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Section 6.01 of the ALI's Complex Litigation Project: Function Follows Form

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Talk about a jerry-built choice-of-law provision. Section 6.01,¹ the basic

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1. § 6.01 Mass Torts

(a) [I]n actions consolidated under § 3.01 or removed under § 5.01 in which the parties assert the application of laws that are in material conflict, the transferee court shall choose the law governing the rights, liabilities, and defenses of the parties with respect to a tort claim by applying the criteria set forth in the following subsections with the objective of applying, to the extent feasible, a single state's law to all similar tort claims being asserted against a defendant.

(b) In determining the governing law under subsection (a), the court shall consider the following factors for purposes of identifying each state having a policy that would be furthered by the application of its laws:

- (1) the place or places of injury;
- (2) the place or places of the conduct causing the injury; and
- (3) the primary places of business or habitual residences of the plaintiffs and defendants.

(c) If, in analyzing the factors set forth in subsection (b), the court finds that only one state has a policy that would be furthered by the application of its law, that state's law shall govern. If more than one state has a policy that would be furthered by the application of its law, the court shall choose the applicable law from among the laws of the interested states under the following rules:

(1) If the place of injury and the place of the conduct causing the injury are in the same state, that state's law governs.

(2) If subsection (c)(1) does not apply, but all of the plaintiffs habitually reside or have their primary places of business in the same state, and a defendant has its primary place of business or habitually resides in that state, that state's law governs the claims with respect to that defendant. Plaintiffs shall be considered as sharing a common habitual residence or primary place of business if they are located in states whose laws are not in material conflict.

(3) If neither subsection (c)(1) nor (c)(2) applies, but all of the plaintiffs habitually reside or have their primary places of business in the same state, and that state also is the place of injury, then that state's law governs. Plaintiffs shall be considered as sharing a common habitual residence or primary place of business if they are located in states whose laws are not in material conflict.

(4) In all other cases, the law of the state where the conduct causing the injury occurred governs. When conduct occurred in more than one state, the court shall choose the law of the conduct state that has the most significant relationship to the occurrence.

(d) When necessary to avoid unfair surprise or arbitrary results, the transferee court may choose the applicable law on the basis of additional factors that reflect the regulatory policies and legitimate interests of a particular state not otherwise identified under subsection (b), or it may depart from the order of preferences for selecting the governing law prescribed by subsection (c).

(e) If the court determines that the application of a single state's law to all elements of the claims pending against a defendant would be inappropriate, it may divide the actions

choice-of-law rule for mass torts in the American Law Institute's Complex Litigation Project's Proposed Final Draft,² consists of a little bit of interest analysis,³ too much of the Restatement (Second) of Conflicts,⁴ and several

into subgroups of claims, issues, or parties to foster consolidated treatment under § 3.01, and allow more than one state's law to be applied. The court also may determine that only certain claims or issues involving one or more of the parties should be governed by the law chosen by the application of the rules in subsection (c), and that other claims or parties should be remanded to the transferor courts for individual treatment under the laws normally applicable in those courts. In either instance, the court may exercise its authority under § 3.06(c) to sever, transfer, or remand issues or claims for treatment consistent with its determination.

American Law Institute, Complex Litigation Project, Proposed Final Draft (May 13, 1993) § 6.01 [hereinafter Proposed Final Draft].

2. I feel compelled to note that I have serious reservations about the constitutional propriety of fashioning federal conflicts laws to be applied to cases presently governed by *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), and *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 61 S. Ct. 1020 (1941). It is obvious that *Erie* and *Klaxon* have a constitutional foundation:

The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.

Erie, 304 U.S. at 77-78, 58 S. Ct. at 822 (footnotes omitted).

"But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence."

Id. at 78-79, 58 S. Ct. at 822 (quoting *Baltimore & O.R. v. Baugh*, 149 U.S. 368, 401, 13 S. Ct. 914, 927 (1893) (Field, J., dissenting)). "Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.'" *Id.* at 79, 58 S. Ct. at 823 (quoting *Black and White Taxicab Co. v. Brown and Yellow Taxicab Co.*, 276 U.S. 518, 533, 48 S. Ct. 404, 408 (1928) (Holmes, J., dissenting)). "We . . . declare that in applying the doctrine [of *Swift v. Tyson*] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." *Id.* at 80, 58 S. Ct. at 823. "We are of the opinion that the prohibition declared in *Erie R. Co. v. Tompkins* against such independent determinations by the federal courts, extends to the field of conflict of laws." *Klaxon*, 313 U.S. at 496, 61 S. Ct. at 1021 (citation omitted).

I do not find persuasive the counterargument or conclusion of the Proposed Final Draft. See Proposed Final Draft, *supra* note 1, at 382-84. However, I assume that others will address that constitutional issue. This article deals with § 6.01 in terms of its efficacy rather than its constitutionality.

3. Section 6.01(b) requires the court to "identify [] each state having a policy that would be furthered by the application of its laws." Proposed Final Draft, *supra* note 1, § 6.01(b).

4. Like the Restatement (Second) of Conflict of Laws (1969), § 6.01(b) and (c) set forth

seemingly slapdash subsections having no apparent legitimate antecedents.⁵ But beauty is as beauty does. Far more important than the form of the rule is the manner in which it functions. So let's see how Section 6.01 works on several choice-of-law problems that may arise in mass tort litigation. In each instance, we'll first subject the problem to interest analysis, which should afford us the most precise determination of which state has the most significant interest in the application of its own law.⁶ Then we'll compare the result with the one produced by Section 6.01.

I. STRICT LIABILITY AND COMPARATIVE NEGLIGENCE

A thousand plaintiffs domiciled in a dozen states bring product liability actions against the defendant on the basis of Section 402A Restatement (Second) of Torts.⁷ The defendant, domiciled in a state other than the domiciles of the plaintiffs, attempts to reduce the amount of damages recoverable by alleging that each plaintiff was negligent in his use of the product and by invoking a comparative negligence statute.⁸ Let's assume that the laws of the plaintiffs' domicile states are the same, and for ease of verbalization, let's collectively refer to those states as State A.⁹ Defendant is domiciled in State B. Both states have adopted Section 402A as a part of their common law and both states have similar

contacts that are to be taken into account without affiliating those contacts with the reasons underlying each state's potentially applicable law. Cf. Restatement (Second) of Conflicts of Laws (1969) §§ 145-180 and 188-221.

5. Proposed Final Draft, *supra* note 1, § 6.01(c)(1), (2), (3), and (4).

6. For my own views on the superiority of interest analysis over the Restatement (Second), see David E. Seidelson, *Interest Analysis or the Restatement Second of Conflicts: Which is the Preferable Approach to Resolving Choice-of-Law Problems?*, 27 Duq. L. Rev. 73 (1988).

7. Restatement (Second) of Torts § 402A (1965).

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

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

8. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 67, at 468-80 (5th ed. 1984).

9. "Plaintiffs shall be considered as sharing a common habitual residence or primary place of business if they are located in states whose laws are not in material conflict." Proposed Final Draft, *supra* note 1, § 6.01(c)(2).

For ease of verbalization, throughout the article I have used "domicile" rather than habitual residence or primary place of business for both natural persons and corporations.

pure comparative negligence statutes.¹⁰ State A, however, holds that its comparative negligence statute is not applicable to Section 402A actions.¹¹ Under State A's law, the plaintiff, even if contributorily negligent, is entitled to recover full compensatory damages from the Section 402A defendant. State A has concluded that, since under comment n¹² to Section 402A contributory negligence is not an available defense, the existence of a comparative negligence statute does not resurrect that defense. State B, on the other hand, permits the Section 402A defendant to assert comparative negligence to reduce the amount of damages recoverable to achieve an "equitable" distribution of the economic loss.¹³ In response to defendant's assertion of comparative negligence pursuant to the law of State B, plaintiffs move that that partial defense be stricken pursuant to the law of State A. How should the court rule on plaintiff's motion?

If the court were to use interest analysis, it would attempt to identify the reasons underlying each state's law. State A precludes the Section 402A defendant from asserting comparative negligence for two reasons: (1) to deter the sale of defective products by making the seller feel an undiluted sting of liability,¹⁴ and (2) to assure that the injured victim does not become an indigent ward of the state.¹⁵ The first reason, aimed at conduct regulation, would convert into a significant interest on the part of State A in having its law applied if the conduct intended to be regulated occurred in State A, or the immediate consequences of that conduct occurred in State A, or the ongoing consequences of that conduct would be felt in State A.¹⁶ Because the injured victims are

10. Keeton et al., *supra* note 8, § 67, at 471.

11. See, e.g., *Staymates v. ITT Holub Indus.*, 527 A.2d 140 (Pa. Super. 1987).

12. Restatement (Second) of Torts § 402A cmt. n (1965).

13. See, e.g., *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

The highest courts of seventeen states and one territory have [applied comparative negligence principles to strict products liability], while nine state legislatures have enacted statutes which make comparative negligence principles applicable to strict products liability. For a listing of these jurisdictions and the case citations see Comment, *Comparative Negligence and Strict Products Liability: Where Do We Stand? Where Do We Go?*, 29 Vill. L. Rev. 695 (1984).

Staymates, 527 A.2d at 145 n.5.

14. "The effect of reducing a plaintiff's recovery by the amount of his fault, the argument goes, will be to reduce or remove the manufacturer's incentive to produce safe products." *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1429 (5th Cir. 1983) (maritime case, rejecting the argument).

15. It was the belief of the drafters of the Restatement (Second) of Torts that the burden of accidental injuries caused by products placed in the stream of commerce be shouldered by those "who market the products," and the cost of such injuries "be treated as a cost of production against which liability insurance can be obtained." Restatement (Second) of Torts § 402A, Comment c.

Staymates, 527 A.2d at 143.

16. When one reason for a state's law is conduct regulation, I believe that reason converts into a significant interest on the part of that state in the application of its law if: (1) the conduct occurred in that state; or (2) the immediate consequences of that conduct occurred in that state; or (3) the continuing consequences of that conduct will be felt in that state. Presumably, a state's interest in regulating conduct rests on a desire to avoid

domiciled in State A, the ongoing consequences will be felt there, irrespective of where the conduct or its immediate consequences occurred. Therefore, State A's conduct-regulating reason converts into a significant interest on the part of that state in having its law applied. Moreover, because the plaintiffs are domiciled in State A, the second reason for that state's law also converts into a significant interest on the part of State A in having its law applied. Plaintiffs are within the class of persons State A wishes to protect from indigence.

State B's law permitting the Section 402A defendant to assert comparative negligence has two underlying reasons: (1) to deter negligent use of products,¹⁷ and (2) to protect the economic integrity of State B sellers.¹⁸ Let's assume that two hundred of the one thousand plaintiffs, although domiciled in State A, used and were injured by the product in State B. As to them, State B's conduct-regulating reason would convert into a significant interest on the part of State B in having its law applied, since the conduct intended to be regulated and the immediate consequences of that conduct occurred in State B. Because the defendant is a State B seller, the second reason for that state's law also would convert into a significant interest on the part of State B in having its law applied. The defendant is within the class whose economic integrity State B wishes to protect.

The court would be confronted with a true conflict and a rather evenly balanced set of competing interests. Each state has an interest in having its law applied based on conduct regulation and on protecting the economic integrity of its domiciled litigant. Which state has the more significant interest in the application of its own law?

the immediate or continuing adverse consequences made possible by such conduct. Consequently, if the conduct occurs within the state, thereby generating its reasonably foreseeable consequences within the state, or the immediate consequences occur within the state, or the continuing consequences will be felt within the state, the state's interest in conduct regulation converts into a significant interest.

David E. Seidelson, *Interest Analysis: The Quest for Perfection and the Frailties of Man*, 19 Duq. L. Rev. 207, 239 (1981).

17. The user will intentionally alter his use of the product only if his perceived cost of altering his use to avoid an accident is less than his expected cost from an accident resulting from his failure to alter his behavior. The inclusion of comparative fault will affect user behavior in a manner that results in a more efficient utilization of resources. Under simple strict liability, as proposed by the plaintiff, the user has no economic incentive to avoid an accident that he could avoid more cheaply than the manufacturer. *Lewis*, 716 F.2d at 1432.

18. A system of strict liability with comparative fault includes in the manufacturer's share of the accident costs only those costs caused by product defects. In that case the manufacturer will have the correct economic incentive to adjust the design of the product to minimize accident costs caused by the design. A system of product liability with no comparative fault would add to the manufacturer's share those accident costs caused by negligent use and not by any product defect. This increase in the manufacturer's share would result in an increased, and therefore inefficient, level of expenditure on preventive measures.

Id.

If the court were to compare only the competing interests in protecting the economic integrity of the domiciled litigants, I suspect State *A*'s interest would prevail. Given an adverse choice-of-law result, the indigence of the injured victim, deprived of a portion of his preexisting capacity to be self-supporting, seems more likely than the bankruptcy of the defendant.¹⁹ But the court is almost certain to recognize that each state's interest in conduct regulation, aimed at protecting and preserving human life, is of greater moment than the admittedly legitimate interests in economic integrity.²⁰ Thus, the state having the more significant interest in conduct regulation is the state whose law is likely to be applied.

Which state has the more significant interest in having its conduct-regulating law applied?²¹ Given an adverse choice-of-law result, State *B*'s interest in regulating the conduct of the product user would be wholly frustrated by State *A*'s law precluding comparative negligence. On the other hand, an adverse choice-of-law result would only partially frustrate State *A*'s interest in regulating the conduct of the seller, which would still feel some sting of liability albeit diminished by comparative negligence. That suggests to me that the court would conclude that State *B* has the more significant interest in the application of its

19. This is a form of comparative impairment, enabling the court to determine which state's interest would be more impaired by application of the other state's law. For an extended discussion of the propriety of the use of comparative impairment by an interest analysis court, see David E. Seidelson, *Resolving Choice-of-Law Problems Through Interest Analysis in Personal Injury Actions: A Suggested Order of Priority Among Competing State Interests and Among Available Techniques for Weighing those Interests*, 30 Duq. L. Rev. 869, 878 (1992).

20. See *id.* at 875.

21. I suppose the court could attempt to determine which state's law, State *A*'s law aimed at protecting and preserving human life by deterring the marketing of defective products or State *B*'s law aimed at protecting and preserving human life by discouraging the negligent use of products, is more likely to accomplish the desired effect. There are, however, a couple of problems with attempting to achieve such a determination. First, such an endeavor seems almost surely destined to turn into a judicial determination of which state's local law is the "better rule of law." I am strongly inclined toward the view that the "better rule of law" factor has no legitimate role to play in ingenuous interest analysis. Its use seems almost invariably to lead to the parochial conclusion that "ours" is the "better" rule of law. Second, absent significant empirical evidence, I'm not sure how a court could determine which state's law was the more effective means of protecting and preserving human life. And, even with such empirical evidence (should it exist), I believe that each state would have the right to make its own determination of what credibility to afford such data or which conflicting studies (should they exist) to credit, and therefore each state would have the right to make its own determination of which of the two approaches was the more effective in accomplishing the desired purpose. Consequently, with or without such empirical data, the court's effort to determine which state's local law constituted the more efficient manner of protecting and preserving human life would almost certainly degenerate into an inappropriate determination of the "better rule of law."

Id. at 875-76 (footnotes omitted).

law, apply that state's law, and deny plaintiffs' motion to strike the comparative negligence defense.

What result would Section 6.01 produce? Subsection (c)(1) provides: "If the place of injury and the place of the conduct causing the injury are in the same state, that state's law governs."²² As to the two hundred plaintiffs under consideration, this subsection would point to the law of State *B*, the same result we achieved through interest analysis. And even if that result might not be applicable to the other eight hundred plaintiffs, thus partially frustrating Section 6.01(a)'s "objective of applying . . . a single state's law,"²³ Section 6.01(e) authorizes the court to "divide the actions into subgroups of . . . parties to foster consolidated treatment . . . and allow more than one state's law to be applied."²⁴ Section 6.01 worked just beautifully with regard to our two hundred plaintiffs, producing the same result as interest analysis and without the intellectual effort required by that methodology. All we had to do was find the appropriate subsection.

Now let's subject the same choice-of-law problem to interest analysis with regard to the other eight hundred plaintiffs. Both of State *A*'s reasons for denying the Section 402A defendant the comparative negligence defense, regulating the conduct of the seller and protecting the injured victim from indigence, would continue to convert into significant interests on the part of State *A* in having its law applied. The conduct-regulating reason would convert because, given the plaintiffs' domicile in State *A*, the ongoing consequences of the conduct intended to be regulated would be felt in that state. And given the plaintiffs' domicile in State *A*, that state's interest in protecting the victims from indigence would convert.

How about State *B*'s underlying reasons? Because the seller is domiciled there, State *B*'s interest in protecting the economic integrity of the seller would continue to convert into a significant interest on the part of that state in having its law applied. But how about State *B*'s interest in regulating the conduct of the product users? Let's assume that these eight hundred plaintiffs used and were injured by the product in State *A*. Then, the conduct intended to be regulated and the immediate consequences of that conduct would have occurred in State *A*, and the ongoing consequences of that conduct would be felt in State *A*, the plaintiffs' domicile. Consequently, State *B*'s conduct-regulating reason would not convert into a significant interest in having its law applied. The court would almost certainly find State *A*'s interests more significant, apply that State's law, and grant plaintiffs' motion to strike the comparative negligence defense.

What result would Section 6.01 produce? As already noted, Subsection (c)(1) provides: "If the place of injury and the place of the conduct causing the

22. Proposed Final Draft, *supra* note 1, § 6.01(c)(1).

23. *Id.* § 6.01(a).

24. *Id.* § 6.01(e).

injury are in the same state, that state's law governs."²⁵ Is that language applicable to our eight hundred plaintiffs? I think not. The comment to Section 6.01 states that "[t]he place of conduct has a[n] . . . interest in regulating the defendant's activity and in requiring defendants who engage in certain conduct resulting in tortious injury to bear the losses associated with their actions."²⁶ That language indicates that Section 6.01(c)(1)'s reference to "the conduct causing the injury"²⁷ is a reference to the defendant's conduct. It's apparent, too, that State *B*, whose law permits the comparative negligence defense for the purpose of regulating the conduct of product users has no "interest in regulating the defendant's activity"²⁸ in the context of our hypothetical case. In our hypothetical, the defendant's conduct occurred in State *B*; plaintiffs' conduct (the conduct intended to be regulated by State *B*'s law) and injuries occurred in State *A*. Thus, Section 6.01(c)(1) provides no resolution to our choice-of-law problem.

Subsection (c)(2) applies only if plaintiffs and defendant share a common domicile.²⁹ Our plaintiffs are domiciled in State *A*, and the defendant in State *B*. Subsection (c)(3) provides:

If neither subsection (c)(1) nor (c)(2) applies, but all of the plaintiffs habitually reside . . . in the same state, and that state also is the place of injury, then that state's law governs. Plaintiffs shall be considered as sharing a common habitual residence . . . if they are located in states whose laws are not in material conflict.³⁰

All eight hundred of our plaintiffs are (collectively) domiciled in State *A*, which was the state of injury for all eight hundred. Therefore, as to this subgroup of parties,³¹ Section 6.01(c)(3) is applicable and would result in the application of the law of State *A*, once again the same conclusion achieved through interest analysis and again attained simply by determining the appropriate subsection of 6.01.

Let's return to the two hundred plaintiffs who, though domiciled in State *A*, used and were injured by the product in State *B*. Defendant continues to be domiciled in State *B*. But let's transpose laws. Now it is State *A* that permits the Section 402A defendant to assert comparative negligence and State *B* that precludes such an assertion. What result would interest analysis achieve? Since we have already identified the reasons underlying the competing laws, we need only transpose those reasons as between State *A* and State *B*. State *A* permits the assertion of comparative negligence to regulate the conduct of product users and to protect the economic integrity of its sellers. Since defendant seller is

25. *Id.* § 6.01(c)(1).

26. *Id.* § 6.01, cmt. a, at 402.

27. *Id.* § 6.01(c)(1).

28. *Id.* § 6.01, cmt. a, at 402.

29. *Id.* § 6.01(c)(2).

30. *Id.* § 6.01(c)(3).

31. *Id.* § 6.01(e).

domiciled in State *B*, that second reason does not convert into a significant interest on the part of State *A* in having its law applied. How about the first reason, regulating the conduct of product users? The conduct intended to be regulated on the part of these two hundred plaintiffs occurred in State *B*. The immediate consequences of that conduct also occurred in State *B*, where the product users were injured. Yet, because the plaintiffs are domiciled in State *A*, the ongoing consequences of that conduct will be felt in that state; thus State *A*'s interest in conduct regulation converts into a significant interest in having its law applied. Does that create an internal conflict on the part of State *A*—an interest in regulating the conduct of its domiciled product users, but an economic interest in assuring its domiciled victims full compensation? I don't think so. State *A*'s law permitting the comparative negligence defense indicates that that state has seen fit to prefer the former interest over the latter. Its law contemplates that the injured victims may suffer a reduced recovery. Consequently, State *A* would have a significant interest in the application of its law permitting the Section 402A defendant the comparative negligence defense.

State *B* precludes the Section 402A defendant from asserting comparative negligence in order to regulate the conduct of sellers and to assure that injured victims domiciled in State *B* do not become indigent wards of that state. Because the plaintiffs are domiciled in State *A*, the latter reason would not convert into a significant interest on the part of State *B* in having its law applied. But since the defendant seller's conduct occurred in State *B* and the immediate consequences of that conduct (plaintiffs' injuries) occurred in that state, the conduct-regulating reason does convert into a significant interest on the part of State *B* in having its law applied. Interest analysis demonstrates a true conflict. Each state has a significant interest in the application of its own law, State *A* wishing to regulate the conduct of its product users and State *B* the conduct of its seller.

Which state's conduct-regulating interest is the more significant? If State *A*'s law permitting comparative negligence is applied, State *B*'s interest in regulating the conduct of its sellers would be only partially frustrated. To the extent that even a diminished liability were imposed, State *B*'s interest would be vindicated in part. On the other hand, if State *B*'s law precluding comparative negligence were applied, State *A*'s interest in regulating the conduct of product users would be wholly frustrated. That suggests that State *A* has the more significant interest in the application of its law. Thus, interest analysis would apply State *A*'s law and deny plaintiffs' motion to strike the comparative negligence defense.

How about Section 6.01? Subsection (c)(1) provides that "[i]f the place of injury and the place of the conduct causing the injury are in the same state, that state's law governs."³² In our present hypothetical, State *B* was both the place of injury of the two hundred plaintiffs and the place of the conduct causing the

32. *Id.* § 6.01(c)(1).

injury, even reading that latter phrase as referring only to the defendant's conduct. Therefore, Section 6.01(c)(1) would apply State *B*'s law precluding the assertion of comparative negligence and grant plaintiffs' motion to strike that defense. For the first time, Section 6.01 has produced a result different from that we achieved through interest analysis. Why the difference?

In our application of interest analysis, we used comparative impairment.³³ We asked, given an adverse choice-of-law result, which state's interest would be more frustrated? Section 6.01 makes no provision for the use of comparative impairment. Rather, where injury and the conduct causing the injury occur in the same state, that state's law applies. I can understand the emphasis on conduct regulation aimed at protecting and preserving human life.³⁴ Indeed, as a general proposition, I acquiesce in that emphasis.³⁵ Human life is precious. In fact, I'm inclined to think that *either* the place of injury *or* the place of the conduct causing the injury has a significant interest in applying its conduct-regulating law.³⁶ Unlike Section 6.01(c)(1), I would not require both. Even beyond that, I believe that the place where the ongoing consequences of the conduct will be felt has a significant interest in the application of its conduct-regulating law.³⁷

But Section 6.01(c)(1) seems to overlook the possibility in our hypothetical: two states may have interests in the application of competing conduct-regulating laws aimed at protecting and preserving human life. State *A* wishes to protect and preserve the lives of its product users by regulating their conduct, and State *B* wishes to protect and preserve the lives of product users generally by regulating the conduct of its sellers. Rather than recognizing and attempting to resolve such a conflict, Section 6.01(c)(1) simply comes down on the side of the state where both plaintiffs' injuries and defendant's conduct occurred. In fact, Section 6.01 seems to fashion a descending order of importance to injury and conduct. Under Subsection (c)(1), if both occur in the same state, that state's law applies.³⁸ Under Subsection (c)(3), if the plaintiffs have a common domicile (or a common collective domicile) and that state is also the place of injury, that state's law governs.³⁹ And under Subsection (c)(4), "[i]n all other cases, the law of the state where the conduct occurred governs."⁴⁰ I would think that rather than imposing such a series of fact-specific rules involving injury and conduct, Section 6.01 might do better to direct the court to engage in comparative impairment analysis in cases where there are conflicting conduct-regulating interests. Apparently the drafters deemed it preferable to "provid[e]

33. See *supra* note 19.

34. See Seidelson, *supra* note 19, at 875.

35. *Id.*

36. See Seidelson, *supra* note 16, at 239.

37. *Id.*

38. Proposed Final Draft, *supra* note 1, § 6.01(c)(1).

39. *Id.* § 6.01(c)(3).

40. *Id.* § 6.01(c)(4).

clear choices rather than relying on the general balancing of competing interests on a case-by-case basis. The inclusion of more precise rules responds to the special problems and circumstances of complex litigation."⁴¹

Let's now return to the eight hundred plaintiffs who used and were injured by the product in State A, their domicile. Once again, let's transpose the laws from their original arrangement. Now it is State A that permits the Section 402A defendant the comparative negligence defense and State B that does not. The underlying reasons for State A's law are to regulate the conduct of product users and to protect the economic integrity of State A sellers. Since the defendant seller is domiciled in State B, the latter reason does not convert into a significant interest on the part of State A in having its law applied. However, since the conduct of the product users occurred in State A, the immediate consequences of that conduct occurred in State A, and the ongoing consequences of that conduct will be felt in State A, that state's conduct-regulating reason does convert into a significant interest in having its law applied.

The underlying reasons for State B's law precluding the Section 402A defendant from asserting comparative negligence are to regulate the conduct of sellers and to protect injured victims domiciled in State B from becoming wards of that state. Since the conduct of the seller occurred in State B, that first reason converts into a significant interest on the part of State B in having its law applied. Because the plaintiffs are domiciled in State A, the second reason for State B's law does not convert.

Interest analysis reveals a true conflict. State A has a significant interest in the application of its law aimed at regulating the conduct of product users. State B has a significant interest in having its law applied to regulate the conduct of the product seller. Which state's interest in the application of its own law is the more significant? Once again, comparative impairment analysis may be helpful. Given an adverse choice-of-law result, which state's interest will be more impaired? If State A's law permitting comparative negligence is applied, State B's interest in regulating the conduct of sellers will be only partially frustrated. But if State B's law prohibiting comparative negligence is applied, State A's interest in regulating the conduct of product users will be wholly frustrated. That suggests that interest analysis would lead the court to the conclusion that State A has the more significant interest in the application of its law, and the plaintiffs' motion to strike the partial defense would be denied.

What result would Section 6.01 produce? Subsection (c)(1) provides that, if injury and conduct occur in the same state, that state's law applies.⁴² But given our earlier determination that the conduct there referred to is that of the defendant, Section 6.01(c)(1) isn't applicable. Subsection (c)(2) doesn't apply because plaintiffs and defendant do not share a common domicile.⁴³ Subsection

41. *Id.* § 6.01, cmt. a, at 400 (citation omitted).

42. *Id.* § 6.01(c)(1).

43. *Id.* § 6.01(c)(2).

(c)(3) provides that, if neither Subsection (c)(1) nor Subsection (c)(2) is applicable, the court should apply the law of plaintiffs' domicile if that is also the place of injury.⁴⁴ That fits our hypothetical. Thus, Section 6.01(c)(3) would lead to the application of State A's law permitting comparative negligence, the same result produced by interest analysis. Unlike the immediately preceding hypothetical, this time the Section 6.01 result would "accommodate" comparative impairment. In that preceding hypothetical, Section 6.01 precluded comparative impairment. Of course, in both instances the Section 6.01 result was the product of fact-specific rules rather than the recognition and rational resolution of competing conduct-regulating rules. Perhaps the drafters consider that a fair bargain, given their view that

[t]he federal transferee court sits as a truly disinterested tribunal, with the task of resolving possible conflicts among the laws of interested states. Consequently, it seems both desirable and necessary to provide specific guidance as to how to accommodate the competing interests of multiple states in having their particular laws govern.⁴⁵

But "disinterested" and uninterested are quite different. To impose on the court a resolution of competing conduct-regulating interests simplified by fact-specific rules, although such a resolution is less than the most rational obtainable, imputes to the court a lack of appropriate interest.

II. USE OF FEDERAL STATUTE TO PROVE NEGLIGENCE

A thousand plaintiffs domiciled in a dozen states bring negligence actions against defendant car manufacturer. The plaintiffs allege that defendant violated the recall provision of the National Traffic and Motor Vehicle Safety Act⁴⁶ in two respects: (1) the notification sent by defendant to owners of cars covered by the recall was inadequate in that it warned only of the possibility of a partial loss of steering caused by a stone's becoming lodged between steering coupling and frame when in fact a total loss of steering would result, and (2) defendant failed to make available to its dealers an adequate number of steering coupling shields necessary to correct the problem.⁴⁷ As a result, the plaintiffs suffered serious personal injuries and property damage. The plaintiffs assert that defendant's violation of the federal statute constitutes negligence as a matter of law. Defendant moves to strike that theory of liability, arguing that violation of a federal statute that creates no private cause of action expressly or impliedly has no legal significance in a state law negligence action. Plaintiffs' domicile states,

44. *Id.* § 6.01(c)(3).

45. *Id.* § 6.01, cmt. a, at 400.

46. 15 U.S.C. § 1411 (1988).

47. This hypothetical is based on *Lowe v. General Motors Corp.*, 624 F.2d 1373 (5th Cir. 1980).

collectively referred to as State A, treat the violation of such a federal statute just as they would a violation of a state criminal statute:⁴⁸ if the victims were within the class of persons intended to be protected by the statute, and if the peril that occasioned the victims' injuries was one the statute was intended to protect against, and if there was a factual cause and effect relationship between violation of the statute and victims' injuries, such violation constitutes negligence per se.⁴⁹ Defendant is domiciled in State B. That state would give no legal effect to the federal statute in a state law negligence action. Plaintiffs of course argue for the application of State A's law and the defendant for the application of State B's law.

Let's first resolve the choice-of-law problem through the application of interest analysis. The reason underlying State A's law is conduct regulation. State A hopes to deter violations of such federal law, thereby diminishing the likelihood of injuries and deaths. That conduct-regulating reason for State A's law would convert into a significant interest on the part of that state in having its law applied if the conduct intended to be regulated occurred in State A, or the immediate consequences of that conduct occurred in State A, or the ongoing consequences of that conduct will be felt in State A. Since all the plaintiffs are domiciled in State A, the ongoing consequences will be felt there. Thus, State A has a significant interest in the application of its law treating violation of the federal statute as negligence per se.

State B's law, which would give no legal effect to the violation of the federal statute, exists to protect the economic integrity of defendants domiciled in that state. State B believes that its domiciled defendants should be immunized from liability predicated on a federal statute creating no private cause of action. Since the defendant is a State B domiciliary, State B has a significant interest in the application of its law. The case presents a true conflict.

Which state's interest in the application of its own law is the more significant as determined by interest analysis? State A's interest in conduct regulation is aimed at protecting and preserving human life. Such an interest almost necessarily is of greater moment than the admittedly legitimate competing interest in protecting economic integrity. Therefore, the court would conclude that State A had the more significant interest in the application of its law and deny defendant's motion to strike the theory of liability based on violation of the federal statute.

How about Section 6.01? Subsection (c)(1) provides that "[i]f the place of injury and the place of the conduct causing the injury are in the same state, that state's law governs."⁵⁰ Let's assume that two hundred of the one thousand plaintiffs were injured while driving or riding as passengers in State B. Let's

48. *Id.* at 1379-80.

49. See David E. Seidelson, *The Appropriate Judicial Response to Evidence of the Violation of a Criminal Statute in a Negligence Action*, 30 *Duq. L. Rev.* 1 (1991).

50. Proposed Final Draft, *supra* note 1, § 6.01(c)(1).

assume too that the defendant's conduct—the preparation of the notification forms and the decision to make a limited number of corrective parts—also occurred in State *B*, defendant's domicile. Then Section 6.01(c)(1) would direct the application of State *B*'s law affording no legal effect to the federal statute. That result is troubling. It seems to be the product of a failure to recognize that a true conflict may arise between one state's conduct-regulating law and another state's economic integrity law and that injury and defendant's conduct may both occur in the latter state. Subsection (c)(1) would then give that state primacy based on its being the situs of injury and conduct (usually both related to conduct regulation), even though that state's law is unrelated—perhaps even antagonistic—to conduct regulation.

Let's assume that six hundred of the plaintiffs were injured in State *A*. Then what result does Section 6.01 produce? Subsection (c)(1) would be inapplicable since injury would have occurred in State *A* and defendant's conduct in State *B*.⁵¹ Subsection (c)(2) would be inapplicable since plaintiffs and defendant are not domiciled in the same state.⁵² Then Subsection (c)(3) comes into play: "If neither subsection (c)(1) nor (c)(2) applies, but all of the plaintiffs habitually reside . . . in the same state, and that state also is the place of injury, then that state's law governs."⁵³ That would point to the application of State *A*'s law, the same result we achieved through interest analysis but contrary to the result produced by Section 6.01 as to the two hundred plaintiffs injured in State *B*. Why that difference? The drafters of Section 6.01 apparently were unwilling to recognize that a conduct-regulating law generates a significant interest on the part of the state having such a law if the ongoing consequences of that conduct will be felt in that state. Subsection (c)(3) requires injury *and* domicile where either should be sufficient.

Now let's assume that two hundred of the plaintiffs, though domiciled in State *A*, were injured in State *C*. What result would Section 6.01 produce? Subsection (c)(1) would be inapplicable because the place of injury (State *C*) and the place of the conduct causing the injury (State *B*) were not in the same state.⁵⁴ Subsection (c)(2) would be inapplicable because plaintiffs and defendant do not share a common domicile.⁵⁵ And Subsection (c)(3) would not apply because plaintiffs' domicile (State *A*) and the place of injury (State *C*) are different.⁵⁶ Then Subsection (c)(4) comes into play: "In all other cases, the law of the state where the conduct causing the injury occurred governs."⁵⁷ Thus, Section 6.01(c)(4) would mandate application of the law of State *B*, and defendant's motion to strike the theory of liability predicated on violation of the

51. *Id.*

52. *Id.* § 6.01(c)(2).

53. *Id.* § 6.01(c)(3).

54. *Id.* § 6.01(c)(1).

55. *Id.* § 6.01(c)(2).

56. *Id.* § 6.01(c)(3).

57. *Id.* § 6.01(c)(4), in pertinent part.

federal statute would be granted. That result is troubling for the same reason that Section 6.01(c)(1)'s similar mandate as to the first two hundred plaintiffs was troubling: a failure to recognize the conflict between one state's conduct regulating law and another state's economic integrity law and the concomitant possibility that the defendant's conduct may have occurred in the state whose law protects economic integrity rather than regulates conduct. The result produced by Section 6.01(c)(4) is further troubling because it apparently disregards the law of State C, the place of injury. If State C's law, like that of State A, treated violation of the federal statute as negligence per se, State C too would have a significant interest in the application of its conduct-regulating law since State C would be the situs of the immediate consequences of the conduct intended to be regulated. In those circumstances, both State A and State C would have a significant interest in having violation of the federal statute treated as negligence per se for the purpose of protecting and preserving human life. Yet Section 6.01(c)(4) would direct application of the law of State B aimed at protecting the economic integrity of the defendant. Just as the drafters refuse to recognize that the state in which the ongoing consequences of the conduct intended to be regulated will be felt has an interest in having its conduct-regulating law applied, so too do they refuse to recognize that the state in which the immediate consequences of the conduct intended to be regulated occurred has an interest in having its conduct-regulating law applied. To the drafters, a state having a law aimed at conduct regulation for the purpose of protecting and preserving human life has a significant interest in having that law applied only if (1) that state is the situs of injury *and* conduct,⁵⁸ or (2) that state is the common domicile of the litigants,⁵⁹ or (3) that state is the domicile of the plaintiffs *and* the place of injury,⁶⁰ or (4) the three previous conditions precedent failing, that state is the situs of the conduct.⁶¹ To me, it is more rational to find such a significant interest on the part of that state having a conduct-regulating law if the conduct intended to be regulated occurred there, or the immediate consequences of that conduct occurred there, or the ongoing consequences of that conduct will be felt there.

III. DUTY TO WARN OF THE "UNKNOWABLE" RISK

A thousand plaintiffs domiciled in a dozen states sue defendant manufacturer to recover for injuries sustained by the former as a result of the use of the latter's product. The theory of liability is that the defendant's product was defective and unreasonably dangerous because of defendant's failure to warn of the risk that occasioned the plaintiffs' injuries. Defendant asserts that, at the

58. *Id.* § 6.01(c)(1).

59. *Id.* § 6.01(c)(2).

60. *Id.* § 6.01(c)(3).

61. *Id.* § 6.01(c)(4).

relevant times, it had no knowledge, actual or constructive, of the existence of such a risk. Plaintiffs do not controvert defendant's lack of knowledge, actual or constructive, and defendant moves for summary judgment. Plaintiffs are domiciled (collectively) in State A, defendant in State B. State A's law imposes liability for failure to warn of a risk that eventuates, irrespective of the defendant's actual or constructive knowledge.⁶² State B's law imposes no liability for failure to warn absent actual or constructive knowledge of the risk.⁶³ Defendant's motion for summary judgment is predicated on State B's law and plaintiffs resist the motion, arguing that State A's law should apply.

Let's begin with interest analysis. Presumably, there are two reasons underlying State A's law. First, State A believes that the imposition of liability for failure to warn, irrespective of knowledge, will stimulate manufacturers to expend more time, effort, and money in identifying all risks incident to the use of their products.⁶⁴ Second, State A wants to assure that its domiciliaries who are injured by such products will not become indigent wards of the state.⁶⁵ State A believes that as between the "faultless" manufacturer and the injured victim, the former should bear the economic loss.⁶⁶ Since the plaintiffs are domiciled in State A, the second reason for that state's law would convert into a significant interest on the part of State A in having its law applied: plaintiffs are precisely within the class of persons State A wishes to protect from indigence. The first reason for State A's law, conduct regulation, would convert into a significant interest on the part of State A in having its law applied if the conduct intended to be regulated occurred in State A, or the immediate consequences of the conduct occurred in State A, or the ongoing consequences of the conduct will be felt in State A. Because the injured victims are domiciled in State A, it becomes apparent that the ongoing consequences will be felt in that state. Clearly, State A has a significant interest in the application of its law imposing liability.

The reason underlying State B's law imposing no liability for failure to warn of the unknown risk is to protect the economic integrity of the faultless State B

62. See, e.g., *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982); but cf. *Feldman v. Lederle Lab.*, 479 A.2d 374 (N.J. 1984) (limiting *Beshada* to asbestos cases). In *Feldman v. Lederle Lab.*, 592 A.2d 1176 (N.J. 1991), cert. denied, 112 S. Ct. 3027 (U.S.N.J. 1992), judgment for plaintiff was affirmed, the court concluding that federal law did not preempt the state law failure to warn action. In *In re Asbestos Litig.*, 829 F.2d 1233 (3d Cir. 1987), cert. denied, 485 U.S. 1029, 108 S. Ct. 1586 (1988), the court held that the distinction drawn by New Jersey between asbestos cases and other cases did not violate the equal protection or due process clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1.

63. See, e.g., *Woodill v. Parke Davis & Co.*, 402 N.E.2d 194 (Ill. 1980).

64. "By imposing on manufacturers the costs of failure to discover hazards, we create an incentive for them to invest more actively in safety research." *Beshada*, 447 A.2d at 548.

65. "[A] major concern of strict liability . . . is the conclusion that if a product was in fact defective, the distributor of the product should compensate its victims for the misfortune that it inflicted on them." *Id.* at 546.

66. *Id.*

manufacturers.⁶⁷ Because defendant is domiciled in State *B*, that reason converts into a significant interest on the part of State *B* in having its law applied. Interest analysis indicates a true conflict: each state has a significant interest in the application of its own law.

Which state's interest is the more significant? I believe that State *A* has the more significant interest, for two reasons. First, that state's interest in conduct regulation, aimed at protecting and preserving human life, would seem to be of greater moment than State *B*'s interest in protecting the economic integrity of State *B*'s manufacturers. Second, State *A*'s interest in assuring that its domiciled victims do not become indigent wards would seem to be of greater significance than State *B*'s interest in protecting the economic integrity of its manufacturer. In the event of an adverse choice-of-law result, the indigence of the injured victims, deprived of some portion of their prior ability to be self-supporting, seems more likely than the bankruptcy of the manufacturer. Consequently, interest analysis would indicate that State *A*'s law should be applied and that defendant's motion for summary judgment should be denied.

What result would Section 6.01 produce? Subsection (c)(1) provides that if the place of injury and the place of conduct are in the same state, that state's law governs.⁶⁸ We have not yet assigned a situs to the injuries. Under interest analysis, it was unnecessary; that methodology recognized that State *A*'s conduct regulation law converted into a significant interest on the part of that state in having its law applied if the ongoing consequences of the conduct would be felt there, as they would given the plaintiffs' domicile in State *A*. That recognition is lacking in Section 6.01. Let's assume that two hundred of the one thousand plaintiffs, although domiciled in State *A*, were injured in State *B*. It's clear that defendant's conduct—its failure to include a warning—occurred in State *B*. Therefore, Section 6.01(c)(1) would direct the application of State *B*'s law and defendant's motion for summary judgment would be granted. That result is contrary to the one we achieved using interest analysis. Moreover, it seems to be contrary to an intuitive sense of propriety to reward the defendant because the victims, although domiciled in a state having a conduct-regulating law and in which the ongoing consequences of that conduct will be felt, were injured in a state having a law aimed at protecting the defendant's economic integrity. We have already noted the drafters' apparent unwillingness to recognize the interest of the plaintiffs' domicile in having its conduct-regulating law applied. Is it possible that, in addition, the drafters are unwilling to recognize that conduct-

67. We believe our holding in this case is justified because a logical limit must be placed on the scope of a manufacturer's liability under a strict liability theory. To hold a manufacturer liable for failure to warn of a danger of which it would be impossible to know based on the present state of human knowledge would make the manufacturer the virtual insurer of the product, a position rejected by this court Strict liability is not the equivalent of absolute liability. There are restrictions imposed upon it. *Woodill*, 402 N.E.2d at 199 (citation omitted).

68. Proposed Final Draft, *supra* note 1, § 6.01(c)(1).

regulating laws aimed at protecting and preserving human life are of greater moment than competing laws aimed at protecting economic integrity? Or is the seemingly inappropriate result achieved by Section 6.01(c)(1) simply another example of the drafters' desire "to provide specific guidance"⁶⁹ to "a truly disinterested tribunal"?⁷⁰ Place of injury or place of the conduct causing injury each possesses significance if either occurs in a state having a conduct-regulating law. Factually, however, either or both (as in our present hypothetical) can occur in a state having, rather than a conduct-regulating law, a law aimed at protecting the defendant's economic integrity. That factual occurrence should not automatically lead to the defendant-protecting law, so long as the victims are domiciled in another state having a conduct-regulating law.

Let's assume that eight hundred of the one thousand plaintiffs were injured in State A, their domicile. What result would Section 6.01 produce? Subsection (c)(1) would now be inapplicable because the place of injury (State A) and the place of the defendant's conduct (State B) would not be the same.⁷¹ Subsection (c)(2) would be inapplicable because plaintiffs and defendant do not share a common domicile.⁷² Subsection (c)(3) would apply because State A would be both plaintiffs' domicile and place of injury;⁷³ therefore, defendant's motion for summary judgment would be denied. Under Section 6.01, the "critical" distinction between the two hundred plaintiffs who suffered the entry of summary judgment against them and the eight hundred who did not is that the former were injured in State B and the latter in State A. But that distinction does nothing to enhance or diminish State A's interest in having its conduct-regulating law applied for the benefit of its domiciled victims or State B's interest in having its economic integrity law applied for the benefit of its domiciled manufacturer. And, just in passing, perhaps it should be noted that interest analysis produced one choice-of-law result applicable to all one thousand plaintiffs, whereas Section 6.01, having "the objective of applying, to the extent feasible, a single state's law to all similar tort claims being asserted against a defendant,"⁷⁴ produced one result for the two hundred plaintiffs and a contrary result for the eight hundred plaintiffs.

IV. MARKET SHARE LIABILITY

A thousand plaintiffs domiciled in a dozen states developed cancer, allegedly as the result of their mothers' ingestion of diethylstilbestrol (DES) during the mothers' pregnancies with plaintiffs. To recover for their injuries, plaintiffs sue five pharmaceutical houses that manufactured and distributed DES at the relevant

69. *Id.* § 6.01, cmt. a, at 400.

70. *Id.*

71. *Id.* § 6.01(c)(1).

72. *Id.* § 6.01(c)(2).

73. *Id.* § 6.01(c)(3).

74. *Id.* § 6.01.

times and places. Of all the drug companies that manufactured and distributed DES at the relevant times and places, only the five defendants remain in business. The five produced approximately ninety percent of the total DES marketed.⁷⁵ Neither the prescribing physicians nor the pharmacists are able to identify the manufacturer of the DES taken by plaintiffs' mothers because of the passage of time. The mothers too are unable to identify the manufacturer for the same reason. Plaintiffs allege that the DES taken by their mothers was defective and unreasonably dangerous because of the absence of a warning that it could cause cancer in a child born after ingestion of the drug by the pregnant mother. Defendants move for summary judgment or partial summary judgment because of plaintiffs' failure to allege and offer proof that any one of the five defendants manufactured the DES actually taken by plaintiffs' mothers. The plaintiffs are domiciled (collectively) in State A. State A has embraced the market share theory of liability under which plaintiffs' complaints and other papers would be legally sufficient.⁷⁶ Under State A's law, plaintiffs would have a right to recover full compensatory damages from the five defendants unless one or more of the defendants carry the burden of persuading the jury that they did not manufacture the DES taken by plaintiffs' mothers.⁷⁷ In the event of such a recovery, plaintiffs' full compensatory damages would be apportioned among the liable defendants in the same proportion in which each had a share of the relevant market.

State B, domicile of three of the five defendants, has rejected the concept of market share liability.⁷⁸ Under State B's law, absent an allegation and preliminary proof (by affidavit or deposition, for example) that defendants had manufactured the DES taken by plaintiffs' mothers, the cause of action would not be legally sufficient and defendants' motions for summary judgment would be granted.

State C, domicile of two of the defendants, has adopted a modified form of market share liability. Under State C's law, plaintiffs would be permitted a partial recovery of compensatory damages from those defendants unable to prove that they had not manufactured the DES used by the plaintiffs' mothers.⁷⁹ State C's law would permit the plaintiffs to recover from those defendants that portion of compensatory damages that equals the defendants' portion of the total relevant market. If those defendants had enjoyed ninety percent of the relevant market,

75. The hypothetical is based on *Sindell v. Abbott Lab.*, 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912, 101 S. Ct. 286 (1980).

76. *Id.*

77. This seemed to be the recovery contemplated by *Sindell*, 607 P.2d at 937. However, in *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988), *reh'g denied*, the court apparently adopted a modified market share liability similar to that imputed to State C in the text, *infra* accompanying note 79.

78. See, e.g., *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581 (5th Cir.), *cert. denied*, 465 U.S. 1102, 104 S. Ct. 1598 (1983) (interpreting Louisiana law and dividing 2-1).

79. See, e.g., *Martin v. Abbott Lab.*, 689 P.2d 368 (Wash. 1984).

the plaintiffs could recover ninety percent of their compensatory damages, with each defendant contributing damages equal to its proportionate share of the relevant market.⁸⁰ Under State *C*'s law, partial summary judgment for that portion of plaintiffs' compensatory damages greater than the total share of the relevant market would be entered in favor of defendants.

Let's resolve the choice-of-law problem through interest analysis, and let's begin with the motions for summary judgment filed by the three defendants domiciled in State *B*. That requires us to identify the reasons underlying the laws of State *A* and State *B*.

In part, State *A*'s law permitting the plaintiffs full compensatory damages from those defendants unable to prove that they did not manufacture the DES exists to assure that victims domiciled in State *A* do not become indigent wards of that state.⁸¹ Since the plaintiffs are domiciled in State *A*, they are within the class intended to be thus protected. Consequently, the first reason for State *A*'s law converts into a significant interest on the part of that state in having its law applied. The second reason for State *A*'s law is conduct regulation.⁸² State *A* believes that imposing such market share liability will deter manufacturers from marketing defective products.⁸³ This conduct-regulating reason would convert into a significant interest on the part of State *A* in having its law applied if the conduct intended to be regulated occurred in State *A*, or the immediate consequences of that conduct occurred in State *A*, or the ongoing consequences of that conduct will be felt in State *A*. Since the plaintiffs are domiciled in State *A*, the ongoing consequences will be felt there. Thus, the second reason for State *A*'s law converts into a significant interest on the part of that state in having its law applied.

The reason underlying State *B*'s law rejecting market share liability is to protect the economic integrity of State *B* defendants whose conduct has not been shown to be a cause in fact of plaintiffs' injuries.⁸⁴ The three defendants domiciled in State *B* fall precisely within the class intended to be protected by that state's law. Consequently, State *B* has a significant interest in the application of its law.

Which state has the more significant interest in the application of its law? I believe interest analysis reveals State *A*'s interest to be the more significant, for a couple of reasons. First, that state's interest in conduct regulation, aimed at

80. *Id.*

81. "From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product." *Sindell*, 607 P.2d at 936.

82. "The manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety." *Id.*

83. *Id.*

84. "The development of products liability and comparative negligence in this state leave th[e] established requirement of proving causation intact . . ." *Zaffit v. Eli Lilly & Co.*, 676 S.W.2d 241, 246 (Mo. 1984) (en banc).

protecting and preserving human life, seems to be of greater moment than State *B*'s admittedly legitimate interest in protecting the economic integrity of State *B* manufacturers. Second, as between State *A*'s interest in protecting the economic integrity of its injured victims and State *B*'s interest in protecting the economic integrity of its manufacturers, the former seems more significant. Given an adverse choice-of-law result, the indigence of the injured victims seems more likely than the bankruptcy of the manufacturers. Therefore, I believe interest analysis would lead to the application of State *A*'s law and denial of the motions for summary judgment of the three State *B* defendants.

What result would Section 6.01 produce? Subsection (c)(1) points to the law of the state where the injury and the conduct causing the injury occurred.⁸⁵ Under interest analysis it was unnecessary to assign a situs to the occurrence of injury; that methodology recognized that State *A*'s conduct-regulating reason converted into a significant interest on the part of that state in having its law applied because the ongoing consequences of the conduct intended to be regulated would be felt in State *A*, the victims' domicile. Section 6.01 lacks that recognition.

Let's assume that two hundred of the one thousand plaintiffs were injured in State *B*, that is to say that their cancers manifested themselves in State *B* before those two hundred victims acquired State *A* domiciles. As to those victims, State *B* would be both the place of injury and the place of the conduct causing the injury, that is the failure of the three defendants to insert a warning with their product. Therefore, State *B*'s law would govern, and the court would grant the motions for summary judgment of the three State *B* defendants as to these two hundred plaintiffs. There are, I believe, two problems with that result. First, it is directly contrary to the result produced by interest analysis. Second, it mandates the application of a law intended to protect the economic integrity of defendants on the basis of two factors—place of injury and place of conduct causing the injury—that are more intimately related to laws intended to be conduct-regulating.

Let's assume that four hundred of the plaintiffs were injured in State *A*. What result does Section 6.01 produce for them? Subsection (c)(1) would be inapplicable since, although State *A* is the place of injury, State *B* is the place of the defendants' conduct causing the injury,⁸⁶ failure to include a warning. Subsection (c)(2) would be inapplicable because plaintiffs and the three defendants do not share a common domicile.⁸⁷ Subsection (c)(3) would be applicable since all of the plaintiffs are domiciled in State *A*, and State *A* is "the place of the injury."⁸⁸ Consequently Section 6.01(c)(3) would direct application of the law of State *A* and the denial of the motions for summary judgment of the

85. Proposed Final Draft, *supra* note 1, § 6.01(c)(1).

86. *Id.*

87. *Id.* § 6.01(c)(2).

88. *Id.* § 6.01(c)(3).

three State *B* defendants as to these four hundred plaintiffs. Once again there is a certain irony in that result. Interest analysis produced a uniform conclusion with regard to all one thousand plaintiffs and the three defendants domiciled in State *B*. Section 6.01(c)(3), although fashioned "with the objective of applying, to the extent feasible, a single state's law to all similar tort claims asserted against a defendant,"⁸⁹ produced one result with regard to the two hundred plaintiffs and the contrary result with regard to the four hundred plaintiffs.

Let's assume that two hundred of the plaintiffs had manifest injury in State *D* before becoming domiciled in State *A*. Interest analysis would continue to point to the law of State *A* since both of its interests, conduct regulation and protecting its injured domiciliaries from indigence, would convert into significant interests in having its law applied. What result would Section 6.01 produce? Subsection (c)(1) would not apply since injury and defendant's conduct did not occur in the same state.⁹⁰ Subsection (c)(2) would be inapplicable because plaintiffs and defendant do not have a common domicile.⁹¹ Because plaintiffs' domicile and place of injury were not in the same state, Section 6.01(c)(3) would not apply.⁹² That leaves Section 6.01(c)(4): "In all other cases, the law of the state where the conduct causing the injury occurred governs."⁹³ That would lead to application of the law of State *B*, and the defendants' motions for summary judgment would be granted. That result, contrary to the one obtained through interest analysis, apparently fails to recognize State *A*'s interests in conduct regulation and protection of its domiciliaries from indigence as well as the fact that both of those interests convert into significant interests on the part of State *A* in having its law applied, irrespective of the occurrence of the injuries in State *D*. In addition, that result applies the law of the state where the defendant's conduct occurred even though the law of that state is not directed at conduct regulation, but rather at protecting the economic integrity of its defendants.

Let's attempt to resolve the choice-of-law problem with regard to some of the plaintiffs and the two defendants domiciled in State *C*, utilizing interest analysis. We have already identified the reasons underlying State *A*'s law, conduct regulation and protecting its injured victims from indigence, and concluded that both convert into significant interests on the part of State *A* in having its law applied. What are the reasons underlying State *C*'s law recognizing a modified form of market share liability permitting plaintiffs to recover that portion of compensatory damages equal to defendants' share of the relevant market? To the extent that State *C* recognizes even a modified form of market share liability, its law would be predicated on (1) assuring that victims

89. *Id.* § 6.01.

90. *Id.* § 6.01(c)(1).

91. *Id.* § 6.01(c)(2).

92. *Id.* § 6.01(c)(3).

93. *Id.* § 6.01(c)(4).

domiciled in State C do not become indigent wards of the state⁹⁴ and (2) conduct regulation.⁹⁵ Because plaintiffs are domiciled in State A, not State C, the first reason would not convert. However, because the conduct of the two defendants domiciled in State C occurred in that state, where they failed to include an appropriate warning with their product, that conduct-regulating reason would convert into a significant interest on the part of State C in having its law applied. But why only partial recovery of compensatory damages limited to the same proportion of the total market enjoyed by the defendants? Presumably, the reason for this aspect of State C's law is to avoid a "distortion"⁹⁶ of liability, that is a liability greater than the total share of the relevant market enjoyed by State C manufacturers. Since the two defendants seeking partial summary judgment are State C domiciliaries, that reason for State C's law would convert. Interest analysis indicates a true conflict: each state has a significant interest in the application of its own law. Yet, it is a limited true conflict. State A is concerned with the economic integrity of its domiciled victims and with conduct regulation. State C is concerned with the economic integrity of its domiciled manufacturers and with conduct regulation. To the extent that the laws of both states are aimed at regulating the conduct of the defendants, it might be asserted that no conflict exists. Still, State C's interest in conduct regulation is tempered by an interest in protecting the economic integrity of its manufacturers by limiting recovery of compensatory damages to the extent that State C manufacturers enjoyed a share of the total relevant market. State A's interest in conduct regulation is not so limited.

Let's attempt to determine which state's interest is the more significant by utilizing comparative impairment analysis. If State A's law is applied, it would wholly frustrate State C's interest in protecting the economic integrity of State C manufacturers. On the other hand, application of State C's law would only partially frustrate State A's interests in conduct regulation and in assuring that its domiciled victims do not become indigent wards. That suggests that State C has the more significant interest in the application of its law. Thus, interest analysis would result in the application of State C's law and the granting of the motions for partial summary judgment of the two State C defendants.

94. "[T]his court is faced with a choice of either fashioning a method of recovery for the DES case which will deviate from traditional notions of tort law, or permitting possibly tortious defendants to escape liability to an innocent, injured plaintiff." *Martin v. Abbott Lab.*, 689 P.2d 368, 381 (Wash. 1984).

95. We are presented with a conflict between the familiar principle that a tortfeasor may be held liable only for damage that it has caused, and the sense of justice which urges that the victims of this tragedy should not be denied compensation because of the impossibility of identifying the individual manufacturer of these generic tablets *if their manufacture and distribution were otherwise culpable*.

Id. (emphasis added).

96. *Id.* at 380.

What result would Section 6.01 produce? Once again, Subsection (c)(1) would be applicable only if injury and conduct occurred in the same state.⁹⁷ Let's assume that two hundred of the plaintiffs were injured in State C before becoming domiciled in State A. Under Section 6.01(c)(1), State C's law would apply. While that is the same result achieved by interest analysis, it is produced here simply because those victims were injured in State C.

How about the four hundred plaintiffs injured in State A? Subsections (c)(1)⁹⁸ (injury and conduct) and (c)(2)⁹⁹ (common domicile) would be inapplicable. Subsection (c)(3) (plaintiffs' domicile and place of injury) would apply and would point to the law of State A.¹⁰⁰ Section 6.01 would produce different results as to those plaintiffs injured in State C and those injured in State A where the place of injury, manifestation of the cancers, could hardly be more fortuitous. It was the pregnant mothers' ingestion of DES that brought about the plaintiffs' ultimate injuries, and the place of those injuries would be where the plaintiffs happened to be when the cancer manifested itself. And, once again, unlike interest analysis, Section 6.01, despite its objective of applying a single state's law, would apply one state's law to the two hundred injured in State C and another state's law to the four hundred injured in State A.

Let's transpose the laws of State A and State C. Now it is State A that permits only partial recovery and State C that permits full recovery. The reasons underlying State A's law would be to assure that its injured victims did not become indigent wards (by providing at least partial recovery),¹⁰¹ to protect the economic integrity of State A manufacturers,¹⁰² and to regulate conduct.¹⁰³ Since the plaintiffs are domiciled in State A, the first reason would convert. Since the two defendants seeking partial summary judgment are domiciled in State C, not State A, the second reason would not convert. However, since the ongoing consequences of the defendants' conduct would be felt in State A, plaintiffs' domicile, State A's interest in conduct regulation would convert into a significant interest on the part of that state in having its law permitting partial recovery applied. The reasons underlying State C's law permitting full recovery would be to assure that injured victims domiciled in that state did not become indigent wards¹⁰⁴ and to regulate conduct.¹⁰⁵ Since the victims are domiciled in State A, the first reason would not convert. However, since the defendants' conduct intended to be regulated occurred in State C, the second reason would convert into a significant interest on the part of State C in having its law

97. Proposed Final Draft, *supra* note 1, § 6.01(c)(1).

98. *Id.* § 6.01(c)(1).

99. *Id.* § 6.01(c)(2).

100. *Id.* § 6.01(c)(3).

101. *See supra* note 94.

102. *See supra* note 96.

103. *See supra* note 95.

104. *See supra* note 81.

105. *See supra* note 82.

permitting full recovery applied. Interest analysis suggests a true conflict: each state has a significant interest in the application of its own law. But is it really a conflict? State A's interest in protecting the economic integrity of that state's manufacturers (thus permitting only partial recovery) does not convert. The only aspects of State A's law that convert into significant interests in the application of that law are conduct regulation and protecting its victims from indigence. That conduct regulating interest underlies State C's law permitting full recovery. Presumably, State C's law permitting full recovery would more effectively serve the mutual interests of both states in conduct regulation and State A's interest in protecting against indigence. And, since no State A defendant is involved, State A's tempering consideration simply would not apply. Apparently, State C's law permitting full recovery would best serve the interests of both states. Interest analysis, then, would lead to the application of State C's law and the denial of the two defendants' motions for partial summary judgment.

How about Section 6.01? Subsection (c), dealing with false conflicts, provides in pertinent part that: "If . . . the court finds that only one state has a policy that would be furthered by the application of its law, that state's law shall govern."¹⁰⁶ Is that language applicable to our present hypothetical? I would like to answer that question affirmatively since that would lead to the application of State C's law, the same result we achieved through interest analysis. And an affirmative answer may be appropriate. Still, Subsection (c) applies "[i]f . . . only . . . one state has a policy that would be furthered by the application of its law."¹⁰⁷ In our hypothetical, it's clear that State C's law (full recovery) serves that state's policy of conduct regulation. But State A's law (partial recovery) serves in part that state's interests in conduct regulation and protecting against indigence. Each of the two states "has a policy that would be furthered by the application of its law."¹⁰⁸ Consequently, Subsection (c) may not be applicable. In that case, we would be compelled to move on to Subsection (c)(1). Subsection (c)(1) requires that injury and defendants' conduct occur in the same state as the conditions precedent to the application of that state's law.¹⁰⁹ The conduct of the two defendants occurred in State C. Let's assume that four hundred of the plaintiffs sustained injury in State A. That would make Section 6.01(c)(1) inapplicable. Because plaintiffs and defendants do not share a common domicile, Subsection (c)(2) would not apply.¹¹⁰ It is Section 6.01(c)(3) that would apply since State A is plaintiffs' domicile and the place of injury of the four hundred;¹¹¹ thus, State A's law would govern. Again, that result is contrary to the one attained by interest analysis, and that difference is

106. Proposed Final Draft, *supra* note 1, § 6.01(c).

107. *Id.*

108. *Id.*

109. *Id.* § 6.01(c)(1).

110. *Id.* § 6.01(c)(2).

111. *Id.* § 6.01(c)(3).

particularly troublesome given our conclusion that State C's law would better serve the conduct-regulating interests of both states.

Let's assume that two hundred of the plaintiffs were injured in State C before becoming domiciled in State A. Then Subsection (c)(1) would apply;¹¹² the place of the injury and the conduct causing the injury would be State C. Consequently, State C's law would apply. That is the same result we achieved through interest analysis, but under Section 6.01(c)(1) the result is the product of the fortuitous site of the manifestation of the cancer, not any recognition that State C's law best serves the conduct-regulating interests of both states. And, again, unlike interest analysis, Section 6.01, despite its objective of applying a single state's law, would apply one state's law (permitting only partial recovery) to the four hundred and the other state's law (permitting full recovery) to the two hundred.

V. THE "ESCAPE" CLAUSE

Subsection (d) provides that:

When necessary to avoid unfair surprise or arbitrary results, the transferee court may choose the applicable law on the basis of additional factors that reflect the regulatory policies and legitimate interests of a particular state not otherwise identified under subsection (b), or it may depart from the order of preferences for selecting the governing law prescribed by subsection (c).¹¹³

How is the court to know when the application of Section 6.01 produces "unfair surprise or arbitrary results"? How is it to know when "additional factors . . . reflect the regulatory policies and legitimate interests of a particular state not otherwise identified under subsection (b)"? And how is it to know when to "depart from the order of preferences for selecting the governing law prescribed by subsection (c)"? The only method for accomplishing those tasks I am aware of is the application of interest analysis. It was that methodology that permitted us to identify those cases in which Section 6.01 seemed to produce an inappropriate result. That suggests that the message conveyed by the drafters is apply Section 6.01 unless interest analysis suggests a different result. If the court must "test" the propriety of the Section 6.01 result by application of interest analysis, why should the court bother with Section 6.01? It would be more efficient simply to apply interest analysis and inherently avoid unfair surprise, arbitrary results, missed regulatory policies and legitimate interests, and an improper order of preference.

Is it possible that the court might misapply interest analysis and arrive at the wrong result? Of course. Judges and lawyers are human beings and to be

112. *Id.* § 6.01(c)(1).

113. *Id.* § 6.01(d).

human is to be fallible. But so too are the drafters of Section 6.01 human. And, as our analysis has suggested, inappropriate results are built into Section 6.01. Consequently, the wrong result produced by inadvertence in applying interest analysis¹¹⁴ seems likely to occur less often than the wrong result produced by the very structure of Section 6.01.

VI. CONCLUSION

Nearly everyone, certainly including the drafters of Section 6.01, wants to achieve the most appropriate choice-of-law results possible. I believe interest analysis is the most efficient methodology for achieving that result. But interest analysis requires intellectual effort on the part of judges and lawyers, and it lacks the comfortable familiarity of numbered rules or sections and subsections. So someone is always trying to produce a set of neatly numbered rules purporting to achieve the same goal as interest analysis: application of the law of the state having the most significant interest in having its law applied to resolve a particular issue.¹¹⁵ Usually, the rules have some "saving clause" that permits or even mandates the use of interest analysis to reduce the likelihood of achieving the wrong result.¹¹⁶ I think it's time we faced up to the fact that, if a court can utilize interest analysis to "corroborate" or "disprove" a result mandated by neatly numbered rules, that same court is probably able to utilize interest analysis to achieve results without the numbered rules. So, ultimately, I am forced to conclude that Section 6.01 and its collection of subsections don't work any better than they look. Sometimes form controls function.

114. It may even be possible to offer the court an order of priority among competing state interests and among available techniques for weighing those interests, all under the aegis of interest analysis. *See, e.g.*, Seidelson, *supra* note 19.

115. *See generally* Restatement (Second) of Conflicts of Laws (1969) and Chief Judge Fuld's famous rule 3:

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

Neumeier v. Kuehner, 286 N.E.2d 454, 458 (1972).

116. *Id.* *See Proposed Final Draft, supra* note 1, § 6.01(d).

