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Comparative Impairment: Louisiana's New Methodology for Resolving Conflicts of Law

*Richard G. Passler**

I. INTRODUCTION

Louisiana has adopted a new conflicts of law methodology in thirty-six new code articles approved by the Louisiana Legislature and signed by the Governor this summer.¹ The phrasing of the general and residual code article, Louisiana Civil Code article 3515, of the new conflicts of law chapter strongly resembles the comparative impairment choice of law methodology advanced by Professor William F. Baxter. The code article's comments state that this is because of the article's "negative formulation" and that "to the extent it is anything more than acoustic, this resemblance is confined to the most basic premise."² Despite the claims of its drafters, the stated purposes and objectives of Article 3515 seem to go well beyond resembling only the "most basic premises" of Baxter's comparative impairment methodology. In fact, what is contained in the general and residual code article and what is in Louisiana's choice of law future is something very akin to the comparative impairment process.

The intent of this article is to aid in the understanding of the new Louisiana choice of law methodology. In light of this, an understanding of comparative impairment, as originally developed by Professor Baxter, is extremely helpful and is explained in the first section of this article. Baxter's comparative impairment method for resolving choice of law issues has been adopted by the California Supreme Court. The second section of this article examines the experiences of the California courts with comparative impairment. The California jurisprudence is relevant

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1. La. Civ. Code arts. 14, 3515-49, 1991 La. Acts No. 923 (effective January 1, 1992). The 36 articles will make up Chapter 3 of the Preliminary Title of the Louisiana Civil Code, entitled Conflict of Law, and Book IV of the Louisiana Civil Code, entitled Conflict of Laws.

2. La. Civ. Code art. 3515, comment b (effective January 1, 1992). The article and its comments, including the reason for its negative phrasing, are discussed at notes 153-57 and accompanying text.

because the resolution of future choice of law problems in Louisiana will be resolved by referring to the new code articles contained in Chapter 3 of the Preliminary Title and Book IV of the Louisiana Civil Code, and specifically the general and residual code article therein, which strongly resembles comparative impairment. The third section of this article discusses the general and residual code article and contrasts it with California's experience with comparative impairment.

II. BAXTER'S COMPARATIVE IMPAIRMENT

Professor William F. Baxter set forth what is currently known as comparative impairment in his 1963 article entitled *Choice of Law and the Federal System*.³ When he wrote his article the use of traditional choice of law rules, such as the law of the place of injury for deciding a tort case,⁴ was still the accepted method for resolving a conflict between two states' laws. In his article Baxter set forth two main ideas: (1) normative principles on which to base choice of law rules are necessary, and (2) having federal courts express the new choice of law rules is required.

A. Normative Criteria

Baxter approved of Professor Brainerd Currie's governmental interest analysis for resolving "false conflict" cases.⁵ However, Baxter rejected Currie's conclusion that "true conflict" cases should be decided by applying forum law.⁶ Baxter instead took the analysis used by Currie one step further, reasoning that "[t]he same analysis by which Currie distinguishes real [true] from false conflicts cases can resolve real [true] conflicts cases."⁷

Baxter used a string of hypotheticals to explain several principles underlying the comparative impairment method. The first principle was that "in choice-of-law cases there are two distinct types of governmental objectives, internal and external."⁸ The state's internal objectives are those that come from the policies underlying the laws promulgated by

3. Baxter, *Choice of Law and the Federal System*, 16 *Stan. L. Rev.* 1 (1963). This is the only choice of law article written by Professor Baxter; the remainder of his articles are on antitrust law.

4. *Restatement of Conflicts of Law* §§ 377, 379 (1934).

5. Baxter, *supra* note 3, at 8. Currie uses the term "false conflict" to mean a case in which only one of the states whose laws are at issue has a legitimate interest in applying its policy. B. Currie, *Selected Essays on the Conflict of Laws* 107-10 (1963).

6. Baxter, *supra* note 3, at 8-9. Currie uses the term "true conflict" to mean a case in which more than one state whose laws are at issue has a legitimate interest in applying its policy. B. Currie, *supra* note 5, at 107-10.

7. Baxter, *supra* note 3, at 9.

8. *Id.* at 17.

a state to resolve conflicting private interests.⁹ The state's external objective is having other states follow the "resolution of contending private interests the state has made for local purposes."¹⁰ That is, State A's external objective is to have other courts apply its rules in cases involving State A's private interests. Baxter stated that in a true conflicts case "the external objective of one state must be subordinated."¹¹ It is the subordination of one interested state's external objectives that leads to "[t]he choice problem posed [which] is that of allocating spheres of lawmaking control."¹²

The second principle enunciated by Baxter was the comparative impairment method for determining which state's external objectives should be subordinated. "The principle is to subordinate, in the particular case, the external objective of the state whose internal objective will be least impaired in general scope and impact by subordination in cases like the one at hand."¹³ The hypotheticals used by Baxter show the similarity between his approach and Currie's method for distinguishing false conflicts from true conflicts. Comparative impairment requires inquiring into both the internal and external objectives of the states and applying them to the current fact pattern. Baxter depicted the method in the following way:

The question "Will the social objective underlying the *X* rule be furthered by the application of the rule in cases like the present one?" need not necessarily be answered "Yes" or "No"; the answer will often be, "Yes, to some extent." The extent to which the purpose underlying a rule will be furthered by application or impaired by nonapplication to cases of a particular category may be regarded as the measure of the rule's pertinence and of the state's interest in the rule's application to cases within the category.¹⁴

Baxter advocated the comparative impairment methodology because it established a standard, "normative criterion," for implementing state policies without sacrificing the ability of people, prior to litigation, to predict the legal consequences of their actions.¹⁵

9. *Id.*

10. *Id.* "Fact situations which differ only in that they are internal to a single state have been assessed by the different groups of lawmakers, and each has reached a different value judgment on the rule best calculated to serve the overall interest of its community."

Id. at 5.

11. *Id.* at 17.

12. *Id.*

13. *Id.* at 18.

14. *Id.* at 9.

15. *Id.* at 20.

B. Using the Federal Courts

Baxter recognized that "the process of resolving choice cases is necessarily one of allocating spheres of legal control among states."¹⁶ Consequently, he found it a "disquieting prospect" that state courts would be responsible for balancing conflicting state interests.¹⁷ Baxter viewed state courts as "active participants in the formulation and implementation of local policies."¹⁸ As a result, "[t]o place in their hands extensive responsibility for deciding when those policies will yield to and when they will prevail over the competing policies of sister states seems unsound."¹⁹ Therefore, Baxter proposed assigning the choice of law question to the federal courts through the use of diversity jurisdiction.²⁰

Baxter believed that the intention that federal courts be responsible for choice of law decisions could be found in the history of the enactments of the diversity clause, the full faith and credit clause, and the Rules of Decision Act.²¹ As a result, Baxter concluded that the United States Supreme Court's decision in *Klaxon Co. v. Stentor Electric Manufacturing Co.*,²² which requires federal courts in diversity cases to apply the conflicts rules of the state in which the court sits, should be overruled.²³ In its place, he advocated the adoption of the comparative impairment methodology as the standard to be used in the application of both the Rules of Decision Act and the full faith and credit clause.²⁴ This would result in federal courts using the comparative impairment methodology to initially determine which state's law should be applied and would lead to a refining of the formulated federal standard.²⁵

C. Application

Baxter then proposed that the forum court should be required to refer to the whole law of the state whose objectives would be more impaired if its policies were not followed as determined by the comparative impairment method.²⁶ This, however, does not make the result reached by the federal court through comparative impairment binding

16. *Id.* at 22.

17. *Id.* at 22-23.

18. *Id.* at 23.

19. *Id.*

20. *Id.* at 40-41. In Baxter's view, the "[r]esponsibility for allocating spheres of legal control among member states of a federal system cannot be placed elsewhere than with the federal government." *Id.* at 23.

21. *Id.* at 33-42.

22. 313 U.S. 487, 61 S. Ct. 1020 (1941).

23. Baxter, *supra* note 3, at 41-42.

24. *Id.* at 42.

25. *Id.*

26. *Id.*

on the forum court. When the forum court refers to the whole internal law of the state indicated by comparative impairment, including that state's conflicts laws, it may find that that state would not apply its own law but would apply the law of the other state. Thus, if the choice of law method used by the state to which comparative impairment points reaches an opposite result, the state whose policies which would be more impaired would find its state's objectives being impaired rather than being furthered as provided for under comparative impairment. Baxter did not like this result and indicated that although they could not be required to do so, every state should adopt the comparative impairment method as a part of its conflicts laws.²⁷

III. THE CALIFORNIA EXPERIENCE

Baxter never intended for a state court to adopt the comparative impairment method before the principle was already being used in the federal system. Thirteen years after his article was published, however, the comparative impairment method, stripped of its federal law component, was adopted in California.²⁸

27. *Id.*

28. Recently, Idaho, Missouri, and the District of Columbia claimed to have adopted the comparative impairment method. What these jurisdictions have actually adopted, however, appears to be some sort of a conglomeration of several methods of resolving conflict of law issues.

Citing Baxter, Horowitz, Leflar, and Currie, the Supreme Court of Idaho used "comparative impairment," "weighing of interests," and "better law" analyses to "conclude that Idaho as the forum state has the most significant interest in having its law applied." *Barringer v. State*, 111 Idaho 794, 798-99, 727 P.2d 1222, 1226-27 (1986).

The Missouri Court of Appeals, citing *Currie and Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978), noted that "[a] number of states have adopted a conflict resolution rule referred to variously as the governmental interest analysis, the flexible governmental interest approach, the comparative impairment of state policies, or advancement of the forum's governmental interest." *Hicks v. Graves Truck Lines, Inc.*, 707 S.W.2d 439, 444 (Mo. Ct. App. 1986) (citations omitted). The Missouri court then went on to state that "*we conclude the government interest analysis offers the better method for resolving true conflict of laws cases, that is, cases in which the Restatement, § 145 test discloses significant contacts with two or more states, each of which has a legitimate local interest in the particular issue in contest.*" *Id.* (emphasis added). Just five paragraphs later the Missouri court stated "*We conclude . . . that the doctrine of comparative impairment should be adopted to resolve choice of law cases in which the facts indicate significant contacts with Missouri and another state under the Restatement § 145 test and in which both states have legitimate state interests in the law choice.*" *Id.* at 445 (emphasis added). The use of comparative impairment in *Hicks* was distinguished by a later Missouri appellate panel. *Markway v. State Farm Ins. Co.*, 799 S.W.2d 146, 149 (Mo. Ct. App. 1990).

The District of Columbia Court of Appeals never specifically stated that it had adopted comparative impairment, but after citing *Currie, Baxter, Horowitz, and Bernhard v.*

A. *Bernhard v. Harrah's Club*

Comparative impairment was expressly adopted by a unanimous California Supreme Court as part of the state's law of conflicts in *Bernhard v. Harrah's Club*.²⁹ The events leading to the case began on July 24, 1971, when Fern and Philip Myers drove to Harrah's, a Nevada gambling casino. In the early morning hours of July 25, 1971, having consumed so many alcoholic drinks as to "reach a point of obvious intoxication rendering them incapable of safely driving a car,"³⁰ the Myers began the trip back to their California residence. Fern Myers, while driving intoxicated on a California highway, allowed the car to drift across the center line into oncoming traffic, resulting in a head-on collision with a motorcycle driven by another California resident, Richard A. Bernhard. As a result of severe injuries caused by the accident, Bernhard filed suit in a California court against Harrah's alleging that it was negligent in continuing to serve alcoholic drinks to the obviously intoxicated Myers and that this negligence was the proximate cause of his injuries.

Nevada law did not impose civil liability on a tavern owner under the circumstances presented in the case.³¹ On the other hand, California law did impose liability on a tavern owner for injuries to a third person

Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, cert. denied, 429 U.S. 859, 97 S. Ct. 159 (1976), the court indicated that it "finds this method of analysis compelling and persuasive." *Estrada v. Potomac Elec. Power Co.*, 488 A.2d 1359, 1361 n.4 (D.C. 1985). The comparative impairment method was subsequently used by the court. *Stutsman v. Kaiser Found. Health Plan*, 546 A.2d 367, 376 (D.C. 1988).

It has also been suggested that New York should adopt the comparative impairment approach. Comment, *New York's Choice of Law Quagmire Revisited*, 51 Brooklyn L. Rev. 579, 583, 608 (1985).

29. 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, cert. denied, 429 U.S. 859, 97 S. Ct. 159 (1976). It was suggested two years prior to *Bernhard* in Professor Harold Horowitz's restatement of California conflicts law that the comparative impairment method was already being used in California. One of three principles to resolve true conflicts according to Horowitz's restatement was the application of a "standard of 'comparative impairment': which state's policy will be least impaired if it is subordinated?" Horowitz, *The Law of Choice of Law in California—A Restatement*, 21 UCLA L. Rev. 719, 723 (1974). Horowitz described "[t]he key element in the inquiry as to whether one state has a greater interest than does another state in having its policy prevail is the 'comparative impairment' approach described by Professor Baxter: Which state's interest would be more impaired if its policy were subordinated?" *Id.* at 748. He then suggested that the comparative impairment method, even if not its terminology, was used by the California Supreme Court as far back as 1858 in a slavery case, *Ex parte Archy*, 9 Cal. 147 (1858). Horowitz, *supra*, at 748-49.

The *Bernhard* court also recognized the use of the comparative impairment analysis but not its terminology in *People v. One 1953 Ford Victoria*, 48 Cal. 2d 595, 311 P.2d 480 (1957). *Bernhard*, 16 Cal. 3d at 321-22, 546 P.2d at 724, 128 Cal. Rptr. at 220.

30. *Bernhard*, 16 Cal. 3d at 315, 546 P.2d at 720, 128 Cal. Rptr. at 216.

31. *Id.* at 317, 546 P.2d at 721, 128 Cal. Rptr. at 217.

proximately caused by continued service to an intoxicated patron.³² The choice of law analysis, therefore, would determine whether Harrah's owed any duty to Bernhard.

The *Bernhard* court began its choice of law analysis with Professor Brainerd Currie's governmental interest analysis.³³ The court found Nevada's purpose for denying civil liability was to protect Nevada tavern owners from being subject "to ruinous exposure every time [they] poured a drink."³⁴ The court found California's law, which imposed civil liability on tavern owners, was designed to protect California residents injured by intoxicated drivers in California.³⁵ In the case the court was faced with a California plaintiff seeking recovery for injuries received in California and a Nevada defendant seeking protection from civil liability; therefore, each state had an interest in having its law applied. Thus, based on these interests, the court easily concluded that "[i]t goes without saying that these interests conflict."³⁶ From this the California Supreme Court found that "for the first time since applying a governmental interest analysis as a choice of law doctrine . . . we are confronted with a 'true' conflicts case."³⁷

After acknowledging and rejecting Currie's original position that the forum state should apply its own law when faced with a true conflict,³⁸ the court shifted to Currie's later stance that "the forum should re-examine its policy to determine if a more restrained interpretation of it is more appropriate."³⁹ This reexamination was to be done by a "moderate and restrained interpretation both of the policy and of the circumstances in which it [the local policy] must be applied to effectuate the forum's legitimate purpose."⁴⁰ The court then concluded that this reexamination should be conducted using the comparative impairment method.⁴¹ Thus, the California Supreme Court summarized its analysis:

32. *Id.*, 546 P.2d at 721, 128 Cal. Rptr. at 217. Although California statutory law does not have a Dram Shop Act, the California Supreme Court had created a jurisprudential one based on several statutes.

33. *Id.* at 316, 546 P.2d at 720-21, 128 Cal. Rptr. at 216-17. Professor Currie's writings on governmental interest analysis may be found in B. Currie, *Selected essays on the Conflict of Laws* (1963).

34. *Bernhard*, 16 Cal. 3d at 318, 546 P.2d at 722, 128 Cal. Rptr. at 218.

35. *Id.*, 546 P.2d at 722, 128 Cal. Rptr. at 218.

36. *Id.* at 318-19, 546 P.2d at 722, 128 Cal. Rptr. at 218.

37. *Id.* at 319, 546 P.2d at 722, 128 Cal. Rptr. at 218. Previous cases had presented false conflicts and unprovided for situations.

38. *Id.* at 319-20, 546 P.2d at 722-23, 128 Cal. Rptr. at 218-19.

39. *Id.* at 320, 546 P.2d at 723, 128 Cal. Rptr. at 219. See Currie, *The Disinterested Third State*, 28 *Law & Contemp. Probs.* 754, 757 (1963).

40. *Bernhard*, 16 Cal. 3d at 320, 546 P.2d at 723, 128 Cal. Rptr. at 219.

41. *Id.*, 546 P.2d at 723, 128 Cal. Rptr. at 219. The court interchangeably cited Baxter's article and Horowitz's article without attempting to distinguish them. *Id.* at 319-21, 546 P.2d at 723-24, 128 Cal. Rptr. at 219-20.

Once [the] preliminary analysis has identified a true conflict of the governmental interests involved as applied to the parties under the particular circumstances of the case, the "comparative impairment" approach to the resolution of such conflict seeks to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state. This analysis proceeds on the principle that true conflicts should be resolved by applying the law of the state whose interest would be more impaired if its law were not applied.⁴²

The court went on to explain that the analysis does not require the court to:

"weigh" the conflicting governmental interests in the sense of determining which conflicting law manifested the "better" or the "worthier" social policy on the specific issue. An attempted balancing of conflicting state policies in that sense . . . is difficult to justify in the context of a federal system in which, within constitutional limits, states are empowered to mold their policies as they wish . . .⁴³

Rather, the court described the analysis as a process in which conflicting state policies are made to accommodate each other based on the intended scope of these policies.⁴⁴ Thus, a court is required to analyze the appropriate *scope* of the conflicting state policies instead of the *quality* of those policies.

The California Supreme Court found it unnecessary to determine how far the scope of the California policy imposing civil liability on tavern owners should be extended.⁴⁵ This was because Harrah's solicited California residents to come to Nevada and served them alcoholic beverages beyond the point of intoxication when it was probable that these people would then return to California in the intoxicated condition. By doing so, Harrah's put itself "at the heart of California's regulatory interest, namely to prevent tavern keepers from selling alcoholic beverages to obviously intoxicated persons who are likely to act in California in the intoxicated state."⁴⁶ California's policy would therefore be significantly impaired if California policy was not applied to Harrah's.⁴⁷

42. *Id.* at 320, 546 P.2d at 723, 128 Cal. Rptr. at 219.

43. *Id.*, 546 P.2d at 723-24, 128 Cal. Rptr. at 219-20 (quoting Horowitz, *The Law of Choice of Law in California—A Restatement*, 21 UCLA L. Rev. 719, 753 (1974) (footnote omitted)).

44. *Bernhard*, 16 Cal. 3d at 320-21, 546 P.2d at 724, 128 Cal. Rptr. at 220.

45. *Id.* at 322, 546 P.2d at 725, 128 Cal. Rptr. at 221.

46. *Id.*, 546 P.2d at 725, 128 Cal. Rptr. at 221.

47. *Id.* at 323, 546 P.2d at 725, 128 Cal. Rptr. at 221.

Conversely, the court found that since Nevada had already subjected its tavern owners to criminal penalties for further providing an intoxicated person with alcoholic beverages, subjecting Harrah's to civil liability in California would not greatly impair Nevada's interests even though under the same facts Nevada would not subject Harrah's to civil liability. To the California Supreme Court, "the imposition of such liability involves an increased economic exposure, which, at least for businesses which actively solicit extensive California patronage, is a foreseeable and coverable business expense."⁴⁸ Therefore, Nevada's interest in protecting Nevada tavern owners from unlimited civil liability would only be impaired when the Nevada tavern owner actively solicited California business. Thus, the court, using the comparative impairment choice of law analysis, concluded "that California has an important and abiding interest in applying its rule of decision to the case at bench, [and] that the policy of this state would be more significantly impaired [than the policy of the state of Nevada] if such rule were not applied."⁴⁹

B. *Offshore Rental Co. v. Continental Oil Co.*

Two years later the California Supreme Court, once again unanimously, used the comparative impairment method in *Offshore Rental Co. v. Continental Oil Co.*⁵⁰ The plaintiff in the case was Offshore Rental Company, Inc. ("Offshore"), a California corporation, which leased oil drilling equipment in the Louisiana Gulf Coast area. The defendant, Continental Oil Company ("Continental"), was a Delaware corporation, headquartered in New York, and doing business in many states including Louisiana and California. Offshore sent Howard C. Kaylor, the vice-president responsible for obtaining contracts, to Louisiana to confer with representatives of Continental. While on Continental's premises in Louisiana, Kaylor was injured through the negligence of Continental employees. After Kaylor was compensated for his injuries by Continental, Offshore brought suit in California for \$5 million in damages for the loss of the services of a "key" employee.

The California Supreme Court found that Louisiana law did not allow a corporate plaintiff a cause of action for the loss of an officer's services.⁵¹ Conversely, the court found that California cases, "although

48. *Id.*, 546 P.2d at 725, 128 Cal. Rptr. at 221. In this manner the court suggested the owners of such business should purchase insurance.

49. *Id.* at 323, 546 P.2d at 725-26, 128 Cal. Rptr. at 221-22.

50. 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

51. *Id.* at 162, 583 P.2d at 724, 148 Cal. Rptr. at 870. See *Bonfanti Indus. Inc. v. Teke, Inc.*, 224 So. 2d 15 (La. App. 1st Cir.), writ refused, 254 La. 779, 226 So. 2d 770 (1969), interpreting La. Civ. Code art. 174 (1952), repealed by 1990 La. Acts No. 705 § 1, which allowed a master a cause of action for the beating or maiming of his servant. The repeal of this statute strengthens Louisiana's policy of not recognizing a cause of action for the loss of an officer's services.

chiefly [in] dicta," supported Offshore's contention that California law granted a cause of action to a party for the loss of a key employee due to injury caused by the negligence of a third party.⁵² The California Supreme Court then "assume[d], for the purpose of analysis," that California law did in fact grant such a cause of action.⁵³ Thus, the choice of law analysis was to be determinative of whether Offshore's cause of action (and therefore its case) against Continental would be allowed to proceed.

The court began its choice of law analysis by using Currie's governmental interest analysis to determine whether it was faced with a false or true conflict. The analysis involved examining the policies underlying each state's law to discuss whether each state had an interest in seeing its law applied to the present case.⁵⁴ Based on Louisiana case law indicating that Louisiana did not grant a cause of action in these circumstances because doing so would produce "undesirable social and legal consequences,"⁵⁵ the California Supreme Court decided the purpose of the Louisiana policy was "to protect negligent resident tort-feasors acting within Louisiana's borders from the financial hardships caused by the assessment of excessive legal liability or exaggerated claims resulting from the loss of services of a key employee."⁵⁶ The court found California's policy was to protect California employers from economic losses resulting from the negligent injuring of a key employee by a third party regardless of whether the injury occurred within the state of California.⁵⁷ In *Offshore* the court was faced with a California corporate plaintiff seeking recovery for the loss of the services of a key employee who was negligently injured in Louisiana by a defendant doing business in Louisiana; therefore, both states were interested in having their own

52. *Offshore*, 22 Cal. 3d at 162, 583 P.2d at 724, 148 Cal. Rptr. at 870. The cause of action was based on Section 49(c) of the California Civil Code which provides: "The rights of personal relations forbid: . . . (c) Any injury to a servant which affects his ability to serve his master, other than seduction, abduction or criminal conversation." Cal. Civ. Code § 49(c) (Deering 1990). The California Supreme Court has since modified its opinion in *Offshore*, concluding that this subsection "does not provide a right of action for a corporate employer seeking recovery for expenses and lost profits incurred as a result of negligent injury to its employees." *I. J. Weinrot and Son, Inc. v. Jackson*, 40 Cal. 3d 327, 341, 708 P.2d 682, 691, 220 Cal. Rptr. 103, 112 (1985).

53. *Offshore*, 22 Cal. 3d at 163, 583 P.2d at 724, 148 Cal. Rptr. at 870.

54. *Id.* at 163, 583 P.2d at 724-25, 148 Cal. Rptr. at 870-71.

55. *Id.* at 163, 583 P.2d at 725, 148 Cal. Rptr. at 871 (quoting *Bonfanti Indus. v. Teke, Inc.*, 224 So. 2d 15, 17 (La. App. 1st Cir.), writ refused, 254 La. 779, 226 So. 2d 770 (1969)).

56. *Offshore*, 22 Cal. 3d at 163-64, 583 P.2d at 725, 148 Cal. Rptr. at 871.

57. *Id.* at 164, 583 P.2d at 725, 148 Cal. Rptr. at 871. The court reasoned that even when the injury occurred outside the state California's economy and tax revenues would nonetheless be affected.

law applied. Thus, the court concluded that Louisiana and California law conflicted and that there was a true conflict which must be resolved.⁵⁸

The court began its discussion by turning to its decision in *Bernhard v. Harrah's Club*. It noted that in *Bernhard* it had rejected the automatic application of forum law when faced with a true conflict.⁵⁹ The court then quoted a large portion of the *Bernhard* analysis describing the comparative impairment method.⁶⁰ After describing the resolution of true conflict cases as "essentially a process of allocating respective spheres of lawmaking influence,"⁶¹ the California Supreme Court then further refined its application of the comparative impairment method.

The court added several factors to the inquiry to be made in the allocation process. First, when possible, the court should determine whether the policies underlying the states' laws were more "*strongly held*" in the past than at the present.⁶² Second, the court should consider whether "*one of the competing laws is archaic and isolated in the context of the laws of the federal union, [and if it finds that it is] it may not unreasonably have to yield to the more prevalent and progressive law, other factors of choice being roughly equal.*"⁶³ Third, the court should consider whether the law, even within its own state, is "infrequently enforced or interpreted."⁶⁴ The purpose of these factors is to determine the current status of a statute and whether its use should be limited to solely domestic matters.⁶⁵ The final "chief criterion in the comparative impairment analysis is the 'maximum attainment of underlying purpose by all governmental entities. This necessitates identifying the focal point of concern of the contending lawmaking groups and ascertaining the *comparative pertinence* of that concern to the immediate case.'"⁶⁶ The California Supreme Court summarized "the comparative impairment approach to the resolution of true conflicts [as an attempt] to determine the relative commitment of the respective states to the laws involved. The approach incorporates several factors for consideration:

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

59. *Id.* at 164, 583 P.2d at 725-26, 148 Cal. Rptr. at 871-72. See *supra* note 38 and accompanying text.

60. *Id.* at 164-65, 583 P.2d at 726, 148 Cal. Rptr. at 872. See *supra* notes 41-44 and accompanying text.

61. *Id.* at 165, 583 P.2d at 726, 148 Cal. Rptr. at 872 (quoting Baxter, *supra* note 3, at 11-12). See *supra* note 16 and accompanying text.

62. *Offshore*, 22 Cal. 3d at 165, 583 P.2d at 726, 148 Cal. Rptr. at 872.

63. *Id.*, 583 P.2d at 726, 148 Cal. Rptr. at 872. (quoting Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv. L. Rev. 1210, 1216 (1946)).

64. *Offshore*, 22 Cal. 3d at 166, 583 P.2d at 726, 148 Cal. Rptr. at 872.

65. *Id.*, 583 P.2d at 726, 148 Cal. Rptr. at 872.

66. *Id.*, 583 P.2d at 726, 148 Cal. Rptr. at 872 (quoting Baxter, *supra* note 3, at 12).

the history and current status of the states' laws; the function and purpose of those laws."⁶⁷

Turning to the history and current status of the laws at issue in *Offshore*, the California Supreme Court found that the Louisiana statute creating a cause of action for the loss of a servant's services only applied to "indentured servants, apprentices and others who are bound in the service of an individual for a specific period of time' and not to 'the class of free servants.'"⁶⁸ Therefore, Louisiana law concurred with the law in a majority of states in not recognizing a cause of action for a corporate plaintiff for the loss of a key employee's services due to the negligent action of a third party.⁶⁹

In looking at the California law which the court had assumed to create a cause of action for *Offshore*, the court noted that not only had no California court ever actually held that such an action existed for the loss of a corporate employee, but also that no California court had even addressed the issue in many years. The court therefore concluded that California had little interest in having its "unusual and outmoded statute" applied to the case while Louisiana had a strong interest in having its "prevalent and progressive" law applied.⁷⁰

The court then attempted to provide further support for its decision, noting that "although the law of the place of the wrong is not necessarily the applicable law for all tort actions, the situs of the injury remains a relevant consideration."⁷¹ In applying this extra factor to the case, the court pointed out that the accident giving rise to the suit had occurred in Louisiana; thus to impose liability on Continental "would strike at the essence of a compelling Louisiana law" for "[a]t the heart of Louisiana's denial of liability lies the vital interest in promoting freedom of investment and enterprise *within Louisiana's borders*, among investors incorporated both in Louisiana and elsewhere."⁷² Therefore, the California Supreme Court held that Louisiana's interests would be more impaired than those of California and that Louisiana law, which did not recognize a cause of action for a corporate plaintiff such as *Offshore* under the facts presented in the case, should be applied.⁷³

67. *Offshore*, 22 Cal. 3d at 166, 583 P.2d at 727, 148 Cal. Rptr. at 873.

68. *Id.* at 167 n.10, 583 P.2d at 727 n.10, 148 Cal. Rptr. at 873 n.10 (quoting *Bonfanti Indus., Inc. v. Teke, Inc.*, 224 So. 2d 15, 17 (La. App. 1st Cir.), writ refused, 254 La. 779, 226 So. 2d 770 (1969)).

69. *Offshore*, 22 Cal. 3d at 168, 583 P.2d at 728, 148 Cal. Rptr. at 874.

70. *Id.*, 583 P.2d at 728, 148 Cal. Rptr. at 874.

71. *Id.*, 583 P.2d at 728, 148 Cal. Rptr. at 874 (citation omitted).

72. *Id.*, 583 P.2d at 728, 148 Cal. Rptr. at 874.

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

C. *Post Bernhard and Offshore*

1. *California Commentators*

The California Supreme Court has not received much support or approval for its adoption of comparative impairment. California commentators have attacked the court's adoption of the method and have even argued for a return to Currie's governmental interest analysis.⁷⁴ The *Bernhard* and *Offshore* decisions, which established comparative impairment in California, have not escaped attack either. Two articles specifically addressing the topic have been published, one authored by Professor Herma Hill Kay of the University of California at Berkeley, Boalt Hall School of Law and the other by Professor Leo Kanowitz of the University of California, Hastings College of Law.⁷⁵

a. *Kay*

Professor Kay felt that when Justice Sullivan indicated in *Bernhard* that for the first time the court was faced with a true conflict, Sullivan was actually faced with an apparent true conflict.⁷⁶ At this point, Kay felt "Justice Sullivan went astray . . . mistakenly stat[ing] that [the forum's reexamination of its policy when a preliminary analysis reveals an apparent conflict] could, consistent with governmental interest analysis, be performed under Baxter's principle of comparative impairment."⁷⁷ Use of comparative impairment was not proper at this stage. This is the stage at which Currie would have used his moderate and restrained interpretation step in an attempt to eliminate the apparent true conflict and the use of forum law; while Baxter, who would use comparative impairment to resolve both true conflicts and apparent true conflicts, would not reexamine the forum's policy. Thus, the effect of what Justice Sullivan did was to merge comparative impairment with Currie's step of moderate and restrained interpretation.

Professor Kay made it clear that the use of comparative impairment method in conjunction with governmental interest analysis as employed by Justice Sullivan was not supported by Currie, Baxter, or Horowitz,⁷⁸ on whom Justice Sullivan relied. According to Kay, the use of "com-

74. Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 Calif. L. Rev. 577, 609 (1980); Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 Hastings L.J. 255 (1978); Note, *After Hurtado and Bernhard: Interest Analysis and the Search for a Consistent Theory for Choice-of-Law Cases*, 29 Stan. L. Rev. 127 (1976).

75. Kay, *supra* note 74; Kanowitz, *supra* note 74.

76. Kay, *supra* note 74, at 583. See *supra* text accompanying note 37.

77. *Id.* at 583.

78. See *supra* note 29.

parative impairment at what Currie could call the apparent true conflict stage has led [California courts] to be overly hasty in identifying true conflicts. Indeed, the courts have seemed anxious to bring comparative impairment analysis into play as quickly as possible."⁷⁹

Kay was equally displeased by Justice Tobriner's use of comparative impairment in *Offshore*. She pointed out that unlike Justice Sullivan who merged comparative impairment with the moderate and restrained interpretation step, Justice Tobriner eliminated the step and proceeded directly to the use of comparative impairment, the result of which was to "resolv[e] true conflict cases, rather than minimiz[e] their occurrence."⁸⁰

Professor Kay was greatly concerned with Justice Tobriner's expansion of the comparative impairment analysis. She pointed out that the addition of a factor which requires testing the "current vitality" of the state's policy goes directly against what Baxter had in mind.⁸¹ This additional factor allows courts to make "super-value judgments," which was precisely what Baxter had intended for the comparative impairment method to avoid. In fact, "the very passage quoted by Tobriner . . . is itself cited by Baxter as an example of the type of super-value judgment that comparative impairment analysis would avoid."⁸²

Professor Kay found several negative side effects from the use of the comparative impairment method by the California courts. As earlier indicated, courts have been too quick to conclude that they are faced with a true conflict because "the present California judges seem to find the comparative impairment approach so satisfactory that they are willing to invent excuses for its use."⁸³ Kay points out that in the fifteen years between the adoption of a kind of governmental interest analysis in 1961⁸⁴ and the adoption of comparative impairment in 1976 by the *Bernhard* court a true conflicts case had not been identified by a California court.⁸⁵ In the next three years, however, three more true conflict cases were identified.⁸⁶ According to Kay, this haste in identifying true conflicts has resulted in "some California courts hav[ing] failed to

79. Kay, *supra* note 74, at 586.

80. *Id.* at 588.

81. *Id.* at 588-89.

82. *Id.* at 589 n.76 (citing Baxter, *supra* note 3, at 18 n.39). See *supra* text accompanying note 63.

83. Kay, *supra* note 74, at 604-05.

84. *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

85. Kay, *supra* note 74, at 604.

86. *Id.* The three cases were *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978), *Duarte v. McKenzie Constr. Co.*, 152 Cal. Rptr. 373 (1979) (not officially reported), and *Cable v. Sahara Tahoe Corp.*, 93 Cal. App. 3d 384, 155 Cal. Rptr. 770 (1979). *Cable* is discussed *infra* at text accompanying notes 105-10.

examine with care and precision the content of local policy" and the placement of "an unnecessary strain on interstate harmony."⁸⁷ Kay's point is exemplified by the court's assumption in *Offshore* that California law provided the plaintiff a cause of action; seven years later the court did analyze the California law in question and concluded that the cause of action did not exist.⁸⁸

Kay concluded that the use of the comparative impairment method did not produce an increase in the uniformity of result in conflicts of law cases.⁸⁹ Therefore, she advocated that California courts return to the application of forum law when governmental interest analysis indicates a true conflict.⁹⁰

b. Kanowitz

Professor Kanowitz also called for a return to Currie's method for resolving true conflicts. He found comparative impairment to be indistinguishable from the fifth of Professor Robert Leflar's five choice-influencing considerations, the application of the better rule of law.⁹¹

The weighing of interests for the purpose of a comparative-impairment analysis, that is, in order to determine which state's interests are more intensely held or the relative reach of *each* state's policies and interests, is thus hardly distinguishable from a weighing to determine which is the better or worthier law.⁹²

Kanowitz pointed to *Beech Aircraft Corp. v. Superior Court*⁹³ as an example of the lack of difference between the two methods, "or, at the very least, that these two functions [comparative impairment and value-weighing] are readily confused by the courts."⁹⁴ In *Beech Aircraft*, the California appellate court's discussion of the conflicts of law issue took place "under a subheading in the opinion entitled, 'The Lower Court Should *Weigh* the Following Facts and Policies in Determining Choice of Law.'"⁹⁵

Additionally, Kanowitz found the analysis used by the court in *Offshore* to be a "better law" analysis "despite its insistence that it is

87. Kay, *supra* note 74, at 605-06.

88. See *supra* note 52.

89. Kay, *supra* note 74, at 610-14.

90. *Id.*

91. Kanowitz, *supra* note 74, at 277 and 286. See also Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 *Calif. L. Rev.* 1584 (1966).

92. Kanowitz, *supra* note 74, at 277 (citation omitted).

93: 61 *Cal. App. 3d* 501, 132 *Cal. Rptr.* 541 (1976).

94. Kanowitz, *supra* note 74, at 281-83.

95. *Id.* at 282. (quoting *Beech Aircraft*, 61 *Cal. App. 3d* at 521, 132 *Cal. Rptr.* at 552 (emphasis added)).

adhering to a comparative-impairment analysis."⁹⁶ Thus, Kanowitz concluded that the comparative impairment method's "imprecision, its manipulability in according greater or lesser weight or significance to the respective interests, and its propensity to engage in interest-counting" rendered it indistinguishable from a weighing of interests to find the better or worthier law.⁹⁷

2. California Appellate Cases

Since the California Supreme Court's decision in *Bernhard and Offshore*, the California Courts of Appeal have found that they were faced with a true conflict which required the use of the comparative impairment method only five times.⁹⁸

a. Hall v. University of Nevada

In *Hall v. University of Nevada*⁹⁹ the plaintiffs were injured in an automobile accident when their vehicle was struck by a car driven by an employee of the University of Nevada who was engaged in official university business in California. At issue on appeal was whether a Nevada statute which limited the state's liability to \$25,000 per claimant would apply even though the plaintiffs had been awarded a judgment of \$1,500,000.¹⁰⁰ The court of appeal concluded that the trial court had properly refused to apply the Nevada limitation based on several factors, including that California's conflicts of law methodology did not require the Nevada statute's application.

In looking at Nevada's policies for the purpose of comparative impairment analysis, the court found that "Nevada advances as its policy, the fact that if liability were not limited, its residents would suffer financially, due to the increased cost of insurance for Nevada vehicles being operated outside the state."¹⁰¹ The court also noted that "California's policy interest lies in providing full protection to those who are injured on its highways through the negligence of both residents and nonresidents."¹⁰² Based on these policies the court concluded that "the

96. Kanowitz, *supra* note 74, at 294.

97. *Id.* at 293.

98. The number would actually be six if one included *Duarte v. McKenzie Constr. Co.*, 152 Cal. Rptr. 373 (1979), which is an opinion not officially published.

99. 74 Cal. App. 3d 280, 141 Cal. Rptr. 439 (1977), *aff'd*, 440 U.S. 410, 99 S. Ct. 1182 (1979).

100. In an earlier case the California Supreme Court ruled that the state of Nevada had waived its sovereign immunity and was subject to suit in California. *Hall v. University of Nev.*, 8 Cal. 3d 522, 503 P.2d 1363, 105 Cal. Rptr. 355 (1972), *cert. denied*, 414 U.S. 820, 94 S. Ct. 114 (1973).

101. *Id.* at 285, 141 Cal. Rptr. at 442.

102. *Id.* at 285-86, 141 Cal. Rptr. at 442.

policy reasons for applying California law herein [are] even stronger than those found in *Bernhard*."¹⁰³ The court pointed out that in *Bernhard* the defendant's culpable conduct had occurred completely within Nevada while in this case the defendant's actions took place completely in California. As a result of "utilizing the public highways within out [sic] state to conduct its business, Nevada should fully expect to be held accountable under California's laws."¹⁰⁴

b. *Cable v. Sahara Tahoe Corp.*

In *Cable v. Sahara Tahoe Corp.*,¹⁰⁵ the defendant was sued under the same theory used in *Bernhard* as a result of a one car accident in Nevada which injured a passenger who was a California resident. Applying comparative impairment to the case the court "conclude[d] that the imposition of civil liability upon commercial purveyors of intoxicating beverages would impair Nevada's interest more significantly than the denial of such liability would impair California's interest."¹⁰⁶

After finding that a true conflict existed in the same manner as the California Supreme Court did in *Bernhard*, the *Cable* court turned to the comparative impairment method. The court pointed out that the California legislature had amended the statute on which the civil liability of tavern keepers had been based, making it "apparent that it has not been the policy of the California Legislature to protect Californians by regulating tavern keepers in Nevada."¹⁰⁷ The *Cable* court therefore concluded that the policy was limited to the *Bernhard* decision which "relates only to Nevada conduct causing injury in California."¹⁰⁸ The court also recognized that "[t]he 'current status' of California law with respect to liability based upon provision of intoxicating beverages is that it has been repudiated."¹⁰⁹ Thus, the court concluded that "it is obvious that the impairment of such a repudiated policy has a minimal effect upon California's governmental interest."¹¹⁰

103. *Id.* at 286, 141 Cal. Rptr. at 442.

104. *Id.*

105. 93 Cal. App. 3d 384, 155 Cal. Rptr. 770 (1979).

106. *Id.* at 390, 155 Cal. Rptr. at 774.

107. *Id.* at 395, 155 Cal. Rptr. at 777.

108. *Id.* at 395-96, 155 Cal. Rptr. at 777-78. This analysis by the court has caused one commentator to write that in his opinion "while cast in the language of comparative impairment, [the analysis in *Cable*] is an example of moderate and restrained reinterpretation of the forum's policy." Kay, *supra* note 74, at 593.

109. *Cable*, 93 Cal. App. 3d at 398, 155 Cal. Rptr. at 779.

110. *Id.*, 155 Cal. Rptr. at 799.

c. *Nicolet, Inc. v. Superior Court*

In *Nicolet, Inc. v. Superior Court*,¹¹¹ the court was faced with actions brought by manufacturers against their insurers for bad faith in their refusal to defend and indemnify the manufacturers against asbestos claims in which the manufacturers sought both punitive and compensatory damages. The court first addressed the insurers based in Pennsylvania and then the insurers based in England.

The court reasoned that, while Pennsylvania probably would not allow punitive damages when an insurer was guilty of bad faith, California would allow punitive damages; therefore, there was a true conflict.¹¹² California's objectives were "public protection and the sanctity of contract."¹¹³ Pennsylvania's objective was the "financial protection of its resident insurance companies in the out of state conduct of their business."¹¹⁴ The court noted that a Pennsylvania court had recently come down on the other side of the punitive damage issue, overruling the granting of a demurrer to a punitive damage claim.¹¹⁵ The court specifically indicated that this one decision did not make "Pennsylvania's seeming rejection of punitive damages . . . 'archaic' and 'isolated.'"¹¹⁶ The court concluded, however, that since the insurer had done business in California, "the interest of California in providing assurance to all of its citizens that rejection of any insurance claim will not be made in bad faith with impunity is paramount, and justifies invocation of its own law in cases brought in this state."¹¹⁷

In turning to the insurer based in England, the court also assumed that an English court would not allow punitive damages, and therefore the court was again faced with a true conflict.¹¹⁸ The court concluded, "[F]or reasons cited at length in this opinion, we believe that California's is the governing law on the subject of punitive damages."¹¹⁹

d. *Zimmerman v. Allstate Insurance Co.*

In *Zimmerman v. Allstate Insurance Co.*,¹²⁰ the court was faced with a suit brought against an insurer by a third party for bad faith.

111. 224 Cal. Rptr. 408 (Cal. Ct. App.), review granted, 719 P.2d 987, 227 Cal. Rptr. 391 (1986), review dismissed as moot, 736 P.2d 319, 236 Cal. Rptr. 905 (1987).

112. *Nicolet*, 224 Cal. Rptr. at 416-17.

113. *Id.* at 417.

114. *Id.*

115. *Id.* at 416 n.6.

116. *Id.* at 418.

117. *Id.*

118. *Id.* at 420.

119. *Id.*

120. 179 Cal. App. 3d 840, 224 Cal. Rptr. 917 (1986).

The plaintiff, then a resident of Illinois, had been injured in Oklahoma in an automobile accident with the defendant's insured, an Oklahoma resident. Subsequent to his recovery from his injuries, he moved to California.

The court recognized that there was a true conflict because Oklahoma, unlike California, did not recognize a cause of action by a third party against an insurer for bad faith.¹²¹ Noting that "the only factor supporting plaintiff's claim of California governmental interest in this case is his status as a resident of this state, who will be uncompensated for the alleged wrongs of defendant," the court refused to hold that California law should apply because doing so would encourage forum shopping.¹²² The court found this to be "of particular concern in a bad faith insurance action, where the plaintiff may complain of a course of conduct occurring over a period of time, during which plaintiff may at any point change his residence to a more favorable locale without notifying the defendant."¹²³ Another result would be to:

abrogate the interest of a jurisdiction such as Oklahoma in the application of its law to a situation arising out of an insurance policy written in Oklahoma, insuring a Oklahoma resident for an accident that occurred in that state, and where the complained of conduct of the insurer occurred, although its effect was upon a third party residing in California.¹²⁴

Thus, the court concluded that Oklahoma was the state with the greater interest.¹²⁵

e. *Denham v. Farmers Insurance Co.*

In *Denham v. Farmers Insurance Co.*,¹²⁶ the court was also faced with a third party bad faith claim against an insurer. The plaintiff's injuries resulted from an automobile accident in Nevada involving a Nevada resident. As in *Zimmerman*, the state of Nevada, like Oklahoma, did not recognize the cause of action.

The court recognized a California interest in protecting its residents from the unfair trade practices of insurers. The court also recognized Nevada interests in regulating insurers in Nevada, protecting Nevada insureds, and, as it did not recognize a cause of action for a third party

121. *Id.* at 845-46, 224 Cal. Rptr. at 919-20.

122. *Id.* at 847, 224 Cal. Rptr. at 920.

123. *Id.*, 224 Cal. Rptr. at 920.

124. *Id.*, 224 Cal. Rptr. at 920.

125. Although this is not the language of comparative impairment, it is the language used by the court.

126. 213 Cal. App. 3d 1061, 262 Cal. Rptr. 146 (1989).

against an insurer for bad faith, "an interest in protecting its defendant insurers as well as its insureds since Nevada insureds would ultimately bear the cost of extending the insurer's liability to third persons."¹²⁷ Thus, the court concluded that there was a true conflict and comparative impairment would be used.

The court noted that the California Supreme Court had decided since *Zimmerman* that California law did not create the cause of action against insurers who commit unfair trade practices.¹²⁸ The court concluded, however, that the decision did not apply in *Denham*, because it did not apply to actions filed before the date of its ruling if the insured's liability had been conclusively determined, as was done here.¹²⁹ Thus, the court concluded that "California's interest in applying its law [was] clearly not as strong."¹³⁰ The court also considered that the injury had occurred in Nevada, citing *Offshore* and its statement that the situs of the injury was still relevant.¹³¹ The final, and deciding, factor considered by the court was that California's only interest was that the plaintiffs were California residents. After extensively quoting from *Zimmerman* on that issue, the court concluded that Nevada law should apply.¹³²

3. Federal Cases

In the fifteen years since California's adoption of the comparative impairment method, the federal courts, in applying California's conflicts law, have also used the comparative impairment method to resolve true conflicts. Three Ninth Circuit court panels,¹³³ one Seventh Circuit panel,¹³⁴ six federal district courts sitting in California,¹³⁵ and seven other federal district courts¹³⁶ have found themselves faced with a true conflict, making

127. *Id.* at 1066, 262 Cal. Rptr. at 148.

128. *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988).

129. *Denham*, 213 Cal. App. 3d at 1065, 262 Cal. Rptr. at 148.

130. *Id.* at 1066-67, 262 Cal. Rptr. at 149.

131. *Id.* at 1067, 262 Cal. Rptr. at 149.

132. *Id.*, 262 Cal. Rptr. at 149.

133. *Rosenthal v. Fonda*, 862 F.2d 1398 (9th Cir. 1988); *Roesgen v. American Home Prods. Corp.*, 719 F.2d 319 (9th Cir. 1983); *Lettieri v. Equitable Life Assurance Soc'y of U.S.*, 627 F.2d 930 (9th Cir. 1980).

134. *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 594 (7th Cir.), cert. denied sub nom. *Lin v. American Airlines, Inc.*, 454 U.S. 878, 102 S. Ct. 358 (1981).

135. *McNall v. Tatham*, 676 F. Supp. 987 (C.D. Cal. 1987); *Federal Savings and Loan Ins. Corp. v. Transamerica Ins. Co.*, 661 F. Supp. 246 (C.D. Cal. 1987); *In re Pizza Time Theater Sec. Litigation*, 112 F.R.D. 15 (N.D. Cal. 1986); *Hernandez v. Aeronaves de Mexico, S.A.*, 583 F. Supp. 331 (N.D. Cal. 1984); *Camp v. Forwarders*

the use of comparative impairment necessary. The opinions of the courts faithfully cite *Bernhard* and *Offshore*; however, they do not at all properly apply the comparative impairment method as adopted by the California Supreme Court in those decisions.¹³⁷ The opinions of the Seventh Circuit and of a federal district court sitting in Illinois even go so far as to state that if an apparent conflict exists, a moderate and restrained interpretation of the states' laws should be applied; if such an analysis then fails to reveal only one state having a legitimate interest in having its law applied, the court is faced with a true conflict to which the comparative impairment method should be applied.¹³⁸ Another federal district court, sitting in Michigan, also stated that it interpreted California law the same way¹³⁹ utilizing a moderate and restrained interpretation of the state's laws to conclude that only one state had a legitimate interest and therefore, "under the 'comparative impairment' doctrine," it was faced with a false conflict.¹⁴⁰ These cases are aberrations, however, as most courts carefully follow the method set forth in the California cases.

IV. LOUISIANA'S NEW CONFLICTS OF LAW METHODOLOGY

In 1973, the Louisiana Supreme Court abandoned the *lex loci delicti* rule for choice of law.¹⁴¹ What the court adopted in its place, however, remained unclear. The fog was somewhat lifted, with help from then Federal District Judge Alvin B. Rubin,¹⁴² in *Ardoyno v. Kyzar* where he explained that Louisiana conflicts law had two distinct steps:

Transp. Inc., 537 F. Supp. 636 (C.D. Cal. 1982); *Fox v. Peck Iron and Metal Co.*, 25 Bankr. 674 (Bankr. S.D. Cal. 1982).

136. In re San Juan Dupont Plaza Hotel Fire Litigation, 745 F. Supp. 79 (D.P.R. 1990); In re Air Crash Disaster at Sioux City, Iowa, 734 F. Supp. 1425 (N.D. Ill. 1990); *Thomason v. Mitsubishi Elec. Sales Am., Inc.*, 701 F. Supp. 1563 (N.D. Ga. 1988); *Peckenpaugh v. Cargill, Inc.*, 1986 WL 15610 (D. Del. 1986); *Spano v. Nationwide Mut. Ins. Co.*, 1986 WL 7818 (W.D. N.Y. 1986); *National Semiconductor Corp. v. Allendale Mut. Ins. Co.*, 549 F. Supp. 1195 (D. Conn. 1982); *Rocky Mountain Helicopters, Inc. v. Bell Helicopter Co.*, 491 F. Supp. 611 (N.D. Tex. 1979).

137. The Seventh Circuit and three of the federal district courts not in California did not properly apply the comparative impairment method. *Air Crash Disaster near Chicago, Ill.*, 644 F.2d 594; *Plaza Hotel Fire Litigation*, 745 F. Supp. 79; *Air Crash Disaster at Sioux City, Iowa*, 734 F. Supp. 1425; *Rocky Mountain Helicopters*, 491 F. Supp. 611.

138. *Air Crash Disaster Near Chicago, Ill.*, 644 F.2d at 621; *Air Crash Disaster at Sioux City, Iowa*, 734 F. Supp. at 1431.

139. In re Disaster at Detroit Metropolitan Airport, 750 F. Supp. 793, 798-99 (E.D. Mich. 1989).

140. *Id.* at 804.

141. *Jagers v. Royal Indem. Co.*, 276 So. 2d 309 (La. 1973).

142. Judge Rubin was later a member of the United States Fifth Circuit Court of Appeals.

The first is to determine whether a false or true conflict exists. If a false conflict exists . . . the law of the state that has the exclusive interest is applied. If the conflict is a true one, the court proceeds to the second stage and applies the principles of the Second Restatement to determine which of the competing interests ought to prevail.¹⁴³

Not all Louisiana appellate courts and federal district courts in Louisiana have completely followed Judge Rubin's explanation of Louisiana conflicts law. The decisions, however, follow "two basic patterns: (1) use of the Restatement Second only to resolve 'true conflicts' exposed by 'governmental interest analysis or a similar process'; and (2) straightforward application of the whole of the Restatement mechanism without first determining whether the case presents a false or [a] true conflict."¹⁴⁴

In 1984, concluding that the conflicts articles of the Louisiana Civil Code were inadequate and had caused the jurisprudence to be chaotic, the Louisiana State Law Institute decided to revise Louisiana's choice of law rules.¹⁴⁵ The result was the adoption by the Council of the Louisiana State Law Institute, on March 17, 1989, of Law of Conflicts Laws: A *Projet*.¹⁴⁶ The *Projet* was formally adopted after editorial revisions on March 17, 1990.¹⁴⁷ The *Projet* was submitted to the Louisiana Legislature during the 1990 Legislative Session and was passed by the Senate; however, the House deferred the bill for further study. On January 12, 1991, the Council of the Law Institute reaffirmed the *Projet*,¹⁴⁸ which was once again submitted to the Louisiana Legislature during the 1991 Legislative Session. The *Projet* was adopted unanimously by both the House (99-0) and the Senate (35-0) with only two minor amendments,¹⁴⁹ and was approved by the Governor on July 24, 1991.¹⁵⁰ The *Projet* provided that Chapter 3 of the Preliminary Title of the Louisiana Civil Code, which previously contained articles 14 and 15, would be amended and reenacted, and be comprised of new articles 14

143. 426 F. Supp. 78, 81 (E.D. La. 1976). Judge Rubin also cited and applied Baxter's comparative impairment method. *Id.* at 84.

144. Note, Choice of Law in Louisiana: Torts, 47 La. L. Rev. 1109, 1143 (1987) (footnotes omitted).

145. Symeonides, Louisiana's Draft on Successions and Marital Property, 35 Am. J. Comp. L. 259 (1987). Louisiana's current choice of law articles are found in La. Civ. Code arts. 14-15 (1952 & Supp. 1991).

146. Louisiana State Law Institute, Law of Conflicts of Laws: A *Projet* (adopted March 17, 1989).

147. Louisiana State Law Institute, A *Projet* for the Codification of Louisiana Law of Conflicts of Laws (adopted March 17, 1990).

148. Louisiana State Law Institute, A *Projet* for the Codification of Louisiana Law of Conflicts of Laws (re-affirmed January 12, 1991).

149. 1991 La. Acts No. 923.

150. *Id.*

through 49.¹⁵¹ The new conflicts of law articles apply to all actions filed after January 1, 1992.¹⁵² The foundation of the entire *Projet*, and, now, the new conflicts of law book of the Louisiana Civil Code, is the general and residual article which states:

Except as otherwise provided in this Book, an issue in a case having contacts with other states is governed by the law of that 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 all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.¹⁵³

This article is the most important one in the new conflicts of law book because "it contains the general principles from which all other articles of this Book have been derived and in light of which they should be applied."¹⁵⁴ There are many similarities between this article and Baxter's comparative impairment method and the form of comparative impairment adopted by the California courts.

The *Projet's* drafters also recognized the article's resemblance to the comparative impairment method; however, they state that the resemblance is merely due to the article's "negative phrasing"¹⁵⁵ and that "to the extent it is anything more than acoustic, this resemblance is confined to the most basic premise."¹⁵⁶ According to the drafters, this basic premise is "that the choice-of-law process should strive for ways to minimize impairment of the interests of all involved states, rather than to maximize the interests of one state at the expense of the interests of the other states."¹⁵⁷ This, however, is not the only resemblance.

151. *Id.* at § 1. The *Projet* also provided that present articles 24 through 85 were to be redesignated by the Louisiana State Law Institute. *Id.* at § 2. The Louisiana State Law Institute subsequently redesignated new articles 15-49 as articles 3515-49 of Book IV, Conflict of Laws.

152. *Id.* at § 4.

153. La. Civ. Code art. 3515 (effective January 1, 1992).

154. La. Civ. Code art. 3515, comment a (effective January 1, 1992).

155. La. Civ. Code art. 3515, comment b (effective January 1, 1992). The negative phrasing of the article by the drafters is deliberate, and intended to distance the article from Currie's governmental interest analysis.

156. *Id.*

157. *Id.*

Several obvious similarities can be found in the general and residual code article itself. The article states that the "law of the state whose policies would be the most seriously impaired if its law were not applied"¹⁵⁸ should be applied to resolve a conflict; in the comparative impairment method the "law of the state whose interest would be the more impaired if its law were not applied"¹⁵⁹ is used to resolve a true conflict. That state, the article provides, is "determined by evaluating the strength and pertinence of the relevant policies of all involved states in light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems."¹⁶⁰ Similarly, the comparative impairment method requires "ascertaining the comparative pertinence" of the laws' underlying policies and accommodating the conflicting state policies based on the intended scope of those policies.¹⁶¹ Thus, it seems that the general and residual code article and comparative impairment are actually the same methodology merely using different terminology.

In a law review article in which he attempts to distinguish the comparative impairment method from the method used in the new conflicts of law book, the *Projet's* reporter, Professor Symeon C. Symeonides, states that the differences between the two approaches "become more evident in the specific rules of the *Projet*, which deliberately steer away from the quantitative measurement of the impairment of state interests that is associated with Baxter's theory."¹⁶² He is wrong. The comparative impairment method does not advocate a quantitative evaluation, or weighing, of states interests. In fact, the California courts have rejected such a weighing of interests.¹⁶³ Symeonides, then, uses as an example one of Baxter's hypotheticals in an attempt to show the difference between the two methods. Symeonides correctly states that if a state Y driver causes injury to another Y driver in an automobile accident occurring in state X while exceeding the speed limit of state X, then Baxter would not apply the negligence per se rule of state X because the regulatory interest of the rule would "not be impaired significantly if it is subordinated in the comparatively rare instances

158. La. Civ. Code art. 3515 (effective January 1, 1992) (emphasis added).

159. *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 320, 546 P.2d 719, 723, 128 Cal. Rptr. 215, 219, cert. denied, 429 U.S. 859, 97 S. Ct. 159 (1976) (emphasis added). See supra note 42 and accompanying text.

160. La. Civ. Code art. 3515 (effective January 1, 1992).

161. *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 166, 583 P.2d 721, 726-27, 148 Cal. Rptr. 867, 872-73 (1978) (emphasis omitted) (quoting Baxter, supra note 3, at 12). See supra note 66 and accompanying text.

162. Symeonides, *Problems and Dilemmas in Codifying Choice of Law for Torts: The Louisiana Experience in Comparative Perspective*, 38 Am. J. Comp. L. 431, 437 (1990).

163. See supra note 43 and accompanying text.

involving two nonresidents."¹⁶⁴ He also correctly states that, conversely, under new Article 3543, "the negligence per se rule will apply because it is a 'rule of the road' which operates territorially and because both the conduct and the resulting injury occurred in that state."¹⁶⁵ Incorrectly, however, Symeonides stops there. This avoids the fact that if there had not been a specific rule which addressed the issue in new Article 3543, the general and residual code article would have to be relied upon and Baxter's result would be proper under the general and residual article, new Article 3515.¹⁶⁶ Therefore, whenever one of the specific articles of the new conflicts of law book does not direct a certain result, the two methods converge and the Louisiana methodology becomes almost indistinguishable from the comparative impairment method.

This, however, is not a conclusion to be avoided. It provides Louisiana with a marvelous opportunity. Instead of trying to make the new Louisiana conflicts law an orphan, as the drafters are attempting to do, we should recognize Baxter as the true father of the methodology on which the new articles are based. The concern of the drafters appears to be that Louisiana courts will turn to the decisions based on Baxter's comparative impairment method as adopted by the California courts. This should not be a cause for alarm because it does not affect the application of specific articles in the new conflicts of law book. When there is an article pointing to a specific result, the Louisiana courts should follow that article. When there is not an article pointing to a specific result, however, the Louisiana courts can learn from the analysis of the California courts and properly apply the new Louisiana approach, free and clear of all baggage which the California courts have brought into the comparative impairment analysis.

Although Baxter only intended his method to be used for resolving true conflicts, and then only beginning with the federal courts, the method adopted in the general and residual code article is still the comparative impairment method. In applying the new Louisiana methodology, courts should remember certain factors. The new conflicts of law book rejects the true/false conflict analysis advocated by Currie's governmental interest analysis.¹⁶⁷ Therefore, no initial inquiry into whether only one state has an interest should be done. The court should initially determine if a code article provides a specific result. If not, then the

164. Symeonides, *supra* note 162, at 437-38 (quoting Baxter, *supra* note 3, at 13).

165. Symeonides, *supra* note 162, at 438. Article 3543, which governs issues of conduct and safety, provides in pertinent part: "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." La. Civ. Code art. 3543 (effective January 1, 1992).

166. La. Civ. Code art. 3515 and comment b (effective January 1, 1992).

167. See *supra* note 155.

court should turn to the method set forth in the general and residual code article. The article provides for the identification of the states' policies including the states' relationship to the parties and the dispute and the domestic and multistate policies involved. These factors are used to determine which state's policies would be most seriously impaired if its law were not applied.

The problems that commentators found with California's use of comparative impairment should not arise in Louisiana. Because a Louisiana court will not find itself faced with a "true" (or "false") conflict, it avoids the principle criticism of the California commentators of hastily identifying a "true" conflict and improperly incorporating Baxter's comparative impairment into Currie's step of moderate and restrained interpretation. Thus, one of Kay's main concerns with California's use of comparative impairment can never be reached in Louisiana.¹⁶⁸ However, because a court is to determine the "strength and pertinence" of the involved states policies, the additional factors added into the analysis by *Offshore* cannot be dismissed. The comments to the general and residual code article indicate that "[w]hat is to be evaluated is not the wisdom or goodness of a state policy, either in the abstract or vis-a-vis the policy of another state, but rather the 'strength and pertinence' of this policy in space."¹⁶⁹ The comments even advocate looking at the legislative policy; therefore, the Louisiana courts would benefit from looking at the history and current status of the states' laws in addition to their function and purpose.¹⁷⁰ While the comparison to "better law" analysis seems inevitable, it should not be accorded great weight because the comments clearly reflect the intent to avoid that type of analysis. Therefore, Louisiana courts should not be led into a better rule analysis as Kanowitz said the California courts have done.¹⁷¹

The analysis of the states' policies in the California decisions is a valuable resource. To ignore this method of analysis simply because of the drafters' insistence that the Louisiana methodology is not the comparative impairment method would be a waste. The analysis by the California courts after they recognize a true conflict and begin applying the comparative impairment method accurately reflects the type of analysis required of a Louisiana court in a choice of law situation.

V. CONCLUSION

Of course, the basis of the Louisiana choice of law analysis rests with the wording of new Article 3515, the general and residual code

168. See *supra* notes 76-79 & 83-89 and accompanying text.

169. La. Civ. Code art. 3515, comment c (effective January 1, 1992).

170. See *supra* notes 62-67 and accompanying text.

171. See *supra* notes 91-97 and accompanying text.

article of the new conflicts of law book.¹⁷² Despite the drafters' insistence to the contrary the new Louisiana conflicts of law methodology is a form of comparative impairment. The difference is that instead of applying comparative impairment when faced with a "true" conflict, as in California, the Louisiana courts will be applying comparative impairment from the moment it recognizes a choice of law problem that is not resolved by a specific conflicts of law code article. Although its adoption does not take exactly the same form as Baxter's comparative impairment or the form used by the California courts, their experience with its use can provide Louisiana courts with a valuable resource that should not be neglected.

172. See *supra* note 153 and accompanying text.

