest in a Louisiana accident involving a Louisiana resident."¹¹¹ The Louisiana resident referred to in *Ramsey*, the plaintiff, was injured by a defective product manufactured in Texas. It is incongruous to assert, as the *Ramsey* court does, that, Texas' domestic policy of punishing negligent manufactures *does not* "translate into an interstate policy designed to punish its own manufacturing citizens,"¹¹² but Louisiana's domestic policy against punitive damages somehow *does* "translate into an interstate policy"¹¹³ of depriving its citizen from such damages. In other words, if Texas' policy of deterring the negligent manufacture of defective products in Texas somehow stops at the Texas border and does not reach out-of-state injuries caused by such manufacturing, why is it that Louisiana's policy of protecting manufacturers from punitive damages somehow operates extraterritorially to protect out-of-state manufacturer's who are not even protected by the law of their own state. The *Ramsey* court's statements can be understood only if one assumes: (a) that Texas' rule imposing punitive damages is not really designed to deter negligent conduct, but rather to reward the victims of such conduct; and (b) that Louisiana's prohibition of punitive damages is not really designed to protect defendants but rather to punish victims who dare ask for such damages. Obviously, such assumptions would be erroneous, but they might enable a court applying the most extreme version of interest analysis to conclude that, in a case like *Ramsey*, Texas would not want to reward non-Texas victims, while Louisiana would want to punish Louisiana victims. It is submitted that neither of the above assumptions nor the resulting conclusion can be reconciled with the letter and spirit of the new law.

The above criticism is confined to the *Ramsey* case. This author does not necessarily disagree with the conclusion of the *Jefferson* and *Orleans Parish* cases that the plaintiffs did not carry the burden of persuasion for applying the escape clause of Article 3547. However, the *Ramsey* case is not good authority for that conclusion or for applying the new conflicts law, including Article 3547. First, *Ramsey* is based on a philosophy that is repudiated by, or is inconsistent with the new law. Second, *Ramsey* is not a good authority for Louisiana courts for another reason: it was decided under federal law rather than Louisiana conflicts law. Jurisdiction in that case was based on the Outer Continental Shelf Lands Act ("OCSLA") which calls for the application of the "civil and criminal laws of each

110. See Symeonides, *supra* note 29, at 705, 736.

111. *Ramsey*, 704 F. Supp. at 1383, quoted in *Jefferson*, 1992 U.S. Dist. LEXIS 9962, at *7.

112. *Id.*

113. *Id.*

adjacent state" to cases falling within the scope of the Act. The *Ramsey* court specifically held that, as interpreted by applicable Supreme Court precedent, OCSLA does *not* incorporate the choice-of-law rules of the adjacent state; the Act calls for the application of only the substantive law of the adjacent state.¹¹⁴ Because the accident in *Ramsey* occurred in the Louisiana part of the continental shelf, Louisiana was the "adjacent state" and its law was applied on that ground, i.e., as a matter of federal statutory choice, not as matter of judicial choice under state law. Unfortunately, the court further opined that the same result would follow under Louisiana's choice-of-law jurisprudence. That opinion, however, was merely a *dictum*, and not a well-reasoned one at that.

2. Contract Conflicts

As of the time of this writing, no contract conflict cases applying the new law have been decided by Louisiana appellate courts. However, two such cases have been decided by federal district courts sitting in diversity,¹¹⁵ and both involve Article 3537, the general and residual article on contract conflicts.¹¹⁶ Before discussing these cases, it may be helpful to describe the approach of this article.¹¹⁷

114. *Id.* at 1382.

115. See *First Alabama Bank v. Baber*, Civ. A. No. 92-1662, 1992 U.S. Dist. LEXIS 13977 (E.D. La. Sept. 16, 1992), discussed *infra* at text accompanying notes 121-128; *Thomas v. Amoco Oil Co.*, 815 F. Supp. 184 (W.D. La. 1993), discussed at *infra* text accompanying notes 129-151. See also *Phoenix Assurance Co. v. Shell Oil Co.*, 611 So. 2d 709 (La. App. 4th Cir. 1992) and *Rice, Fowler, Kingsmill, Vance, Flint & Booth v. J.A.R., Inc.*, Civ. A. No. 92-3298, 1993 U.S. Dist. LEXIS 9353 (E.D. La. June 30, 1993) (containing a passing reference to the new law). For other contract conflicts rendered after the effective date of the new law but decided under the old law, see *Em Nominee Partnership Co. v. Arkla Energy Resources*, 615 So. 2d 1369 (La. App. 2d Cir. 1993); *Ankum v. White Consol. Indus., Inc.*, Civ. A. No. 91-2990, 1992 U.S. Dist. LEXIS 16203 (E.D. La. Oct. 21, 1992); *Radiophone, Inc. v. Pricellular Corp.*, Civ. A. No. 91-4306, 1992 U.S. Dist. LEXIS 17007 (E.D. La. Nov. 4, 1992); *Farrell Constr. Co. v. Jefferson Parish*, Civ. A. No. 86-4242, 1992 U.S. Dist. LEXIS 12795 (E.D. La. Aug. 20, 1992). In addition, see the following insurance conflicts, also decided under the old law: *Willett v. Nat'l Fire & Marine Ins. Co.*, 594 So. 2d 966 (La. App. 3rd Cir. 1992); *Dugger v. Upledger Inst.*, 795 F. Supp. 184 (E.D. La. 1992); *Kadan v. Commercial Ins. Co.*, 800 F. Supp. 1392 (E.D. La. 1992).

116. La. Civ. Code art. 3537 provides:

Article 3537. General rule. Except as otherwise provided in this Title, an issue of conventional obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.

That state is determined by evaluating the strength and pertinence of the relevant policies of the involved states in the light of: (1) the pertinent contacts of each state to the parties and the transaction, including the place of negotiation, formation, and performance of the contract, the location of the object of the contract, and the place of domicile, habitual residence, or business of the parties; (2) the nature, type, and purpose of the contract; and (3) the policies referred to in Article 3515, as well as the policies of facilitating the orderly planning of transactions, of promoting multistate commercial intercourse, and of protecting one party from undue imposition by the other.

117. The description of the approach of Article 3537 draws heavily from the Reporter's

The first paragraph of this article enunciates the objective of the choice-of-law process for contract conflicts in language that is purposefully identical to that of the first paragraph of Article 3515, the article that enunciates the overall philosophy of the new law.¹¹⁸ As in Article 3515, the objective is to identify "the state whose policies would be most seriously impaired," that is, the state that, in light of its connection to the parties and the transaction and its interests implicated in the conflict, would bear the most serious legal, social, economic, and other consequences "if its law were not applied" to the issue at hand. As envisioned by Article 3537, the search for the applicable law should not be a mechanical, quantitative process. It should be based on an objective and impartial evaluation of the consequences of the choice-of-law decision on each of the involved states with a view towards accommodating their respective interests, rather than selfishly promoting the interests of one state at the expense of the others.

The second paragraph of Article 3537 prescribes the process or method for attaining the objective enunciated in the first paragraph in language that is parallel to, though more specific than, the language used in the second paragraph of Article 3515.¹¹⁹ Article 3537 adds specificity to the description of this process by: providing an illustrative list of the factual contacts that are usually pertinent in contract conflicts;¹²⁰ adding to the list of "policies mentioned in Article 3515" certain sets of policies that are *ex hypothesi* pertinent in contract conflicts; and

comments to that article, including the use of verbatim excerpts from these comments without quotation marks or other citations. It is believed that, since the Reporter and this author are the same person, such use is permissible.

118. This approach is described in detail in Symeonides, *supra* note 29, at 692-96, and in Symeonides, *Les grands problèmes*, *supra* note 32, at 232-39.

119. This cross-reference to Article 3515 also incorporates by reference the analysis prescribed by that article. The first step of the analysis is to identify "the relevant policies of the involved states." A state is considered "involved" when it has any of the factual contacts expressly listed in the second paragraph of this article or included by implication in the phrase "pertinent contacts." The "relevant policies" of that state are identified through the resources of the interpretative process by focusing on the specific rules of substantive contract law whose applicability is being urged in the particular case. The second step of the process is to evaluate "the strength and pertinence of [these] policies in the light of" the three sets of factors listed in the second paragraph, to wit: (i) the factual contacts of each involved state to the parties and the transaction; (ii) the "nature, type and purpose of the contract"; and (iii) the policies listed in clause (3).

120. This list is neither exhaustive nor hierarchical. It is intended to discourage rather than encourage a mechanistic counting of contacts as a means of selecting the applicable law. That one state has more contacts with the dispute than another state does not necessarily mean that the law of the first state should be applied to any or all issues of the dispute, unless the contacts are of the kind that implicate policies of that state that "would be most seriously impaired if its law were not applied" to the issue at hand. For example, in a contract pertaining to immovables, the fact that the "location of the object of the contract" is in one state may well be more important than all other factual contacts of another state, if the particular issue in dispute is such as to implicate a strong policy of the situs state concerning land utilization or security of land titles. Similarly, the place of the performance of a contract would normally be more important than most other factual contacts combined if the issue in dispute is the availability of specific performance and the contract is considered immoral under the law of the place of performance.

providing that the evaluation of the strength and pertinence of the involved policies is to be made "in the light of . . . the nature, type, and purpose of the contract."

Deliberately placed between the lists of factual contacts and multistate considerations, the last quoted phrase should help orient the dialectical process of evaluating the strength and pertinence of state policies. Indeed, the nature, type, or purpose of the particular contract may provide useful pointers for assessing the relative importance of factual contacts and the relative pertinence of multistate considerations. For example, in a contract with family-law aspects (e.g., a child-support agreement), the domicile of the parties would normally be more important than any of the other factual contacts listed in clause (1), and the policy of facilitating and promoting multistate commercial intercourse (clause 3) would be far less relevant than any of the other multistate considerations listed in clause (3). Similarly, in an employment contract, the place where the services were to be rendered would usually be among the more important factual contacts, and the policy of "protecting one party from undue imposition by the other" would acquire particular significance. Finally, the latter policy would usually be more important in small consumer contracts than in commercial contracts between parties with equal bargaining power.

The first case applying Article 3537 is *First Alabama Bank v. Baber*.¹²¹ In *Baber*, an Alabama bank sued a Louisiana debtor to collect on a loan secured by a collateral mortgage on "operating interests" in land located in Louisiana. The court drew the proper distinction between the law applicable to the mortgage, on the one hand, and the law applicable to the loan contract, that also established the mortgage, on the other. The court was also correct in concluding that while the law applicable to the mortgage is determined through Article 3535 on real rights, the law applicable to the loan contract is determined through Article 3537, the general article on contract conflicts.¹²² Since the only question before the court involved the loan contract itself rather than the mortgage created by it, the court properly applied Article 3537. Noting that the record did not contain sufficient facts for a complete analysis of the choice-of-law question, the court found that the available facts were nevertheless sufficient to sustain a conclusion that the contract was governed by Louisiana law. The court noted that defendant was a Louisiana resident doing business in Louisiana, that the contract's purpose was to provide the defendant with operating capital for his Louisiana business, and that the operating interests securing the various loans and advances were interests in land located in Louisiana.¹²³ The court concluded that, except for the plaintiff bank's Alabama locale, no other facts "outweigh those factors pointing to Louisiana as the appropriate source of law."¹²⁴

121. Civ. A. No. 92-1662, 1992 U.S. Dist. LEXIS 13977 (E.D. La. Sept. 18, 1992).

122. *Id.* at *4, relying on Reporter's comment (b) to La. Civ. Code art 3535.

123. *Id.* at *6.

124. *Id.*

The court was right to complain that the record was sparse with facts from which to decide the choice-of-law question. The court would have been equally right to complain about the apparent lack of any reference in the parties' briefs to the relevant policies of the two states. Without such reference, the choice-of-law decision is bound to degenerate into a quantitative counting of contacts. The blame for such a phenomenon would lie squarely upon the parties. Fortunately, the court's decision was correct for an additional reason. The court quoted a clause in the contract providing that the "[m]ortgagor does herein and hereby waive the three day's notice of demand provided for by Article 2639 of the Code of Civil Procedure of the State of Louisiana."¹²⁵ The court saw in this clause evidence that "Louisiana law was at least contemplated [by the parties] as the governing law."¹²⁶ This finding means that the application of Louisiana law would also be supported by Article 3540, which provides that contractual issues other than capacity or form are governed by the law "expressly chosen or clearly relied upon by the parties."¹²⁷ Since the opposing party offered no evidence or argument to rebut this conclusion, or to prove that the law of Alabama "would otherwise be applicable under Article 3537,"¹²⁸ the court's conclusion must be accepted as correct.

The second case applying Article 3537 is *Thomas v. Amoco Oil Co.*¹²⁹ *Thomas* involved the validity of an indemnity agreement between Woodson, a Louisiana construction company, and Amoco Oil Company, whose domicile is not mentioned in the opinion; however, the court noted that Amoco is neither domiciled in Louisiana nor in Texas, the other involved state.¹³⁰ The indemnity agreement was contained in a contract calling for construction work by Woodson on an Amoco owned land-based pipeline in Texas. The contract was negotiated via mail and telephone conversations between Louisiana and Illinois, and was executed by Woodson in Louisiana. The indemnity agreement would be invalid under the Louisiana Oilfield Indemnity Act ("LOIA"),¹³¹ but only if the agreement is one that "pertains to a well for oil, gas, or water."¹³² The court concluded that, since Woodson failed to establish that the Woodson-Amoco agreement pertained to a gas well,¹³³ the LOIA was inapplicable, and thus the indemnity agreement was

125. *Id.*

126. *Id.*

127. La. Civ. Code art. 3540 (emphasis added). This article provides in full as follows:
Article 3540. Party Autonomy. All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537.

128. La. Civ. Code art. 3540.

129. 815 F. Supp. 184 (W.D. La. 1993).

130. *Id.* at 187.

131. La. R.S. 9:2780 (1991).

132. *Id.* (emphasis added).

133. The Amoco pipeline connected one of Amoco's Texas refineries to one of its terminals, and transported butane to and from the refinery. The court noted that there was no sufficient nexus between this pipeline and "a well" so as to bring this case within the scope of LOIA. *Thomas*, 815

ultimately valid under Louisiana law. Apparently the agreement was also valid under Texas law. Although the opinion contains no reference to Texas law, the court eventually allowed Amoco to "pursue its contractual indemnity claim,"¹³⁴ a decision that would be correct only if the agreement was valid under Texas law.¹³⁵

If in fact the indemnity agreement was valid under the law of both states, there would be no conflict and the court's whole discussion of the choice-of-law issue would have been unnecessary. For example, the court's conclusion that "Louisiana has a greater interest in enforcing its anti-indemnity statute than does Texas. Thus, the policies behind Louisiana's indemnity law will be 'most seriously impaired' if Louisiana law is not applied,"¹³⁶ sounds hollow when one remembers that by its own terms, Louisiana's "indemnity law" was actually inapplicable to the case at hand. Similarly, the court's statement that "Louisiana's interest in protecting a resident contractor is greater than Texas' interest in protecting a non-resident contractor"¹³⁷ is equally meaningless when one remembers that neither state would have actually protected the contractor in this case. Finally, the court's assertion that "Texas suffers no impairment of its interests if Louisiana law is applied . . . [because] Texas is merely the place of performance of the contract and the location of the accident"¹³⁸ is a vast over-simplification. If the indemnity agreement was valid under Texas law (either because the agreement did not fall within the scope of its anti-indemnity statute or for any other reason), Texas would have an interest in seeing to it that contracts for the performance of services in Texas are faithfully performed. In this sense, the court's assertion that since "[n]either party is domiciled in Texas . . . [neither] should reasonably expect the protection of the Texas indemnity statute"¹³⁹ is another simplification. On the other hand, if the indemnity agreement was invalid under Texas law, Texas would still be deemed to have an interest in applying its law to ensure safety at the workplace by preventing the protection of the indemnitee from the consequences of his own negligence.

Fortunately, as said earlier, the court's choice-of-law discussion was harmless because the same result would follow regardless of which law one applies to this "false conflict." Nevertheless, the above discussion serves to illustrate the dangers encountered when one elevates state policies in the abstract, without relating those policies to the facts of the case at hand. Whether one employs interest analysis, the Restatement Second, or the new Louisiana conflicts law, one consideration remains constant: A state does not have an interest in having its law applied just because

F. Supp. at 188.

134. *Id.* at 189.

135. Texas also has its own version of an oilfield anti-indemnity act, but that act, like the LOIA, applies only to oilfield-related contracts.

136. *Thomas*, 815 F. Supp. at 187.

137. *Id.*

138. *Id.*

139. *Id.*

it has some contacts with the transaction or the parties. A state is interested only if its contacts with the transaction are such that applying its law to the case would actually further the pertinent policies underlying that law. With this in mind, it should be obvious that a state neither has an interest in applying a statute that is actually inapplicable, nor in protecting a domiciliary who is actually not protected by the statute.

3. Workers' Compensation Conflicts

Another aspect of *Thomas* that calls for some pause is the court's handling of a workers' compensation issue. The case began with a tort suit filed by Thomas, an employee of Woodson, who was injured by a gas explosion while working within the course and scope of his employment for Woodson on Amoco's pipeline in Texas. Amoco brought a third-party complaint against Woodson alleging that plaintiff's injury was caused by Woodson's negligence and seeking defense and indemnity for any amounts for which Amoco may be cast to pay Thomas. Shortly before Thomas' claim was to go to trial, he settled with Amoco. Woodson sought dismissal of Amoco's third-party complaint alleging that the workers' compensation laws of Texas and Louisiana bar Amoco's claim for contractual indemnity under each law's "exclusive" remedy provisions. The court concluded that: (a) the Louisiana Workers' Compensation Act was applicable to this issue; (b) the Act "relieves an employer from the obligation to indemnify under the 'tort-indemnity' theory";¹⁴⁰ and (c) the Act does not preclude indemnification based on a contract between the employer and the third party demanding indemnification.¹⁴¹ All three conclusions are correct. However, the court's first conclusion on the applicability of the Louisiana Workers' Compensation Act calls for further discussion.

The court assumed that this choice-of-law issue is governed by Article 3515, the general and residual article of Book IV of the Civil Code. However, since this article applies "except as otherwise provided in this Book,"¹⁴² one should first examine whether another more specific article in Book IV is applicable to the issue. In that context, one should examine the applicability of the tort articles of Book IV, or at least Article 3542. Secondly, since Book IV applies "unless otherwise expressly provided by the law of this state,"¹⁴³ one should also determine whether the particular choice-of-law issue is addressed by a more specific provision of Louisiana legislation. In that inquiry, one should consider Louisiana Revised Statutes 23:1035.1, the specific provision that defines the extraterritorial reach of the Louisiana Worker's Compensation Act. This provision authorizes the extraterritorial application of the Act to injuries occurring outside Louisiana if at

140. *Id.* at 186-89.

141. *Id.* at 186.

142. La Civ. Code art. 3515.

143. La. Civ. Code art. 14. *See supra* discussion at note 31.

the time of the injury the injured employee's employment is principally localized in Louisiana or the employment contract was made in Louisiana.¹⁴⁴ Since Thomas met both of these conditions, his recovery from his employer Woodson would clearly be governed by the Louisiana Act. Since Thomas had settled with Amoco, this question was no longer before the court. The only question before the court was whether Woodson's immunity from suits by Thomas or by third parties like Amoco should also be governed by the Louisiana Act. The court answered this question in the affirmative by applying Article 3515 as follows:

We believe that Louisiana is the only state which has an actual interest in the workers' compensation aspect of this litigation; and as a result, Louisiana's policies would be "most seriously impaired" if its laws are not applied. The Louisiana Workers' Compensation Statute was enacted to protect injured Louisiana employees as well as to prevent them from becoming a financial burden on the state because of their disabilities. Although Mr. Thomas was injured in Texas, he is domiciled in Louisiana and presumably expected to return to Louisiana after completing his work for Amoco. Thus, Louisiana, not Texas would bear the social costs of his inability to work. In addition, as a Louisiana employer, Woodson had "justified expectations" in making payments to Mr. Thomas according to Louisiana's workers' compensation statutory scheme. Thus, we find that Texas' interest in enforcing its workers' compensation laws would not be "seriously impaired" by the application of Louisiana law. We hold, therefore, that Louisiana law applies to the workers' compensation aspect of this dispute.¹⁴⁵

Although the court's conclusion is correct, its analysis suffers from three flaws. First, the court makes no mention of whether the Texas Workers Compensation Act was any different from the Louisiana Act on the issue of whether Woodson would be obligated to indemnify Amoco. Woodson had claimed that such indemnification was precluded by the "exclusivity provisions" of both the Louisiana and the Texas Acts.¹⁴⁶ If that was true, then there was no conflict on this issue and the court's choice-of-law discussion was needlessly lengthy.

Second, assuming there was a conflict between the Louisiana and Texas Acts, the issue before the court was not the obligation of Woodson to provide recovery

144. La. R.S. 23:1035.1 (1985). This statute provides, in part, as follows:

R.S. 23:1035.1. Extraterritorial coverage. (1) If an employee, while working outside the territorial limits of this state, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this Chapter had such injury occurred within this state, such employee, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this Chapter, provided that at the time of such injury (a) his employment is principally localized in this state, or (b) he is working under a contract of hire made in this state.

145. *Thomas*, 815 F. Supp. at 186.

146. *Id.*

for the injured employee, but rather Woodson's immunity under the Louisiana Act from tort suits by Thomas or third parties such as Amoco. In that context, the court's statement that "[t]he Louisiana Workers' Compensation Statute was enacted to protect injured Louisiana employees as well as to prevent them from becoming a financial burden on the state because of their disabilities,"¹⁴⁷ and its observation that "Mr. Thomas . . . is domiciled in Louisiana and [is] presumably expected to return to Louisiana,"¹⁴⁸ are not particularly helpful. More relevant is the court's statement that "as a Louisiana employer, Woodson had 'justified expectations' in making payments to Mr. Thomas according to Louisiana's workers' compensation statutory scheme."¹⁴⁹ It would be more to the point if the court were to speak of Woodson's expectations in *not* having to make payments to Amoco if such payments are not required by "Louisiana's workers' compensation statutory scheme." This was in fact the issue in *Thomas*.

Third, assuming that there was a conflict with regard to this issue between the Louisiana and Texas Acts, then in resolving this conflict one should pay proper attention to those provisions of the Louisiana Act that delineate its intended extraterritorial reach. *With regard to the employee's recovery*, these provisions expressly extend the Act's reach to Texas injuries if the employment is localized in Louisiana. The same should also be true with regard to the employer's immunities. There is a close interrelationship between the Act's provisions requiring the employer to provide compensation for the injured employee and the provisions immunizing the employer from tort suits by the employee or third parties like Amoco. The two sets of provisions are inseparable components of the "fundamental equation in every workers' compensation system."¹⁵⁰ Assuming that Texas law would require Woodson to provide tort indemnity to Amoco, then the application of Texas law would significantly impair the interests of Louisiana in establishing the proper equilibrium between the rights of employers and employees and in enabling employers like Woodson to properly calculate and insure against the costs of industrial accidents.¹⁵¹

147. *Id.*

148. *Id.*

149. *Id.*

150. *Eger v. E.I. Du Pont DeNemours Co.*, 539 A.2d 1213 (N.J. 1988). According to the court in *Eger*:

Immunity from tort liability of a party obligated to provide compensation coverage is an essential element of the fundamental equation in every workers' compensation system: the statutorily imposed agreement in which an employer provides compensation coverage protecting employees injured in all work-related accidents without regard to fault in return for immunity from suit based on fault arising from such accidents. . . . "The courts clearly consider that *this system of mutual give and take would be upset if the employee could sue for negligence in another jurisdiction.*"

Id. at 1217 (quoting *Jonathan Woodner Co. v. Mather*, 210 F.2d 868, 873-74 (D.C. Cir.) (footnote omitted), *cert. denied*, 348 U.S. 824, 75 S. Ct. 39 (1954)) (citations omitted).

151. See *Eger*, 539 A.2d 1213, a case very similar to *Thomas* but involving the reverse fact pattern. In *Eger*, the New Jersey Supreme Court wrote:

This of course only answers the question of whether Louisiana's interests would be impaired by the application of Texas law. It does not answer the question of whether Louisiana's interests would be *more* impaired by the application of Texas law than Texas interests would be by the application of Louisiana law. To answer that question, one should examine the relevant Texas law and its underlying policy. If, as it is likely, Texas' law was no different from Louisiana's, then neither state's interests would be impaired by the application of the other state's law. If Texas law was different than Louisiana's, then a true conflict might result that should be resolved through the approach of Article 3515, with proper attention being paid to the extraterritorial policies of Louisiana Revised Statutes 23:1035.1.

4. Liberative Prescription Conflicts

Two Louisiana appellate court cases and one diversity case decided during the survey period involve Article 3549 of the new law on liberative prescription¹⁵² and provide good illustrations of its operation in practice.¹⁵³ Before discussing

Application of New Jersey law to allow a tort suit against a South Carolina general contractor such as Du Pont would undermine the foundation of that state's workers' compensation statute. . . .

. . . [T]he obligation to provide workers' compensation coverage and immunity from tort liability are linked in any integrated and comprehensive workers' compensation scheme. . . . [S]ubjecting a South Carolina general contractor to tort liability in addition to the expense of providing compensation coverage for all employment-related accidents would frustrate that state's interest in regulating the manner in which victims of industrial accidents are compensated.

Id. at 1217-18. See also *Cooney v. Osgood Machinery, Inc.*, 612 N.E.2d 277, 282-83 (N.Y. App. 1993):

Missouri's decision to shield employers from contribution claims is thus a policy choice implicating significant State interests: "to deny a person the immunity granted * * * by a work[er]'s compensation statute of a given state would frustrate the efforts of that state to restrict the cost of industrial accidents and to afford a fair basis for predicting what these costs will be." (Restatement [Second] of Conflicts of Laws § 184, cmt. b, at 547.) Indeed, as the Restatement concluded in a related context, for another State "to subject a person who has been held liable in work[er]'s compensation to further unlimited liability in tort or wrongful death would frustrate the work[er]'s compensation policy of the State in which the award was rendered." (Restatement [Second] of Conflicts of Laws § 183, cmt. c, at 544.)

152. For a brief discussion of Article 3549, see Symeonides, *The Louisiana Experience*, *supra* note 32, at 502-07. See also Symeon C. Symeonides, *Revising Puerto Rico's Conflicts Law: A Preview*, 28 Colum. J. Trans'n'l L. 413, 433-447 (1990), discussing a similar, but not identical, article drafted by this author for the Puerto Rican Academy of Legislation and Jurisprudence and contained in the *Projet for the Codification of Puerto Rican Private International Law* (Academy Draft #1, March 1, 1991). The discussion in the text draws from these writings.

153. See *Smith v. Odeco (UK), Inc.*, 615 So.2d 407 (La. App. 4th Cir. 1993); *Rafferty v. Government Employees Ins. Co.*, 613 So. 2d 727 (La. App. 4th Cir. 1993); *Louisiana Land and Exploration Co. v. Enserch Corp.*, Civ. A. No. 92-02057, 1992 U.S. Dist. LEXIS 15710 (E.D. La. Sept. 28, 1992), discussed at text accompanying *infra* notes 219-221. For other cases involving prescription conflicts that were rendered after January 1, 1992, but decided under the old law, see

them, however, it might be helpful to explain the philosophy of the new law on this issue and to compare it with the old law.¹⁵⁴

a. The Old Law

Until the enactment of the new law, Louisiana's choice-of-law rules on prescription conflicts were found in paragraphs six and seven of former Article 15 of the Civil Code. Paragraph six contained the general rule requiring the application of the law of the forum (hereinafter *lex fori*) to all prescription conflicts. Paragraph six provided:

The prescription provided by the laws of this state applies to an obligation arising under the laws of another jurisdiction which is sought to be enforced in this state.¹⁵⁵

This paragraph embodied the traditional common-law approach which, based on the premise that prescription is a matter of procedure, assigned all prescription questions to the exclusive domain of the law of the forum.¹⁵⁶ This is in high contrast to the civil-law approach which considers liberative prescription merely as a mode of extinction of an obligation and thus a substantive matter which is

Trizec Properties, Inc. v. U.S. Mineral Prods. Co., 974 F.2d 602 (5th Cir. 1992); Washington v. Allstate Ins. Co., Civ. A. No. 91-3779, 1992 U.S. Dist. LEXIS 9961 (E.D. La. June 30, 1992); *In re Public Investors, Inc. v. Finevest Life Investors*, Civ. A. No. 92-1106, 1992 U.S. Dist. LEXIS 7146 (E.D. La. May 19, 1992); *National Union Fire Ins. Co. v. Ward*, 612 So.2d 964 (La. App. 2d Cir. 1993).

154. For a discussion of the pre-1992 law, see Dana P. Karam, Note, *Conflict of Laws—Liberative Prescription*, 47 La. L. Rev. 1153 (1987); Symeon C. Symeonides, *Louisiana and Comparative Conflicts Law* 376-77 (4th ed. 1993).

155. This paragraph was formerly the first paragraph of Article 3532 of the Civil Code and was placed there in 1960. It was drawn from a similar provision contained in Article 13 of the 1870 Code of Practice (repealed in 1960) which provided that "[t]he forms, the effects and the prescription of actions are governed by the law of the place where they are brought . . ." 1983 La. Acts No. 173 authorized the redesignation of the two paragraphs of La. Civ. Code art. 3532 (the second paragraph being the "borrowing statute" discussed below) as paragraphs six and seven of Article 10 of the Civil Code, and provided that this redesignation was not meant to be "an amendment to or a reenactment of" Article 3532. In 1987, Article 10 of the Civil Code was redesignated as Article 15 by 1987 La. Acts No. 124, which, again, provided that this redesignation was "neither an amendment to or a re-enactment" of Article 10.

156. For recent discussions of past and present American practice, see Robert A. Leflar et al., *American Conflicts Law* 348-56 (4th ed. 1986); Scoles & Hay, *supra* note 32, at 58-67; Russell J. Weintraub, *Commentary on the Conflict of Laws* 56-66 (3d ed. 1986); Margaret R. Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 *Ariz. St. L.J.* 1 (1980); P. John Kozyris & Symeon C. Symeonides, *Choice of Law in the American Courts in 1989: An Overview*, 38 *Am. J. Comp. L.* 601, 630-36 (1990); Gary L. Milhollin, *Interest Analysis and Conflicts Between Statutes of Limitations*, 27 *Hastings L.J.* 1 (1975); Karam, *supra* note 154; Symeon C. Symeonides, *Choice of Law in the American Courts in 1988*, 37 *Am. J. Comp. L.* 457, 474-78 (1989); Louise Weinberg, *Choosing Law: The Limitations Debate*, 1991 *U. Ill. L. Rev.* 683 (1991).

governed by the same law as the one that governs the obligation.¹⁵⁷ In the United States, the traditional approach gradually began to give way as soon as it was realized that, in such a mobile society, the inexorable application of the prescription law of the forum rewards shopping for the forum with the lengthiest prescriptive period. To curtail such forum shopping, state legislatures in the rest of the country enacted "borrowing statutes," that authorized the borrowing by the forum court of the prescription law of another state.¹⁵⁸ The state whose law is borrowed is typically the "state where the cause of action arose"¹⁵⁹ and is normally the state

157. The civil-law approach is exemplified in this hemisphere by the following: (1) Article 229 of the Bustamante Code, which provides that "[e]xtinctive prescription of personal actions is governed by the law to which the obligations which is to be extinguished is subject." Code of Private International Law (Bustamante Code), Annexed to Convention on Private International Law, signed at Havana on February 20, 1928, in *Convencion de Derecho Internacional Privado* (1928); (2) Article 2099 of the Peruvian Civil Code, which provides that "the limitation of personal actions as a result of inaction for a period of time (*prescription extinctiva*) is governed by the law of the underlying obligation." 129 Normas Legales 128-33 (Oct. 1984) in Alejandro M. Garro, *Peru: Private International Law in the New Civil Code of 1984*, 24 I.L.M. 997, 1011 (1985) (Although the article has been amended recently, it is virtually identical to the above.).

On the European continent, see Paragraph 10 of Article 10 of the Spanish Civil Code as amended in 1974, which provides that "[a] law that governs the obligation also governs matters relating to performance and to the consequences of non-performance as well as to extinction." *Extract of Preliminary Title of the Spanish Civil Code as amended July 9, 1974*, 21 Netherlands L. Rev. 367, 374 (1974).

For other examples of the civilian approach, see (1) Article 148 of the Swiss Federal Statute on Private International Law of December 18, 1987, which provides: "1. The law applicable to a claim governs its prescription and extinction. 2. In case of extinction by set-off, the applicable law is the law that governs the claim against which the set-off is asserted." Swiss Federal Statute on Private International Law of December 18, 1987 231 (Cornu Hankins & Symeon C. Symeonides trans. LSU Publication 1989); (2) Article 32 of the 1986 Law Amending the Introductory Law to the German Civil Code, which provides: "The law applicable to the contract by virtue of Articles 27 through 30 and Article 33 Paras. 1 and 2 shall govern in particular: . . . (d) the various ways of extinguishing obligations, and prescription and limitation of actions." Gerhard Wegen, *Federal Republic of Germany Act on the Revision of the Private International Law (July 25, 1986)*, 27 I.L.M. 1, 21; (3) Section 30(4) of the Hungarian Decree on Private Law of 1979, which provides: "To the statute of limitations the law otherwise applicable to the claim shall apply." Hungarian Law Decree #13 of 1979 on Private International Law (Official Translation) 59.

For a comprehensive discussion of this subject, see Hage-Chahine, *Les conflits dans l'espace et le temps en matiere de prescription* (1977); Dayant, *Les problemes actuels de conflit de lois en matiere de prescription*, *Travaux du Comite Francais Droit International Prive* C30-32: 167-196 (1969-71).

158. This movement began in the middle of the 19th century and culminated in the 20th century when a total of 38 states had enacted a borrowing statute in one form or another. The states that have not enacted such a statute are: Arkansas, Connecticut, Georgia, Maryland, Michigan, New Hampshire, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, and Vermont. The District of Columbia also did not enact any borrowing statute. In recent years Ohio and Texas repealed their borrowing statute.

159. See, e.g., Ala. Code § 6-2-17 (1988); Ariz. Rev. Stat. Ann. § 12-506 (1988); Cal. Civ. Proc. Code § 361 (West 1982); Colo. Rev. Stat. § 13-80-118 (1989); Del. Code Ann. tit. 10, § 8121 (1975); Fla. Stat. Ann. § 95.10 (West 1988); Haw. Rev. Stat. § 657-9 (1989); Idaho Code § 5-238 (1988); Ind. Code § 34-1-2-6 (b) (1983); Iowa Code Ann. § 614.7 (West 1989); Kan. Civ. Proc. Code

whose law would be applicable to the merits of the action (*lex causae*). While they vary in breadth and detail, these statutory exceptions to the *lex fori* rule share one common characteristic: they apply only in cases in which the forum's prescriptive period is longer, not shorter, than that of the state of the *lex causae*.¹⁶⁰ Louisiana enacted its own borrowing statute by Act 168 of 1855, which eventually found its way into the civil code and became paragraph seven of former Article 15.¹⁶¹ That paragraph provided:

When a contract or obligation has been entered into between persons who reside out of this state, and such contract or obligation is barred by prescription, or the statute of limitations, of the place where it is to be paid or performed, it shall be considered and held to be barred by prescription in this state, upon the debtor who is thus discharged coming into this state.¹⁶²

This statute is one of the narrowest in the country.¹⁶³ The terms "contract or obligation," as used in the statute, suggest that the statute encompasses not only causes of action based on contract, but also causes originating in other sources, such as delicts or quasi-delicts. Nevertheless, closer analysis suggests that the

Ann. § 60-516 (Vernon 1988); Ky. Rev. Stat. Ann. § 413.320 (Baldwin 1979); Mass. Gen. Laws Ann. ch. 260, § 9 (West 1980); Miss. Code Ann. § 15-1-65 (Supp. 1989); Mo. Ann. Stat. § 516-190 (Vernon Supp. 1990); Nev. Rev. Stat. § 11-020 (1989); N.Y. Civ. Prac. L. & R. 202 (McKinney 1972); N.C. Gen. Stat. § 1-21 (1988); Ohio Rev. Code Ann. § 2305-20 (Baldwin 1988); Okla. Stat. Ann. tit. 12, §§ 104-108 (West 1988); Or. Rev. Stat. §§ 12.410-480 (1988); R.I. Gen. Laws § 9-1-18 (1985); Tenn. Code Ann. § 28-1-112 (1980); Wash. Rev. Code Ann. § 4-16-290 (1988).

160. For representative samples of American borrowing statutes, see Symeonides, *supra* note 154, at 397-99. For a comprehensive study of borrowing statutes, see David H. Vernon, *Statutes of Limitations in the Conflict of Laws*, 32 Rocky Mtn. L. Rev. 287 (1960) (For an update see David H. Vernon, *Conflict of Laws: Theory and Practice* 3-14 to 3-16 (2d ed. 1982)). See also John W. Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. Fla. L. Rev. 33 (1962); Ibrahim J. Wani, *Borrowing Statutes, Statutes of Limitations and Modern Choice of Law*, 57 UMKC L. Rev. 681 (1989).

161. 1855 La. Acts No. 168 was later designated, without any substantive change, as § 2808 of the Louisiana Revised Statutes and then incorporated into the Civil Code of 1870 as Article 3532 of that Code. In 1960, this article was amended by 1960 La. Acts No. 30. Act 30 took the language of Article 13 of the repealed Code of Practice of 1870 and inserted it as a new paragraph into Article 3532. Since then, the two paragraphs of Article 3532 have met the same fate, eventually becoming paragraphs six and seven of former Civil Code Article 15. See *supra* note 155.

162. La. Civ. Code art. 15, ¶ 7 (repealed 1991 La. Acts No. 923, effective Jan. 1, 1992).

163. Of the 38 borrowing statutes in the United States, the statutes of 36 states encompass all "actions" or "causes of action," without regard to whether these actions arise out of contracts, torts, etc. Only Virginia and West Virginia have narrower statutes. West Virginia's statute is confined to actions "[u]pon a contract which was made and was to be performed in another state." W. Va. Code § 55-2-17 (1990). Virginia's borrowing statute provides: "No action shall be maintained on any contract which is governed by the law of another state or country if the right of action thereon is barred either by the laws of such state or country or of this Commonwealth." Va. Code Ann. § 8.01-247 (Michie 1990). The similarity to Louisiana's borrowing statute found in paragraph seven of former Article 15 of the Civil Code is obvious.

original legislative intent was to encompass only contractual causes of action. Although today no lawyer needs to be reminded that obligations may arise from sources other than contracts,¹⁶⁴ that was not necessarily true in 1855. It is more likely that in the minds of the drafters of Act 168 of 1855 the term "obligation" was meant to be either synonymous or parallel with the term "contractual obligation."¹⁶⁵ This view is supported by the likely source of the Louisiana statute,¹⁶⁶ by its French text,¹⁶⁷ and because the words "contract or obligation" contained therein are followed by the words "has been *entered into*." The italicized words presuppose a volitional act—a contract, or a unilateral juridical act. One does not "enter into" a delictual obligation. One *incurs* a delictual obligations as a result of some "acts or facts."¹⁶⁸ Had the drafters intended to include delictual obligations within the scope of this provision, they would have used a different verb. Thus, it seems rather clear that the original legislative intent was to confine this statute to contractual causes of action. Whether this limitation should have been retained by the Louisiana Legislature is a different question, especially in the latter half of this century when forum shopping in tort cases became increasingly common. In any event, Louisiana courts have abided by this limitation and have not attempted to expand the statute to non-contractual causes. In fact, apparently because of the extreme narrowness of this statute, Louisiana courts have never had the opportunity to apply it squarely.¹⁶⁹

164. See La. Civ. Code art. 1757 which provides that "obligations arise from contracts and other declarations of will. They also arise directly from the law, regardless of a declarations of will, in instances such as wrongful acts, . . . unjust enrichment and other acts or facts."

165. Evidence of this conclusion is found in Article 1750 of the Civil Code of 1825 (Article 1757 of the Code of 1870) which defined a civil obligation as "a legal tie, which gives the party *with whom it is contracted*, the right of enforcing its performance by law." La. Civ. Code art. 1750 (1825) (emphasis added). The italicized words show that, even the drafters of the 1825-1870 Code used the broad term "obligation" as more or less synonymous with the narrower term "contractual obligation." This erroneous understanding was probably more prevalent in the period around 1855, a period of a rather serious decline of the civil-law tradition.

166. There is strong reason to suspect that the Louisiana statute was modelled after the Virginia and West Virginia statutes, judging from the striking similarity in the language of these statutes and the proximity in the dates of their enactment. The West Virginia statute was enacted in 1849 and is now found in W. Va. Code § 55-2-17 (1990). The Virginia statute was enacted at about the same time and, except for punctuation, was identical to the West Virginia statute. It is now found in Va. Code Ann. § 8.01-247 (Michie 1990). Both statutes are confined to contract actions.

167. The French translation published on the opposite page from the English original in the official publication of Act 168 of 1855 uses the words "*sera contractée*" for the English phrase "entered into." Similarly, the words "to be paid or performed" are translated as "*devra être payé ou exécuté*." The French text of a Louisiana statute of the period around 1855 is not authoritative, however, since, unlike the Civil Codes of 1808 and 1825 which were drafted in French and then translated into English, the ordinary statutes of the last three quarters of the 19th century were drafted in English and then translated into French. Nevertheless, although the French text of Act 168 is not authoritative, it reflects the understanding of that period that the "obligation" contemplated by the drafters of 1855 La. Acts No. 168 was of the type that was *contracted* rather than incurred.

168. La. Civ. Code art. 1757.

169. The only case that came close to applying this statute to a cause of action—as opposed to

Because paragraph 7, one of the narrowest exceptions in the nation, was the only Louisiana exception to the *lex fori* rule, Louisiana law did not develop smoothly in this very important area of conflicts law. Louisiana courts had their hands tied, while common-law courts were free to develop other exceptions to the *lex fori* rule in their effort to curtail the forum shopping generated by the rule. Even when the traditional conflicts theory dominated the United States, American courts developed an exception that authorizes the court to apply a foreign prescriptive period that is shorter than the forum's, if the foreign period is conceived or perceived as a limitation to the right itself, not just the remedy.¹⁷⁰ For example, common-law courts typically invoke this exception to dismiss a wrongful death action arising under the law of another state, if the other state's law subjects the action to a shorter limitation period. Noting that a wrongful death action was not recognized by the common law, these courts reason that the action was granted by statute supposedly *on the condition* that it be exercised within the short limitation period. Although this exception was mentioned in *dicta* by Louisiana courts,¹⁷¹

a foreign judgment—was *Drs. Young & Geraghty v. Bowie*, 3 La. App. 8 (Orl. 1925). *Bowie* involved an action for the recovery of fees for medical services rendered in Maryland by two doctors domiciled there to a patient who was then domiciled in Texas and who moved to Louisiana after the lapse of Texas' two-year statute of limitations. The court of appeal affirmed the trial court's dismissal of the action which was filed within Louisiana's three-year prescriptive period but did not discuss nor rely expressly on this statute, then La. Civ. Code art. 3532. The court relied upon *Newman v. Eldridge*, 107 La. 315, 31 So. 688 (1902), a case that applied La. R.S. 2808 (1870) (the predecessor of paragraph seven) to a foreign judgment. *Walworth v. Routh*, 14 La. Ann. 205 (1859), like *Newman*, involved a foreign judgment rather than a foreign cause of action. In determining whether La. R.S. 2808 (1870) was applicable to a foreign judgment, the court in *Roper v. Monroe Grocer Co.*, 171 La. 181, 129 So. 811 (1930) stated in dictum that the word "between" in the clause "whenever any contract or obligation has been entered into or judgement rendered between persons who reside out of the State" was used "with reference to *contracts*, more than with reference to judgments." *Id.* at 813 (emphasis added). In *Kirby Lumber Co. v. Hicks Co.*, 144 La. 473, 80 So. 663 (1919), which involved a contractual cause of action, the court held correctly that the borrowing statute was inapplicable because, although the contract involved Texas land and was perhaps to be performed in that state, the contracting parties were both domiciled in Louisiana and had contracted there. Finally, in *Trizec Properties, Inc., v. U.S. Mineral Prods. Co.*, 974 F.2d 602 (5th Cir. 1992), the statute was found to be inapplicable to a non-contractual cause of action.

170. See *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140 (1886); *Bournias v. Atlantic Maritime Co.*, 220 F.2d 152 (2d Cir. 1955). For the latest examples of cases applying the shorter built-in limitation period of a foreign wrongful death statute, see *Siroonian v. Textron, Inc.*, 844 F.2d 289 (5th Cir. 1988); *Shell Oil Co. v. Hickman*, 716 F. Supp. 931 (W.D. Va. 1989).

171. The first case in Louisiana to mention this exception was a diversity case, *Kozan v. Comstock*, 270 F.2d 839 (5th Cir. 1959), in which the Fifth Circuit said that "[i]f a foreign statute of limitations not only bars the remedy but extinguishes the substantive right as well, then the forum will apply the limitation period of the foreign jurisdiction." *Id.* at 841. However, this statement was pure dictum. Moreover, the authority cited for it, a law review article, Mary B. Perkins, Comment, *Limitation of Actions in the Conflict of Laws*, 10 La. L. Rev. 374, 377 (1950), is suspect. The article claimed that one Louisiana case, *Harrison v. Stacy*, 6 Rob. 15 (La. 1843), had applied this exception; however, although the court in *Harrison* applied a Mississippi prescriptive period that might qualify as preemptive or "substantive," the basis for doing so is not at all clear. *Harrison* did not mention the pertinent Louisiana prescription and ignored completely Article 13 of the 1825 Code of Practice.

the better view is that it was not recognized in Louisiana because neither paragraph six nor paragraph seven of Civil Code article 15 would seem to permit it.

Responding to criticisms by commentators,¹⁷² American courts begun to gradually break away from the traditional *lex fori* rule and began subjecting prescription issues to the same choice-of-law analysis as the other issues before the court without any a priori reliance on the *lex fori*.¹⁷³ This new trend is reflected in the 1987 and 1988 revisions of § 142 of the Second Conflicts Restatement.¹⁷⁴ Subsection (1) of new § 142, especially through its cross-reference to § 6, establishes a nuanced, flexible formula for determining the law applicable to prescription. This formula purports to be detached from any a priori preference for either the *lex fori* or the *lex causae*. However, perhaps because this formula may be time-consuming (or it may mean different things to different people), this formula is implemented through presumptive rules that are based on the *lex fori* as the basic rule.

In 1982, the Commissioners on Uniform State Laws promulgated a new uniform act,¹⁷⁵ which, somewhat surprisingly, moved to the other extreme by adopting the premise that prescription is a substantive matter which should therefore be governed by the law of the state whose law would govern the merits

which provided that "prescription of actions . . . [is] governed by the law of the place where it is brought." The *Kozan* dictum was repeated in *Rohde v. Southeastern Drilling Co., Inc.*, 667 F.2d 1215 (5th Cir. 1982), but again as dictum. *Kleckley v. Hebert*, 464 So.2d 39 (La. App. 3d Cir. 1985), should be seen as a case of federal preemption rather than choice of law. Recently, Judge Sear rejected the applicability of this exception in *Trizec Properties, Inc. v. U.S. Mineral Prods. Co.*, Civ. A. No. 89-4133, 1991 U.S. Dist. LEXIS 5241 at *4 n.4 (E.D. La. Apr. 11, 1991).

172. In addition to the writings cited at *supra* note 156, see James A. Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 Washburn L.J. 405 (1980); Note, *An Interest-Analysis Approach to the Selection of Statutes of Limitation*, 49 N.Y.U. L. Rev. 299 (1974). For an early criticism, see, *The Statutes of Limitations and the Conflict of Laws*, 28 Yale L.J. 492 (1919). For an excellent recent discussion, see Weinberg, *supra* note 156.

173. This trend is represented by *Heavner v. Uniroyal, Inc.*, 305 A.2d 412 (N.J. 1973). See also *Nelson v. International Paint Co.*, 716 F.2d 640 (9th Cir. 1983); *Tomlin v. Boeing Co.*, 650 F.2d 1065 (9th Cir. 1981); *Schum v. Bailey*, 578 F.2d 493 (3d Cir. 1978); *Air Prods. and Chems., Inc. v. Fairbanks Morse, Inc.*, 206 N.W.2d 414 (Wisc. 1973).

174. Section 142 of the Restatement (Second) provides in part:

In general, unless the exceptional circumstances of the case make such a result unreasonable: (1) The forum will apply its own statute of limitations barring the claim; (2) The forum will apply its own statute of limitations permitting the claim unless (a) maintenance of the claim would serve no substantial interest of the forum; and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

For critical discussion, see Weinberg, *supra* note 156, at 705-710.

175. See Uniform Conflict of Laws—Limitations Act, 12 U.L.A. 56 (1988). This Act has been adopted by Arkansas, Colorado, Montana, North Dakota, Oregon, and Washington. For an authoritative discussion, see Robert A. Leflar, *The New Conflicts-Limitations Act*, 35 Mercer L. Rev. 461 (1984). Professor Leflar was the chairman of the Drafting Committee, with the late Professor James A. Martin of Michigan serving as the Reporter. See also Laura Cooper, *Statutes of Limitation in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction*, 71 Minn. L. Rev. 363 (1986); Weinberg, *supra* note 156, at 702-705.

of the action (*lex causae*).¹⁷⁶ However, recognizing that often the forum has important interests in matters of prescription, this Act makes some concessions in favor of the law of the forum (*lex fori*). Section 4 of the Act authorizes resort to the *lex fori* if the limitation period of the *lex causae* "is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against the claim." This Act is a significant improvement over its predecessor which had called for the application of whichever of the two laws (i.e., the *lex fori* or the *lex causae*) provided for the shorter prescriptive period.¹⁷⁷ Although not directly influenced by the civil law, the new Act accidentally reflects the civilian approach which considers prescription as merely a mode of extinguishing the obligation and subjects it to the same law as the one applicable to the merits of the obligation or action (*lex causae*).¹⁷⁸

b. Lessons Derived From Experience and Comparison

It seems that both the civil-law approach and the traditional common-law approach suffer from a holistic characterization of prescription as being always a substantive or always a procedural matter. In fact, a rule of prescription may, and usually does, serve both substantive and procedural objectives or policies.¹⁷⁹ For

176. Section 2 of the Uniform Conflict of Laws—Limitations Act provides:

(a) Except as provided by Section 4, if a claim is substantively based: (1) upon the law of one other state, the limitation period of that state applies; or (2) upon the law of more than one state, the limitation period of one of those states chosen by the law of conflict of laws of this State, applies.

(b) The limitation period of this State applies to all other claims.

177. See Uniform Statute of Limitations on Foreign Claims Act § 2, 14 U.L.A. 507, 508 (1980). This Act was promulgated in 1957 and was officially withdrawn in 1978 after being adopted in only three states (Oklahoma, Pennsylvania, and West Virginia).

178. See *supra* note 157.

179. For an authoritative and eloquent articulation of this basic truth, see Justice Brennan's concurring opinion in *Sun Oil Co. v. Wortman*, 486 U.S. 717, 736, 108 S. Ct. 2117, 2129 (1988) (Brennan, J., concurring):

Were statutes of limitations purely substantive, the issue would be an easy one, for where, as here, a forum State has no contacts with the underlying dispute, it has no substantive interests and cannot apply its own law on a purely substantive matter. Nor would the issue be difficult if statutes of limitations were purely procedural, for the contacts a State has with a dispute by virtue of being the forum always create state procedural interests that make application of the forum's law on procedural questions "neither arbitrary nor fundamentally unfair." Statutes of limitation, however, defy characterization as either purely procedural or purely substantive. The statute of limitations a State enacts represents a balance between, on the one hand, its substantive interest in vindicating claims and, on the other hand, a combination of its procedural interest in freeing its courts from adjudicating stale claims and its substantive interest in giving individuals repose from ancient breaches of law. A State that has enacted a particular limitations period has simply determined that after that period the interest in vindicating claims becomes outweighed by the combination of the interests in repose and avoiding stale claims. One cannot neatly categorize this complicated temporal balance as

instance, a rule that subjects medical malpractice claims to a short prescription is designed to accomplish certain substantive objectives by shielding a particular class of defendants (doctors and their insurers and through them the consumers at large) from prolonged exposure to liability. At the same time, this rule promotes certain procedural objectives by reducing the number of malpractice actions and thus helps to conserve judicial energy. Similarly, a rule that prohibits renunciation of prescription promotes substantive aims by protecting the debtor from the coercive power of the creditor. At the same time, by preventing the lengthening of prescription beyond the point considered appropriate by the law of the forum, this rule serves procedural policies by protecting the courts from the burden of, and dangers inherent in, adjudicating old claims. On the other hand, a rule that prohibits the contractual shortening of prescription of actions by an insured against his insurer subordinates the procedural policies of encouraging the early filing of actions to the preferred substantive policy of protecting the insured from the superior bargaining power of the insurer.

Thus, from the choice-of-law perspective, the automatic application of the law of the forum to all multistate cases (the traditional common-law approach) would seem to be as arbitrary as the automatic application of the *lex causae* (the traditional civil-law approach). By exaggerating the procedural function of prescription and ignoring its substantive function, the traditional common-law approach encourages forum shopping and a disregard for the legitimate interests of other states that might be more intimately related to the parties and their dispute. By overemphasizing the substantive function of prescription, the traditional civilian approach prevents the forum from promoting its own procedural interests *qua* forum.

Therefore it is not surprising that, despite their original differences, both of these approaches have gradually come to recognize the need for some concessions in favor of the other and have abandoned their exclusive adherence to a single law. This need for exceptions is perhaps the most important lesson from this experience. In a sense, it is less important which of the two laws (i.e., *lex fori* or *lex causae*) is eventually adopted as the basic rule, as long as it is subjected to appropriate exceptions. The difficult question is therefore not whether exceptions should exist, but which exceptions should be carved out of the basic rule. While reasonable people might disagree on where exactly to draw the lines of the compromise, this experience can at least help identify some of the forces that are usually at work in prescription conflicts. Without a claim to completeness, these forces may be placed in four categories: (a) the procedural and substantive policies embodied in the particular prescription rule of the forum; (b) the substantive policies embodied in the prescription rule of the state whose law governs the merits of the action; (c) the universal policy of discouraging forum shopping; and (d) the federally sanctioned policy of providing a forum for multistate causes of action in appropriate circumstances. Obviously, these forces do not appear with the same intensity in all

prescription conflicts and usually point in opposite directions. However, they do exist, cannot be ignored, and are not susceptible to simplistic recipes.

*c. The New Law*¹⁸⁰

i. The New Basic Rule

Drawing from the above lessons, Article 3549 of the new law attempts to combine the strengths and avoid the problems of the common-law approach and the civil-law approach. Consistent with, but not because of Louisiana's mixed legal heritage, Article 3549 is built around the *lex causae* and the *lex fori*, the two poles of the civilian and the common-law approaches respectively—perhaps with a slight tilt in favor of the latter. The article attempts to attain a balance between the four competing forces identified above and to find the golden mean between tradition and progress, between predictability and flexibility. The first paragraph of Article 3549¹⁸¹ provides that forum prescription law applies without exception, and without consideration of whether or not it bars the action, to all actions whose merits are governed by forum substantive law. The first sentence of the second paragraph also provides that the *lex fori* applies in principle even to actions the merits of which are governed by the substantive law of another state. However, this general statement is qualified by two exceptions articulated in the subparagraphs (1) and (2) of that paragraph.¹⁸² By retaining the *lex fori* as the basic rule, Article

180. The discussion of the new law on this issue draws heavily from the Reporter's comments to Article 3549, including the use of verbatim excerpts from these comments without quotation marks or other citations. It is believed that, since the Reporter and this author are the same person, such use is permissible.

181. La. Civ. Code art. 3549 provides:

Article 3549. Law Governing Liberative prescription. When the substantive law of this state would be applicable to the merits of an action brought in this state, the prescription and peremption law of this state applies.

When the substantive law of another state would be applicable to the merits of an action brought in this state, the prescription and peremption law of this state applies, except as specified below:

(1) If the action is barred under the law of this state, the action shall be dismissed unless it would not be barred in the state whose law would be applicable to the merits of the action and maintenance of the action in this state is warranted by compelling considerations of remedial justice.

(2) If the action is not barred under the law of this state, the action shall be maintained unless it would be barred in the state whose law is applicable to the merits and maintenance of the action in this state is not warranted by the policies of this state and its relationship to the parties or the dispute nor by any compelling considerations of remedial justice.

This article applies to issues of liberative prescription and peremption, including all questions of commencement, suspension, interruption, and accrual. This article does not apply to prescription of judgments, to acquisitive prescription, or to prescription of non-use of real rights other than ownership.

182. These two exceptions are deliberately phrased differently so that the burden of displacing

3549 maintains an important link with prior Louisiana law and serves the goals of simplicity and predictability. At the same time, by carving out of that rule two broad and flexible exceptions, the second paragraph of the article will hopefully achieve the right amount of flexibility.

ii. The First Exception: Actions Barred by the Lex Fori But Not by the Lex Causae

The first exception is established by subparagraph (1) of the second paragraph of Article 3549, which begins by reaffirming the *lex fori* rule for actions barred under the law of the forum,¹⁸³ and then states the two prerequisites for the exception.¹⁸⁴ The first is that the action "would not be barred in the state whose law would be applicable to the merits of the action." The second is that "maintenance of the action in this state is warranted by compelling considerations of remedial justice." This language is borrowed from the 1986 revision of § 142 of the Restatement Second. The examples given by the Restatement are pertinent to the application of this provision and illustrate its exceptional character. These examples refer to cases where "through no fault of the plaintiff an alternative forum is not available as, for example, where jurisdiction could not be obtained over the defendant in any state other than the forum or where for some reason a judgment obtained in the other state having jurisdiction would be unenforceable in other states. . . . also . . . situations where suit in the alternative forum, although not impossible would be extremely inconvenient for the parties."¹⁸⁵ As might be surmised from the initial phrase of the quotation, none of these examples should be seen as requiring the forum to entertain an action solely because it is time-barred in all or most other states. The disapproving reference to *Keeton v. Hustler Magazine, Inc.*¹⁸⁶ as an "egregious example of forum shopping" in the comments to this section of the Restatement leaves little doubt that the plaintiff's own

forum law will be heavier in cases where forum law provides for a longer prescriptive period (subparagraph 2) than in cases in which it provides for a shorter prescriptive period (subparagraph 1) than the foreign *lex causae*.

183. The rationale for the rule in these cases is that the application of the shorter prescriptive period of the *lex fori* promotes the forum's interest in judicial economy and protects the integrity of its judicial system.

184. This exception departs from prior Louisiana law which did not allow the displacement of the *lex fori* when it provided for a shorter prescriptive period than that of the *lex causae*. See *supra* text accompanying notes 163-172. The reason for this was apparently the desire to protect the judicial system of the forum from the burden of, and the dangers inherent in, adjudicating claims that were deemed too old under the forum's principles of liberative prescription. However, in some cases this otherwise legitimate desire should yield to an equally important need to provide a forum. By authorizing a new exception to the *lex fori* rule, subparagraph (1) recognizes this need.

185. Restatement (Second) of Conflict of Laws, 1986 Revisions, § 142 cmt. f (Supp. March 31, 1987).

186. 465 U.S. 770, 465 S. Ct. 770 (1984). In *Keeton*, the plaintiff was able to take advantage of New Hampshire's unusually long six-year statute of limitation and to file her defamation action in that state after it had already prescribed in virtually all other states of the United States.

procrastination is not likely to make his case compelling enough to reach the threshold of this exception.

The first Louisiana appellate case involving this exception was *Smith v. Odeco (UK), Inc.*¹⁸⁷ *Smith* involved an action by a resident and citizen of the United Kingdom for injuries suffered aboard a U.S. flag vessel (drilling rig) owned by Odeco, while the vessel was engaged in exploration and development of offshore energy resources in waters overlaying the Continental Shelf off the coast of Spain. The defendant companies were incorporated under Delaware law and had their corporate offices in New Orleans, Louisiana. The parties conceded and the court agreed that the law applicable to the merits of this action would be the law of the United Kingdom, apparently because the plaintiff was domiciled and hired in that country and took his work orders out of Odeco (UK)'s office in Aberdeen, Scotland. This conclusion renders inapplicable the first paragraph of Article 3549 and makes applicable its second paragraph. The Louisiana action was filed after the accrual of Louisiana's one-year prescription for torts, but before the accrual of the three-year limitation provided by British law. Thus, since the action was barred by the prescription law of the *lex fori* but not by that of the *lex causae*, the case falls within the scope of subparagraph 1 of the second paragraph of Article 3549.

The court held that the exception described above was applicable and allowed the action to proceed because "'compelling considerations of remedial justice' exist which warrant maintenance of this suit in Louisiana."¹⁸⁸ In support of its holding, the court quoted an example from the Reporter's comments to Article 3549 explaining the application of this exception. The example refers to cases where "through no fault of the plaintiff an alternative forum is not available as, for example, when jurisdiction could not be obtained over the defendant in any state other than the forum"¹⁸⁹ The court explained that the plaintiff was blameless in that he filed the appropriate action in Scotland well within the British prescriptive period of three years, and perhaps within the Louisiana prescriptive period of one year.¹⁹⁰ The court also explained that under Scottish law, the Scottish courts did not have jurisdiction over any of the defendant companies because none of them was either domiciled in or had its "management and control" in any part of the United Kingdom.¹⁹¹

187. 615 So. 2d 407 (La. App. 4th Cir. 1993).

188. *Id.* at 410.

189. Reporter's cmt. (f) to La. Civ. Code art. 3549, *quoted in Smith*, 615 So. 2d at 409.

190. *See infra* text accompanying notes 196-197.

191. *Smith*, 615 So. 2d at 409-410. The court also noted:

when plaintiff filed suit in Aberdeen, Scotland, Odeco (UK), Inc. could not be located at its registered address. An additional attempt to serve the corporation resulted in the discovery that Odeco (UK), Inc. no longer did business there and that the premises were now occupied by a company named Diamond M-Odeco Inc. which existed in the United Kingdom in name only, and no management and control of the company was exercised there. The affiant further states that the Scottish Courts could thus decline jurisdiction. The affiant further avers that he is "not aware of any reasonable grounds on which it would be open to Mr. Smith to sue any co-defender in Scotland in respect to this

Instead, all the defendants had their corporate offices in New Orleans, Louisiana.¹⁹² The court concluded that "Louisiana is the only forum where a suit may be maintained against all the defendants, with their principal offices [in Louisiana]"¹⁹³ and that "[i]n the absence of an alternative forum in which there is jurisdiction over all defendants, 'compelling considerations of remedial justice' exist which warrant maintenance of this suit in Louisiana."¹⁹⁴

Both the result and the reasoning in *Smith* are entirely in accord with the spirit of the new law. However, one technical point raised by *Smith* deserves further discussion. The court states that the plaintiff's Scottish action was filed on September 22, 1989;¹⁹⁵ however, the court also states that this was also the date of the accident.¹⁹⁶ Since it is rather uncommon for lawsuits to be filed on the very date of the accident, especially offshore accidents, it is likely that there is a typographical error in the dates given by the court. The date of the filing of the Scottish action would have been relevant *if* the Scottish court was a court of "competent jurisdiction and venue."¹⁹⁷ In such a case, under Civil Code article 3462, as interpreted in *Taylor v. Liberty Mutual Ins. Co.*,¹⁹⁸ the filing in the Scottish court would interrupt the running of the Louisiana prescription.¹⁹⁹ Interruption would occur at least if the Scottish action was filed within Louisiana's prescriptive period.²⁰⁰ In turn, this would mean that the action would *not* be barred by either the *lex fori* or the *lex causa*, and hence, the case would fall under neither of the exceptions provided in the second paragraph of new Article 3549. Instead, the case would fall within the opening sentence of the second paragraph which calls for the application of the prescription law of the forum. However, since the *Smith* court held that the Scottish courts did not have jurisdiction, then under Civil Code article 3462, the filing in Scotland could not interrupt the Louisiana prescription even if the filing was within the Louisiana prescriptive period of one year from the accident.²⁰¹

accident."

Id. at 409.

192. *Id.*

193. *Id.* at 410.

194. *Id.*

195. *Id.* at 409.

196. *Id.* at 408.

197. La. Civ. Code art. 3462.

198. 579 So. 2d 443 (La. 1991).

199. "Prescription is interrupted when an obligee commences an action against his obligor that is timely in a court of competent jurisdiction and venue under the law of the forum, regardless of whether the forum is a Louisiana court. La. Civ. Code art. 3462." *Id.* at 445 (reaffirming previous jurisprudence cited therein).

200. Some loose language in *Taylor* suggests that the same effect would be produced if the filing was after the accrual of the Louisiana period but within the foreign court's prescriptive period. See *infra* note 207 and accompanying text.

201. However, under La. Civ. Code art. 3462, "[i]f action is commenced in an incompetent court . . . prescription is interrupted only as to a defendant served by process within the prescriptive period." (emphasis added). It appears that at least one defendant, Odeco (UK), was served with

Thus considered, the only way for the plaintiff to pursue his action in Louisiana would be through the escape clause of subparagraph 1. In applying that subparagraph, one very relevant consideration in determining whether there exist "compelling considerations of remedial justice" for maintaining the plaintiff's action in Louisiana is the plaintiff's own blameworthiness. In assessing that factor, the court should accord proper weight to the fact that the plaintiff did file an action in Scotland and that the action was filed not only within the Scottish prescriptive period but, in all likelihood, also within Louisiana's prescriptive period. The *Smith* court did precisely that and should be applauded.²⁰²

Smith may be usefully contrasted with a similar case that was decided the opposite way under the old law. *Kozan v. Comstock*²⁰³ involved a medical malpractice action arising out of a medical procedure that occurred in Indiana at a time when both the doctor and the patient were domiciled in that state. Fifteen months later, the plaintiff sued the doctor in Indiana within that state's two-year limitation period. That action remained pending for many years while the defendant left the state. He was eventually located by the plaintiff in Louisiana where he was sued on the same cause of action. The Fifth Circuit Court of Appeals held that the plaintiff's Louisiana action was barred by Louisiana's prescription of one year. The court reasoned that the Louisiana prescription was not interrupted by the plaintiff's Indiana action because, although the action was filed within Indiana's prescriptive period, it was filed after the accrual of the Louisiana prescription. This holding might have been technically correct under Louisiana's conflicts law as it then existed; as explained earlier, the old law required the inexorable application of the law of the forum to cases such as *Kozan*.²⁰⁴ However, the holding was also unduly harsh for the plaintiff who had done everything a prudent plaintiff could do under the circumstances. He filed his first action, and did so timely, in the state that had the exclusive claim to apply its substantive and prescriptive law. Although that action might have been untimely under Louisiana law, the plaintiff had no reason to anticipate its application. It is only because the defendant left Indiana and established a domicile in Louisiana that the plaintiff had to file a second action in this state. This case is quite similar to *Smith* and thus could also be a good candidate for the exception provided in subparagraph 1 of the second paragraph of Article 3549.²⁰⁵

process. See *Smith*, 615 So. 2d at 409 ("Odeco (UK) Inc., answered the [Scottish] suit."). Thus, prescription might have been interrupted as to Odeco (UK) and, under Civil Code articles 1799 and 3503, as to all other defendants solidarily liable to the plaintiff with Odeco (UK). See *Taylor*, 579 So. 2d 443.

202. *Smith*, 615 So. 2d at 409.

203. 270 F.2d 839 (5th Cir. 1959).

204. At the time Article 13 of the Louisiana Code of Practice provided in part that "the prescription of actions . . . [is] governed by the law of the place where they are brought."

205. The only difference between *Smith* and *Kozan* is that the defendant doctor in *Kozan* would

It could be argued that this part of *Kozan*, which held that the timeliness of the Indiana action should be judged by Louisiana's rather than Indiana's standards, might have been repudiated by the Louisiana Supreme Court in *Taylor v. Liberty Mutual Ins. Co.*²⁰⁶ *Taylor* contains statements to the effect that the "timeliness" of a suit filed in a foreign state is to be judged by the standards of that state rather than by those of Louisiana.²⁰⁷ However, these statements should be read in context. In *Taylor*, a Louisiana resident injured in July 1985 in an Arkansas accident caused by a Texas driver sued the tortfeasor in Arkansas in May 1987, within two years from the accident. In April 1988, while the Arkansas suit was pending, plaintiff filed suit in Louisiana against his own UM carrier.²⁰⁸ The court held that the timeliness of the Arkansas *tort* suit against the tortfeasor should be judged by Arkansas law which provides for a three year limitation, rather than by Louisiana's one-year prescription. Since that suit was timely filed, then under Civil Code articles 3462, 1799 and 3503, it interrupted prescription of the obligation of the UM carrier who was solidarily bound to plaintiff with the tortfeasor. Thus, the plaintiff's action against his UM insurer, which is subject to the two-year prescriptive period of Louisiana Revised Statutes 9:5629 did not prescribe. However, despite dicta that might suggest otherwise, the court did *not* hold that the Arkansas filing, which occurred more than a year after the accident, interrupted the *accrued* Louisiana prescription of one year against the *tortfeasor*. The court was simply preoccupied with the interruption of the *two-year* Louisiana prescription against the plaintiff's UM carrier. In that context, it is important to note, although the *Taylor* court did not, that the Arkansas action was filed within two years from the accident. Hence, under Civil Code articles 3462, 1799, and 3503, it was capable of interrupting the two-year prescription of Louisiana Revised Statutes 9:5629.²⁰⁹ Thus, reduced to its essentials, *Taylor* stands for the proposition that a foreign suit filed against a person solidarily liable with the defendant interrupts prescription against the

in all likelihood be subject to the jurisdiction of Indiana courts under that state's long-arm statute.

206. 579 So. 2d 443 (La. 1991).

207. "[G]eneral conflicts of laws provisions would require that the tort statute of limitations of Arkansas be applied to determine the timeliness of a suit . . . filed in that forum and arising out of an accident occurring in that state." *Id.* at 446. After discussing the various modern choice-of-law methodologies, the court concluded that under any of these methodologies "Arkansas law on the limitation of actions applies and requires the determination that the Arkansas tort suit was timely." *Id.* at 447.

208. The Arkansas suit was later settled and voluntarily dismissed in July 1988. Since it occurred after the filing of the Louisiana action, the dismissal did not retroactively "erase" the interruption caused by the Louisiana action. See *Levy v. Stelly*, 277 So.2d 194 (La. App. 4th Cir. 1973), sanctioned by La. Civ. Code art. 3463, cmt. f.

209. On the other hand, if the Arkansas action was filed after the accrual of the two-year prescription provided by La. R.S. 9:5629, but within the three-year Arkansas limitation, then, under the law that was in force at the time, the insurer would have had a much stronger argument that the action against it should be barred in Louisiana. Under the new law, this scenario could simply be a candidate for the application of the exception contained in subparagraph 1 of the second paragraph of Article 3549.

Louisiana defendant when the foreign suit is timely under the prescription provided by Louisiana law for actions against that defendant.

iii. *The Second Exception: Actions Barred by the Lex Causae
But Not by the Lex Fori*

The second exception to the *lex fori* rule is established by subparagraph 2 of the second paragraph of Article 3549. This subparagraph also begins by reaffirming the basic rule of the *lex fori* for actions not barred under forum prescription law,²¹⁰ and then spells out the three prerequisites for the exception in favor of the *lex causae*. Again, all three prerequisites must be satisfied before this exception is utilized. Before dismissing an action that has been timely filed under forum law, the court must be satisfied that the action has prescribed in the state of the *lex causae*, and that neither the substantive nor the procedural or remedial policies of the forum state would be served by maintaining the action. Only then would the policy of providing a forum be outweighed by the policy of discouraging forum shopping.

The first necessary prerequisite for the application of the exception is that the action would be barred by the statute of limitations or some other time-bar recognized "in the state whose law is applicable to the merits [of the action]." The second prerequisite is a showing that maintenance of the action in the forum state "is not warranted by the policies of [the forum] state and its relationship to the parties or the dispute." This test can be viewed either from a negative or from a positive angle. The court must be satisfied that the policies of the forum in providing a longer prescriptive period for actions of the type before the court would not be adversely affected by dismissing the particular action, or that these policies would be served by entertaining the action. Either way, this evaluation will be based on an examination of the relationship, if any, that the forum has with the parties or their dispute. The pertinent question will be whether that relationship is of the kind that would implicate in a significant way the forum's policies in providing a longer prescriptive period.²¹¹ Finally, the third prerequi-

210. Here the rationale for the *lex fori* rule is that entertaining such actions promotes whatever substantive policies the forum has in not providing for a shorter prescriptive period and preserves to the plaintiff the opportunity to pursue fully his judicial remedies in the forum state. These substantive and procedural policies underlying forum prescription law are entitled to preference in a forum court, unless it is amply demonstrated that neither set of policies is actually implicated in the particular case and that the opposing substantive policies of another state, that of the *lex causae*, are implicated more intimately. Only then may forum law be displaced.

211. By way of illustration, it would seem that if none of the parties is domiciled in the forum state and neither they nor their dispute is related to it in any other significant way, the policies of this state would not be served by imposing on its overburdened courts the adjudication of a dispute which, but for the existence of jurisdiction, is essentially a foreign dispute. Dismissing the action in such a case—which on its face appears to be a case of forum shopping—would not seriously affect whatever interest the forum has in providing a longer prescriptive period, especially since, *ex hypothesi*, this state is not the state of the *lex causae*.

site is a showing that maintenance of the action in this state is not warranted by "compelling considerations of remedial justice." This phrase is intended to have the same meaning as in subparagraph 1. Again, under no circumstances should this phrase be seen as a command or even as a license for entertaining a particular action simply because it is barred in all or most other states. Such egregious examples of forum shopping as *Keeton v. Hustler* are neither encouraged nor condoned by Article 3549.

The first Louisiana appellate case involving this exception was *Rafferty v. Government Employees Ins. Co.*,²¹² a suit by a California insured against his California UM insurer arising out of an accident in California. The plaintiff continued living in California for about twenty-two months following the accident, and then filed suit in Louisiana "alleging that he was a resident and domiciliary of the Parish of Orleans."²¹³ The tenor of the quoted phrase suggests that the court seems to suspect that the plaintiff might have been forum shopping. The court assumed correctly that the law applicable to the merits of the action would have been California law. This assumption renders inapplicable the first paragraph of Article 3549 and renders applicable the second paragraph of the article. California's statute of limitation for such actions is one year,²¹⁴ while Louisiana's applicable prescription is two years from the date of the accident.²¹⁵ Since the plaintiff's action would be barred by California law (*lex causae*), but not by Louisiana law (*lex fori*), the case falls within the scope of subparagraph 2 of the second paragraph of Article 3549. The court dismissed the action under the following rationale:

Maintenance of the action is not warranted by the policies of this state and its relationship to the parties because this state's public policy regarding the appropriate prescriptive period for a UM claim has no application to a policy issued in California to a California resident. There are no compelling considerations of remedial justice warranting the maintenance of this action. Respondent had a year in which to

On the other hand, if the plaintiff is a Louisiana domiciliary, then dismissing his action would deprive him of the opportunity to litigate in the most convenient forum, and would close to him the doors of the judicial system which he helps sustain through his taxes. Depending on the other circumstances of the particular case, dismissal here might not be warranted in light of the policies of this state derived from its relationship to the plaintiff. Similarly, if the defendant is a Louisiana domiciliary, there would seem to be less of a concern about forum shopping by the plaintiff and less of an argument of unfair surprise by the defendant. These two factors would suggest that allowing the action would be warranted by the policies of this state; however, whether this would actually be so should be determined by the court by examining all the circumstances surrounding the particular case.

212. 613 So. 2d 727 (La. App. 4th Cir. 1993).

213. *Id.* at 728.

214. The insurance policy also provided that any suits by the insured against his insurer must be brought within one year from the date of the accident. Such a clause was permissible under California law.

215. La R.S. 9:5629 (1991).

bring an action which would have been timely under his contract and the law of the state where he was living, where the accident took place, and where all parties involved in the accident resided. No injustice was done to him by the application of the one year prescriptive period. Consequently there are no compelling considerations of remedial justice applicable to his situation.²¹⁶

The court distinguished this case from *Taylor v. Liberty Mutual Ins. Co.*,²¹⁷ in that the plaintiff in that case had filed an action in the state of the accident at a time that was within the prescriptive period of that state. The court noted:

When respondent filed the present suit . . . [t]he insurer had been discharged of its obligation. Respondent could not resuscitate this expired claim by moving to another state where the prescriptive period was longer. An essential difference between *Taylor* and this case is that the plaintiff *Taylor* kept his claim alive by filing a timely suit against his insurer's solidary obligor; whereas the respondent allowed his claim to die in California and subsequently seeks to revive his claim by moving to Louisiana and invoking its lengthier prescriptive period.²¹⁸

Indeed, this was an essential difference, and the court was entirely correct in so holding. Let us assume, however, that California had a three year prescription for UM actions, as opposed to Louisiana's two, and that the plaintiff in *Rafferty* did file an action in California within two and a half years from the accident. In such a case, the question will be whether this action, which was timely under California law but not under Louisiana law, could cause the interruption of the Louisiana prescription. Under the broad *Taylor* statement that the timeliness of the foreign action is determined by the standards of the foreign court,²¹⁹ the answer could be affirmative. However, as explained earlier, *Taylor* should not be read in that fashion. Indeed, it would be anomalous to speak of an *interruption* of an *accrued* prescription. Thus, the better view is that the filing of the California action would not interrupt the accrued Louisiana prescription. This case would then be identical to *Smith* and *Kozan*, and would be a candidate, perhaps not a good one, for the exception of subparagraph 1 of the second paragraph of Article 3549.

216. *Rafferty*, 613 So. 2d at 729.

217. 579 So. 2d 443 (La. 1991), discussed *supra* at note 208. *Taylor* differed from *Rafferty* in several respects. The plaintiff in *Taylor* was a Louisiana resident, who was insured for UM coverage under a policy issued to his Louisiana employer. He was injured in an Arkansas accident and sued the tortfeasor in Arkansas not only within that state's three-year statute of limitation, but also within Louisiana's two-year prescription.

218. *Rafferty*, 613 So. 2d at 729.

219. See *supra* note 208 and accompanying text.

Returning to *Rafferty*, this case may be usefully contrasted with *Louisiana Land & Exploration Co. v. Enserch Corp.*,²²⁰ a diversity case decided under the new law. *Enserch* involved an action on a contract that was arguably governed by Texas law.²²¹ Texas limitation law would bar the action, but Louisiana prescription law would not. After quoting in length from Reporter's comment (i) of Article 3549, the court found that the exception contained in subparagraph 2 of the second paragraph of the article was inapplicable

because maintenance of this action is warranted by Louisiana's policies of providing a forum for its citizens and extending a more lengthy prescriptive period of ten years for actions on contracts.

LL&E has its principal place of business in Louisiana, and Louisiana's interest in maintaining the action outweighs the court system's general interest in discouraging forum shopping under the circumstances. Therefore, even assuming that Texas law controls the merits of this dispute, the court finds insufficient legal reason to alter the general rule of applying the forum's prescription law.²²²

The contrast with *Rafferty* is instructive. The two cases together illustrate that the forum's "relationship to the parties or the dispute,"²²³ and especially its relationship to the plaintiff, will prove instrumental in determining whether to apply the exception of subparagraph 2. When the forum's relationship to the plaintiff and the dispute is as tenuous and suspect as in *Rafferty*, the exception is likely to be held applicable. The action will be dismissed, unless the plaintiff proves the existence of "compelling considerations of remedial justice"²²⁴ warranting the maintenance of the action in this state. On the other hand, when the forum's relationship to the plaintiff and the underlying contract or other dispute is as solid as was in *Enserch*, the exception will be found inapplicable. The action will be maintained, regardless of the existence of other considerations of remedial justice, because in most cases such a relationship will implicate the forum state's policy in providing a judicial forum for its own citizen or for contracts or other transactions centered therein.

C. Some Interim Conclusions

The few cases decided since the enactment of the new Louisiana conflicts law provide too small a sample from which to draw general conclusions.

220. Civ. A. No. 92-02057, 1992 U.S. Dist. LEXIS 15710 (E.D. La. Oct. 6, 1992). Caveat: This author consulted with plaintiffs in this case.

221. This issue was not litigated; however, the court appeared skeptical as to whether Texas law would actually be applicable to the merits of the action. See *id.* at *3 ("even assuming that Texas law controls the merits of this dispute").

222. *Id.* at *2-3.

223. La. Civ. Code art. 3549, ¶ 2, subpar. 2.

224. *Id.*

Nevertheless, a few tentative observations can be ventured. First, some litigants seem to pay insufficient attention to the conflicts dimension of their case and thus fail to raise timely or appropriately the choice-of-law issue. This phenomenon was more common under the previous law, but it is still encountered under the new law. Second, the cases decided so far under the new law have remained entirely within its letter and spirit. Third, it seems that, so far, courts have been able to apply the new law more easily than most of its critics had been willing to concede during the drafting years. The new law has reduced uncertainty and has restored consistency in Louisiana conflicts jurisprudence. It is hoped that the same consistency will be maintained in the future.

