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Fifty Conflict of Laws “Restatements”: Merging Judicial Discretion and Legislative Endorsement

Shirley A. Wiegand*

I. INTRODUCTION

The arcane and complex world inhabited by choice of law scholars seems light years away from the world inhabited by those who must resolve real tort, contract, and property disputes. Practicing lawyers and judges must find real answers to problems such as these:

1. What is the measure of damages for an automobile accident in Canada between State X and Canadian residents when Canadian law precludes the recovery of non-economic damages?
2. Does State X or State Y contract law apply when a State X company supplies defective materials for building construction in State Y?
3. Does State X’s safe place statute protect a State X resident who slips and falls in a State Y motel parking lot?
4. Is a State X hospital liable for shipping bone marrow in a defective container, thus forcing a State Y child to undergo a second bone marrow removal, when State X law would prohibit recovery?
5. Does State X’s law apply to insurance issues when a State X resident is involved in an accident in State Y?

All of these questions involve choice of law issues, all have arisen in the courts of just one state in the past decade,¹ and all states have wrestled with similar issues.

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1. See *State Farm Mut. Auto. Ins. Co. v. Gillette*, 641 N.W.2d 662 (Wis. 2002) (Canadian auto accident); *Edward E. Gillen Co. v. Valders Stone & Marble, Inc.*, 468 N.W.2d 32 (Wis. Ct. App. 1990) (stone for breakwater and ramp); *Johnson v. Travelers Ins. Co.*, 486 N.W.2d 37 (Wis. Ct. App. 1992) (fall in parking lot); *Kuehn v. Childrens Hospital, Los Angeles*, 119 F.3d 1296 (7th Cir. 1997) (bone marrow container); see, e.g., *Albert Trostel & Sons Co. v. Employers Ins. of Wausau*, 551 N.W.2d 63 (Wis. Ct. App. 1996), *rev’d in part on other grounds*, 576 N.W.2d 88 (Wis. Ct. App. 1998); *American Family Ins. Co. v. Powell*, 486 N.W.2d 537 (Wis. Ct. App. 1992); *Continental Ins. Co. v. Garrison*, 54 F. Supp. 2d 874 (E.D. Wis. 1999); *Sybron Transition Corp. v. Security Ins. Co.*, 107 F.3d 1250 (7th Cir. 1997) (insurance issues).

In one recent year, more than 1,600 choice of law cases were reported in American state and federal courts.² All require efficient, practical, and just resolution. Those issues have become more difficult since the 1960s when states began to reject traditional methods of resolving them. For example, since 1965 when one state rejected traditional choice of law methodology, its courts were called upon to resolve choice of law issues in at least eighty-five cases.³ No doubt, many more attorneys have settled cases without fully litigating (or even being aware of) the choice of law issues.

While choice of law scholars discuss, debate, and even argue about the best way to resolve the issues, judges and attorneys go about their business. But that business is made more difficult by the myriad of modern choice of law methodologies that states apply today.

This article examines current choice of law methodologies and critiques proposals for new and improved methodologies. It rejects the call for a national approach and instead proposes that each state adopt its own statutory choice of law code. The author recommends that each state begin this process by conducting empirical research and analysis of its own choice of law jurisprudence to determine how judges have approached the issue since rejection of traditional methods. Such analysis would examine not only substantive results, but also the methodologies employed and the possible existence of various biases in choice of law analysis. A thorough analysis would also likely reveal clear patterns for those issues that reappear from time to time. Drafters of a state choice of law code, rather than creating a choice of law methodology from whole cloth, would base their recommendations on the state's own jurisprudence. Such a result engages the efforts of both the judicial and legislative branches of the state's government, thereby resulting in a credible written product that reflects the state's own policies and jurisprudence: a true "restatement" of the law.

II. MODERN CHOICE OF LAW METHODOLOGIES

Until the 1960s, an American court's choice of law methodology was fairly predictable. Courts applied a traditional approach incorporated in the First Restatement of Conflict of Laws:⁴ the law of the place where the particular right "vested." For tort cases, the right vested at the place of injury; for contract cases, the place of

2. Symeon C. Symeonides, *Choice of Law in the American Courts in 2003: Seventeenth Annual Survey*, 52 Am. J. Comp. L. 9, 10 (2004).

3. See *infra* text accompanying note 148.

4. Restatement of Conflict of Laws (1934).

contracting; for property disputes, the property's location.⁵ The 1960s witnessed the beginnings of the choice of law revolution that led to the varied approaches seen today. Those who happily rejected the traditional approach could not anticipate that courts would be struggling with "modern" methodologies forty years later. As one court noted when it rejected the traditional approach in 1965:

[W]e do so in the belief that the rule contemplated by the [then proposed Restatement (Second) and two prior cases] will result in a common law of conflicts that will be administered with uniformity as jurisdictions generally adopt this rule. To arrive at such uniformity requires an analysis on a consistent basis so that a similar fact situation will result in a similar determination.⁶

That has not happened.

Currently, only ten states follow traditional methodology for tort and eleven for contract.⁷ Three states follow the "significant contacts" method for tort and five follow it for contract.⁸ Twenty-two states purport to follow the Restatement (Second)⁹ for tort and twenty-four for contract.¹⁰ For tort issues, three states apply "interest analysis" and three others apply forum law.¹¹ Five states follow Leflar's "better law" methodology for torts and two of them apply it for contract disputes.¹² Finally, six states apply a combination of modern methodologies for torts and ten of them for contracts.¹³

Even assuming that the list above accurately describes what courts actually do—and in fact, it does not (courts routinely combine methods, apply only a portion of a particular method, arrive at a conclusion without describing their analysis at all)—the

5. Obviously these rules were not as simple as they sound. The place of the contract's formation often depended upon whether the contract was unilateral or bilateral; when the disputed issue involved contract performance, the law of the place of performance often applied, rather than where the contract was entered. Traditional rules had a number of exceptions. See Shirley A. Wiegand, *Officious Intermeddling, Interloping Chauvinism, Restatement (Second), and Leflar: Wisconsin's Choice of Law Melting Pot*, 81 Marq. L. Rev. 761, 761-64 (1998).

6. *Wilcox v. Wilcox*, 133 N.W.2d 408, 416 (Wis. 1965).

7. Symeonides, *supra* note 2, at 26.

8. Symeon C. Symeonides, *Choice of Law in the American Courts in 2000: As the Century Turns*, 49 Am. J. Comp. L. 1, 13-15 (2001).

9. Restatement (Second) of Conflict of Laws (1971).

10. Symeonides, *supra* note 8, at 13. However, as a number of scholars have noted, courts often purport to follow Restatement (Second) while in fact applying only a portion of the methodology or applying an entirely different methodology. See, e.g., Wiegand, *supra* note 5, at 788-89, 801-03.

11. Symeonides, *supra* note 8, at 13.

12. *Id.*

13. *Id.*

methodologies themselves allow wide areas of discretion. For example, in a simple torts case, the Restatement (Second), the most widely accepted choice of law methodology, requires courts to look first for a presumptive law to apply, then consult at least two other Restatement sections, both of which consist of multiple “relevant” factors including “the needs of the interstate and international systems,” “the relevant policies of the forum” and “of other interested states and the relative interests of those states in the determination of the particular issue,” “the protection of justified expectations,” and so on.¹⁴ The methodology is not only complex, but it provides no underlying principle other than applying the law of the state that has the “most significant relationship” to the issue. Leflar’s “better law” methodology limits the relevant factors to five (called “choice-influencing considerations”), but the fifth factor directs the court to determine which of the competing laws is “better,”¹⁵ again permitting broad discretion.

As a result, it has become difficult to predict what a court will do when faced with choice of law issues, and each case seems to demand an ad hoc determination. For attorneys, this lack of predictability may discourage settlement; it certainly inhibits an accurate case valuation. For judges, choice of law issues take an inordinate amount of time and require a fairly complex analysis.

The current situation has been described in a variety of ways, generally unfavorably. It is “a total disaster,” “chaos,” “gibberish,” “a veritable playpen for judicial policymakers,” “a conflicts mine field in a maze constructed by professors drunk on theories.”¹⁶

III. CHANGING THE CHOICE OF LAW LANDSCAPE

Resolving the current disarray involves two questions, one involving form, the other substance. The first question asks how changes might be achieved, i.e., through federal action, state-by-state legislation, changes in common law, or some other process. The second question asks what standards or rules might take the place of current choice of law methodologies.

Scholars have proposed a variety of solutions that address either form or substance or both. Most of them focus on the desirability of

14. See Restatement (Second) of Conflict of Laws §§ 6, 145-146 (1971).

15. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. Rev. 267, 282 (1966).

16. Michael H. Gottesman, *Adrift on the Sea of Indeterminacy*, 75 Ind. L.J. 527, 527 (2000); Alfred Hill, *For a Third Conflicts Restatement—But Stop Trying to Reinvent the Wheel*, 75 Ind. L.J. 535, 538 (2000); Friedrich K. Juenger, *A Third Conflicts Restatement*, 75 Ind. L.J. 403, 403 (2000); Paul v. Nat’l Life, 352 S.E.2d 550, 551 (W. Va. 1986); Friedrich K. Juenger, *Choice of Law and Multistate Justice* 235 (1993) [hereinafter Juenger, *Choice of Law*].

a national uniform choice of law methodology. Why is national uniformity so important? Most who advocate uniformity argue that it will lead to predictability and discourage forum shopping.¹⁷ Prior to the 1960s, all states followed the traditional First Restatement method. This method privileged predictability over other goals such as justice, rationality, and respect for state policies. It did not matter where a case was filed; the law of the place of injury would govern a tort case.¹⁸ This discouraged forum shopping and enabled parties to predict the applicable law.

Once states began to follow their own methodologies, however, it became imperative for attorneys to shop around—filing a case in a traditional state, for example, when the law of the place of injury favored the plaintiff.¹⁹ Choice of law thus became a key factor in forum shopping. Modern methodologies may favor important values like the implementation of state policy, rationality, and justice, but the variety and complexity of approaches have led to unpredictability. “[T]he parties cannot know what law governs their conduct until after they have acted. The resulting uncertainty is unfair, and it discourages desirable interstate activity.”²⁰ It is argued that a uniform choice of law regime would reinstate predictability, and its adherents hope that other values could be incorporated in the new methodology as well.

Scholars disagree, however, on the best way to implement a uniform approach. Some believe that the United States Congress should pass a federal choice of law statute.²¹ Even assuming that this is an area suitable for federal legislation, so far Congress has not expressed sufficient interest in such a project. This is not surprising, given the arcane nature of the subject matter and the fact that the electorate has not clamored for action. Congress is more likely to address choice of law issues in discrete areas, such as part of federal products liability or mass disaster legislation,²² rather than involving

17. See, e.g., Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 Geo. L.J. 1 (1991); Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 Mich. L. Rev. 2134 (1991).

18. Obviously, there were exceptions to the rule. See Wiegand, *supra* note 5.

19. Both state and federal courts are bound to apply the state's choice of law rules even though those rules may lead to the substantive law of another state. States follow their own choice of law rules because, under choice of law analysis, such rules are deemed procedural rather than substantive, and states are free to apply their own procedural rules. Federal courts are bound to follow the states' choice of law rules under the mandate of *Erie* and *Klaxon*. See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938); *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020 (1941).

20. Kramer, *supra* note 17, at 2137.

21. See, e.g., Gottesman, *supra* note 17.

22. See, e.g., S. 10, 108th Cong. (2003) (“a bill to protect consumers in

itself in a generalized all-encompassing choice of law code for tort, contract, property, and other disputes. Federal legislation is unlikely to lead to uniform rules or standards covering the vast array of choice of law issues facing courts today.

Some scholars have proposed action by the National Conference of Commissioners on Uniform State Laws (the Conference).²³ That body is comprised of “lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments . . . to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.”²⁴ Once the Conference has completed its work, state legislatures are free to adopt, or not, the proposed law. An advantage of uniform laws is that their implementation occurs only after they have been subjected to state legislative debate and adoption. A law adopted through the legislative process becomes positive law, carrying with it the imprimatur of the state’s legislative branch. If the law is well drafted to provide clear guidance to courts, parties will at least be able to predict the methodology that a court will follow and, over time, may be able to predict results based on precedent.

Professor Larry Kramer argues as well that, in addition to increased predictability, a Conference-drafted uniform law serves substantive purposes. He notes that “in any true conflict, we have (at least) two competing versions of justice, each associated with a different sovereign. Because these sovereigns are, by definition, coequal . . . we have no ground from which to judge one state’s law better or more just.”²⁵ Instead of asserting that one state’s policy is more important or just than another’s, we should instead “think about choice of law more like treaty negotiations, where the ‘correctness’ of a particular solution is simply a matter of what the states agree to do.”²⁶ “[T]he only ‘right’ answer is one the interested states agree mutually to adopt.”²⁷ States will agree to a rule that is even-handed and reasonable, directing individual states to subordinate their interests when they have less at stake, permitting them to assert their

managed care plans” and provides that certain civil actions be governed by the law of the plaintiff’s state). Congress is more likely to pass federal legislation that preempts a particular field like products liability, rather than provides choice of law rules for state and federal courts. *See, e.g.*, Jonathan D. Glater, *Pressure Increases for Tighter Limits on Injury Lawsuits*, N.Y. Times, May 28, 2003, at A1.

23. *See, e.g.*, Kramer, *supra* note 17; *see also* Juenger, *Choice of Law*, *supra* note 16, at 416.

24. National Conference of Commissioners on Uniform State Laws, *About NCCUSL*, at http://www.nccusl.org/Update/Home_desktopdefault.aspx (last visited Nov. 15, 2004).

25. Kramer, *supra* note 17, at 2140.

26. *Id.* at 2141.

27. *Id.* at 2143.

interests when the stakes for them are higher. "Maximizing the interests of different states can be done only on a more wholesale basis: by identifying generally shared policies or policy preferences and constructing rules that systematically advance these."²⁸ Encouraging states to act cooperatively means that there must be one body of rules that states agree to follow, and, it is argued, the best way to do that is through the work of the National Conference, a body of representatives from all fifty states whose final product undergoes consideration by individual state legislatures.

Others have proposed that the American Law Institute (ALI), a body comprised of judges, lawyers, and law teachers, begin work on a Restatement (Third) of Conflict of Laws.²⁹ Founded in 1923, ALI's purpose is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."³⁰ Its bylaws "authorize an elected membership of 3,000" consisting of "judges, lawyers, and law teachers from all areas of the United States as well as some foreign countries, selected on the basis of professional achievement and demonstrated interest in the improvement of the law."³¹

A Reporter, chosen by the Institute, prepares the initial draft which is then submitted to a small group of experts in the field.³² The draft is thereafter revised, likely multiple times, and submitted to "the Council of the Institute, a group consisting of some sixty prominent judges, practicing lawyers, and law teachers" before it is finally approved by the entire Institute membership.³³ "The final product, the work of highly competent group scholarship, thus reflects the searching review and criticism of learned and experienced members of the bench and bar."³⁴

The advantages of a Third Restatement for choice of law are several. After more than thirty years since its inception, the

28. *Id.* at 2145.

29. See, e.g., Bruce Posnak, *The Restatement (Second): Some Not So Fine Tuning for a Restatement (Third): A Very Well-Curried Leflar over Reese with Korn on the Side (Or Is It Cob?)*, 75 Ind. L.J. 561 (2000); William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 Ind. L.J. 417 (2000); Joseph William Singer, *Pay No Attention to That Man Behind the Curtain: The Place of Better Law in a Third Restatement of Conflicts*, 75 Ind. L.J. 659 (2000); Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 Ind. L.J. 437 (2000).

30. The American Law Institute, Certificate of Incorporation, available at <http://www.ali.org/ali/01-Certificate03.pdf>.

31. The American Law Institute, *About the American Law Institute*, at <http://www.ali.org/ali/thisali.htm> (last visited Nov. 15, 2004).

32. *Id.*

33. *Id.*

34. *Id.*

Restatement (Second) clearly has become the courts' favorite modern methodology. As noted above, nearly half of the states follow the Restatement (Second) of Conflict of Laws, though they do not necessarily follow it closely or faithfully. A new Restatement would likely build on this popular approach and would therefore be familiar to judges and lawyers. Critics of the Restatement (Second), however, note that its complexity and ambiguity make it difficult to apply, allow judges too much discretion, and lead to unpredictability.³⁵ The new Restatement could fine-tune the old, retaining its strengths and jettisoning its weaknesses.

Such a project has its disadvantages as well. First of all, it would take a long time; the Restatement (Second) project spanned nearly twenty years.³⁶ Furthermore, those who draft new "restatements" do not necessarily represent all states and all viewpoints. They are a select group of scholars and choice of law "experts" chosen by other select groups of scholars and "experts." They have dedicated much of their professional lives to devising their own theories about what works and what does not.

A new Restatement, like the last, will be anything but a "restatement" of the law,³⁷ in part because the law varies markedly from state to state and even from court to court within each state. This area of the law is simply too unsettled. Instead the new Restatement will be an entirely new product cobbled together by a variety of scholars, all of whom have their own idea of what choice of law should look like.

The proposal for a uniform law may seem quite reasonable regardless of whether the National Conference or the ALI draft it. However, aside from the fact that neither has yet taken up the gauntlet, there is little agreement about the substance of a uniform law. More than sixty years have passed since the first Restatement, and "the theoretical debates are reaching the point of diminishing returns The theoretical scholarship, while adequate to demonstrate the faults of the *First Restatement*, does not seem to be able to produce consensus on the proper modern approach."³⁸ Until the Conference or ALI begin work on such a project, it is hard to predict what its result would be, and it may be that each body would

35. See, e.g., Gottesman, *supra* note 16; Hill, *supra* note 16.

36. The ALI began work in 1952 and approved the final draft in 1969. See Restatement (Second) of Conflict of Laws (1971).

37. See, e.g., Posnak, *supra* note 29, at 561 (arguing that the Institute should adopt a Model Act, rather than a "restatement": "whatever we come up with will almost certainly not restate the conflicts law Although this did not deter the drafters of the Second Restatement, to be honest and avoid misleading, our product should not be called a restatement.").

38. Richman & Reynolds, *supra* note 29, at 426-27.

face the same challenge as that faced by other groups attempting to find national consensus in this area.

For example, one scholar asserts that any new proposal “should contain no rigid rules” except for “two presumption-raising, jurisdiction-selecting rules,” should add two factors to the current “seven choice-influencing factors,” and “should prohibit the weighing of ‘Currie interests’ in true conflicts.”³⁹

Another encourages the drafters to “shift from the present heavy emphasis on territorialism to interest analysis,” at least for loss-distribution tort issues.⁴⁰ Yet another argues that drafters of a new Restatement should “consider every principle and rule . . . not only in light of domestic scenarios but of international disputes as well” and should “work comparatively,” i.e., “look at foreign conflicts law” as well as American conflicts law.⁴¹

One scholar is “troubled by any project that seeks to govern choice of law by rules rather than an approach,”⁴² while another believes “that some type of rules are necessary.”⁴³ The latter would abandon the Second Restatement’s rules and instead adopt “flexible rules with built-in escapes which will allow courts enough freedom to deviate in exceptional cases.”⁴⁴

Some of those quoted above would no doubt participate in the drafting of a Third Restatement or uniform law. It appears that they are no more in agreement about the substance of a new methodology than the drafters of the Second Restatement were. The result of that earlier process was a mishmash of rules, presumptions, and factors, reflecting a process that incorporated everyone’s ideas. It appears at this stage that a Third Restatement or uniform law would do the same.

An additional disadvantage of a Third Restatement is that, unlike the process for a proposed “uniform law” described above, the final draft of a Restatement does not receive legislative consideration and approval. It is given only the weight any court determines to give it, and courts are unlikely to apply the new Restatement in a uniform, and hence, predictable manner. That has certainly been true for the Restatement (Second), and there is yet no reason to believe that a new Restatement will fare any better.

In fact, the likelihood of achieving a national uniform approach to choice of law appears doubtful, at least in the foreseeable future.

39. Posnak, *supra* note 29, at 562.

40. William A. Reppy, Jr., *Codifying Interest Analysis in the Torts Chapter of a New Conflicts Restatement*, 75 Ind. L.J. 591, 593-94 (2000).

41. Mathias Reimann, *A New Restatement—For the International Age*, 75 Ind. L.J. 575, 584-85 (2000).

42. Gary J. Simson, *Leave Bad Enough Alone*, 75 Ind. L.J. 649, 654 (2000).

43. Symeonides, *supra* note 29, at 447.

44. *Id.*

There simply is no national consensus about the best approach and, to date, primarily legal scholars have been engaged in the debate. If they cannot agree on the best approach, it is unlikely that any other body will be able to do so.

A. *State-by-State Approach*

What then is the solution to this troubling state of affairs? I propose that we abandon the search for a national uniform approach to choice of law. So long as we have fifty independent sovereign states, each with its own idea of what best represents its interests and what is just, each with its own unique body of statutory and common law, we will have fifty different approaches to this issue as well. Nothing is wrong with that.

For example, West Virginia is quite adamant that it rejects modern approaches to choice of law tort issues. In 1986, when faced with that specific question, the court clearly rejected the "modern" Restatement (Second), calling it "pretty intellectual," but noting, "we still prefer a rule. The lesson of history is that methods of analysis that permit dissection of the jural bundle constituting a tort and its environment produce protracted litigation and voluminous, inscrutable appellate opinions, while rules get cases settled quickly and cheaply."⁴⁵ The court added:

[W]e remain convinced that the traditional rule, for all of its faults, remains superior to any of its modern competitors. Moreover, if we are going to manipulate conflicts doctrine in order to achieve substantive results, we might as well manipulate something we understand. Having mastered marble, we decline an apprenticeship in bronze. We therefore reaffirm our adherence to the doctrine of *lex loci delicti* today.⁴⁶

Wisconsin courts, too, have announced a policy for choice of law decisions that other states might not accept. In a number of cases, the state's highest court has articulated a strong state policy of compensating victims, even those who are not Wisconsin residents.⁴⁷ Such a court might be reluctant to abandon its own policy in the interest of national uniformity.

45. *Paul v. National Life*, 352 S.W.2d 550, 554 (W. Va. 1986).

46. *Id.* at 556. After announcing its adherence to the place-of-injury rule, the court then employed the public policy exception to that rule and applied West Virginia law to a car accident that occurred in Indiana. *Id.*

47. *See, e.g., Hunker v. Royal Indemnity Co.*, 204 N.W.2d 897, 905 (Wis. 1973); *Conklin v. Horner*, 157 N.W.2d 579, 583 (Wis. 1968).

If we value predictability, rather than sacrificing state individuality for it, we can achieve some success by improving choice of law methodologies state by state, ensuring that when a lawsuit is filed in State X, we can predict at least the choice of law methodology State X will follow and determine in advance the applicable law. This proposal rejects a uniform approach. Some will argue that choice of law results then will be determined by the forum that the plaintiff chooses. Well, yes, probably. But that is part of the litigative decision made every day by plaintiffs, and choice of law plays but one role in that decision. So long as states have different court procedures, standards of proof, rules for the introduction of evidence, remedies including damage measurements and caps, and a variety of different laws and processes that may influence the final outcome, plaintiffs will shop for the most favorable forum. That is the price we pay for a federation of fifty sovereign states.

Furthermore, it should come as no surprise to anyone that laws change as one crosses state boundaries. When one enters a new state, one is surely aware that driving laws change. One state requires motorcyclists to wear helmets, another does not. One requires seatbelts, another does not. One permits radar detectors, or a right hand turn on a red light, another does not. Corporations doing business in more than one state know they must be aware of different laws, and parties involved in litigation surely would not be shocked that states employ different choice of law methodologies.

Once we acknowledge that a one-size-fits-all approach to choice of law is unrealistic (and perhaps undesirable as well), we can instead focus our efforts on improving choice of law methodology state by state. Once again we face the question of how and what.

One obvious path to choice of law improvement within each state is through the courts. Clearly, courts in any particular state can choose to reject that state's current choice of law methodology and adopt a new and improved methodology. They have certainly done so before and, in fact, often seem to do so on a regular basis. However, reliance upon common law has led to the current quandary, and this process has not resulted in predictability. Courts have generally reached what they believe are fair and just results, but choice of law determinations too often depend upon the discretion of each individual judge. It is true that judges frequently rely upon their sound discretion in a variety of areas, but in many cases the legislative branch provides statutory discretionary boundaries. Such is not the case for choice of law, currently. Here judges choose the applicable methodology and apply it without any legislative guidance at all. For the most part, they attempt to effectuate "state policy" by reliance upon complex and ambiguous choice of law methodologies that permit, even require, broad discretion. Continuing to rely on

common law for choice of law guidance will only perpetuate the current disarray.

Legislation is another means of effecting choice of law improvement. In fact, choice of law statutes can be found in all states, but these are quite specific and are not intended to provide general choice of law rules. Perhaps the best example can be found in various sections of the Uniform Commercial Code, which designate the choice of law for particular sections of the Code.⁴⁸ In addition, a number of states have adopted borrowing statutes that designate the applicable statute of limitations in a multistate case.⁴⁹ State legislatures have also enacted choice of law provisions for other discrete areas of the law, generally as part of an overall legislative scheme for that particular area, but it is rare to find legislatures enacting as a separate matter a wholesale approach to choice of law.

Some of the primary goals for any choice of law regime are predictability, fairness, justice, and ease of application. That can best be achieved when the choice of law methodology is clear and unchanging and when courts' discretion is bound by legislative direction. Creating a choice of law code that has undergone legislative scrutiny and deliberation is more likely to lead to just results.

Predictability and ease of application can best be achieved when those faced with choice of law issues can consult a clear, accessible, unambiguous, affordable source for the answer, without the necessity of consulting a variety of sources or requiring detailed legal briefs. A state choice of law statute satisfies the concern for predictability, fair results, and ease of application if it is well-drafted and incorporates well-reasoned substantive results.

In fact, many scholars are in agreement that legislative action is the best approach. "[I]t gives litigants and courts an indisputably authoritative text" to which they can turn.⁵⁰ "Determinative choice-of-law rules would confer three benefits that are missing in the present state of chaos": predictability, administrative efficiency, and uniformity [within each state] that results in a level playing field ("even-handed justice").⁵¹ Professor Nafziger notes that "25 civil law jurisdictions abroad" have enacted choice of law codes in the last

48. See, e.g., U.C.C. §§ 1-301, 4A-507, 5-116, 9-103 (2004).

49. See, e.g., Cal. Civ. Pro. Code § 361 (2004); Fla. Stat. § 95.10 (2003); Idaho Code § 5-239 (2003); Utah Code Ann. § 78-12-45 (2003); Nev. Rev. Stat. 11.020 (2003); Wis. Stat. § 893.07 (2003).

50. Patrick J. Borchers, *Louisiana's Conflicts Codification: Some Empirical Observations Regarding Decisional Predictability*, 60 La. L. Rev. 1061, 1064 (2000).

51. Michael H. Gottesman, *supra* note 16, at 528-29.

forty years,⁵² so American attempts would not mark an abrupt departure from international approaches.

Recently, two states have made the attempt, passing comprehensive choice of law codes. These efforts certainly merit attention, though the first attempt has been met with mixed reviews. Louisiana was the first to try such an approach, and in 1992, its new choice of law codification became effective.⁵³ It is the culmination of a four year project, begun when conflict of laws Professor Symeon Symeonides, serving as Reporter, drafted the articles. They were thereafter "debated, amended, and eventually adopted, first one by one and then *in toto*, by an Advisory Committee and then by the Council of the Louisiana State Law Institute."⁵⁴ The completed, approved project was only then submitted to the Louisiana legislature for adoption. The new Code consists of eight major sections⁵⁵ and thirty-six articles governing the status of persons, the validity of marriage and divorce, marital property rights, succession to movables and immovables, rights to real and personal property, capacity to enter a contract, validity of contracts, issues of conduct and safety, issues of loss distribution, and a host of other specific issues unique to one of the eight major areas.⁵⁶

The codification reflects threads of modern choice of law methodologies drawn from a variety of sources. For example, the overriding principle for all cases "having contacts with other states" is that courts should apply "the law of the state whose policies would be most seriously impaired if its law were not applied to that issue."⁵⁷ This principle of comparative impairment is generally associated with Professor William Baxter and the well-known case, *Bernhard v. Harrah's Club*,⁵⁸ though the new code's drafter notes that "the two approaches have much less in common than their acoustic resemblance might suggest."⁵⁹ The Louisiana statute borrows factors from Restatement (Second) as well, noting that in order for the court to determine that state whose policy will be least impaired involves an evaluation of

the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each

52. James A.R. Nafziger, *Oregon's Project to Codify Choice of Law Rules*, 60 La. L. Rev. 1189, 1199 (2000).

53. See La. Civ. Code arts. 14, 3515-3549.

54. Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 Tul. L. Rev. 677, 684 (1992).

55. General Provisions, Status, Marital Property, Successions, Real Rights, Conventional Obligations (contracts), Delictual and Quasi-Delictual Obligations (torts), and Liberative Prescription (statutes of limitation).

56. La. Civ. Code arts. 14, 3515-3549.

57. *Id.* art. 3515.

58. 546 P.2d 719 (Calif.), *cert. denied*, 429 U.S. 859, 97 S. Ct. 159 (1976).

59. Symeonides, *supra* note 54, at 691.

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.⁶⁰

Not surprisingly, the traditional *situs* rule prevails; real property rights are governed by the law of the *situs*.⁶¹ As with other modern methodologies, the remainder of the statute is short on rules and long on standards. Contract issues are “governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue,” taking into account the “strength and pertinence of the relevant policies of the involved states in the light of” various contract-related factors.⁶²

General tort issues are dealt with similarly.⁶³ However, borrowing from New York’s distinction between loss-allocating and conduct-regulating rules,⁶⁴ the statute provides that the place of injury-causing conduct determines the law to be applied for “[i]ssues pertaining to standards of conduct and safety . . . if the injury occurred in that state or in another state whose law did not provide for a higher standard of conduct.”⁶⁵ Otherwise, the law of the place of injury applies if “the person whose conduct caused the injury should have foreseen its occurrence in that state.”⁶⁶ If the conduct occurred in Louisiana by a person domiciled in Louisiana, or by one who “had another significant connection with” Louisiana, then Louisiana law would apply.⁶⁷

Issues involving “loss distribution and financial protection” are governed by a specific subsection as well. If the tortfeasor and victim are domiciled in the same state, that state’s law applies.⁶⁸ If they do not share a domicile, then other rules apply with an emphasis on place of injury.⁶⁹

Products liability cases receive special attention. Louisiana law applies if the injury occurred in Louisiana to a Louisiana domiciliary or if the “product was manufactured, produced, or acquired in” Louisiana and injured a Louisiana domiciliary anywhere.⁷⁰

60. La. Civ. Code art. 3515.

61. *Id.* art. 3535.

62. *Id.* art. 3537.

63. *See id.* art. 3542.

64. *See, e.g.*, *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963); *Schultz v. Boy Scouts of America*, 480 N.E.2d 679 (N.Y. 1985).

65. La. Civ. Code art. 3543.

66. *Id.*

67. *Id.*

68. *Id.* art. 3544.

69. *Id.*

70. *Id.* art. 3545.

The statute contains an exception to the specific tort rules when the “totality of circumstances of an exceptional case” indicate clearly “that the policies of another state would be more seriously impaired if its law were not applied to the particular issue.”⁷¹

Given the history and development of choice of law analysis over the past several decades, it is clear that Louisiana’s code has incorporated many of the features of modern methodology, and, like the Restatement (Second), has opted for a combination of rules and standards, with emphasis on standards and policies. This is neither good nor bad in and of itself. It simply represents one approach—that of reducing years of national choice of law jurisprudence to positive statutory law. The advantages of such an approach are many.

First, the analysis has been subjected to judicial scrutiny as well as to scholarly debate. Most of this has taken place outside of Louisiana, of course; the notion of comparative impairment has been borrowed from California courts and loss distribution/conduct regulation from New York courts.⁷² But regardless of the source, modern methodologies have been time-tested, interpreted, and debated. They are familiar to many.

Second, the Louisiana project has received legislative scrutiny and approval. Thus, both the legislative and judicial branches (though not necessarily the *Louisiana* judicial branch) have placed their stamps of approval on various aspects of the methodology.

How well does the new codification hold up? Two scholars have examined the Code’s application. Professor Patrick J. Borchers, believing that “[p]redictability is . . . an important value in the law,”⁷³ measured “the affirmance rate in Louisiana by appellate courts of trial court conflicts decisions before and after the codification.”⁷⁴ Affirmance rates, he reasoned, “are a reasonable proxy for decisional predictability.”⁷⁵ The affirmance rate improved from fifty-two and nine tenths percent before the new code to seventy-six and two tenths percent, results that he finds “hopeful and suggestive that comprehensive conflicts codifications can produce significant benefits.”⁷⁶

Professor Russell J. Weintraub, too, examined the effect of Louisiana’s codification. After examining thirty-two contracts cases

71. *Id.* art. 3547.

72. *See, e.g.*, *Bernhard v. Harrah’s Club*, 546 P.2d 719 (Calif.), *cert. denied*, 429 U.S. 859, 97 S. Ct. 159 (1976); *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963); *Schultz v. Boy Scouts of America*, 480 N.E.2d 679 (N.Y. 1985).

73. Borchers, *supra* note 50, at 1069.

74. *Id.* at 1061.

75. *Id.*

76. *Id.* at 1062.

decided under the new code, he concluded that “fifteen misapply the articles in the most fundamental manner” and that “[o]nly five, or perhaps six cases apply the Code as the drafters intended.”⁷⁷ He notes that “[j]udges are not stupid, just busy” and that “[t]hey meet choice of law issues rarely.”⁷⁸ Despite a lengthy article explaining the new code written by the project’s reporter, plus numerous comments to each of its provisions, courts still have had a difficult time applying it. Professor Weintraub blames the difficulty on the fact that so few lawyers know anything about conflict of laws as a subject:

When bar examiners took the subject off the bar examinations, attendance in the course plummeted. Louisiana’s experience with its Conflict of Laws Code is not unique. All over the country, state and federal courts that purport to be following one of the new choice of law methods list territorial contacts and select law without knowing whether it matters what law applies.⁷⁹

Despite these mixed reviews, one other state decided to attempt a conflict of laws statutory approach. In 2001, Oregon adopted the “first phase” of a legislative project to codify choice of law in that state.⁸⁰ As with Louisiana’s conflicts law, the project began with a state law reform commission, and a well-known academic scholar⁸¹ served as Reporter for the project.⁸² The first phase of the legislation, signed into law on May 21, 2001, deals only with contract choice of law issues.⁸³ It is designed “to provide a clear, comprehensive set of choice of law rules to replace the jumble of rather ambiguous and unstable jurisprudence created by Oregon courts” and “to overcome the *lex fori* orientation of judicial decisions while protecting Oregon interests, especially those of its residents, to the greatest extent possible.”⁸⁴ Although its approach is different from that of Louisiana, it too grants broad discretion to courts while at the same time providing them with presumptive rules. The approach most closely resembles that of the Restatement (Second) but with a heavier emphasis on rules.

77. Russell J. Weintraub, *Courts Flailing in the Waters of the Louisiana Conflicts Code: Not Waving but Drowning*, 60 La. L. Rev. 1365, 1365-66 (2000).

78. *Id.* at 1366.

79. *Id.* at 1376-77.

80. James A.R. Nafziger, *Oregon’s Conflicts Law Applicable to Contracts*, 38 Willamette L. Rev. 397, 397 (2002); *see also* 2001 Or. Laws 164; H.B. 2414, 71st Leg. (Or. 2001).

81. Willamette University College of Law Professor James A.R. Nafziger.

82. Nafziger, *supra* note 52, at 1189.

83. Nafziger, *supra* note 80, at 397.

84. *Id.* at 398-99.

For example, Oregon law applies to a “contract for construction work to be performed primarily in Oregon,”⁸⁵ to a “contract of employment for services to be rendered primarily in Oregon by a resident of Oregon,” to “a consumer contract, if . . . the consumer is a resident of Oregon at the time of contracting and . . . the consumer’s assent to the contract is obtained in Oregon, or the consumer is induced to enter into the contract in substantial measure by an invitation or advertisement in Oregon.”⁸⁶

Presumptive rules apply to specific types of contracts “unless a party demonstrates that the application of [the specified] law would be clearly inappropriate under the principles of Section 9” of the act.⁸⁷ The presumptive rules include applying the *situs* rule to contracts involving real property, the place of performance for personal services contracts, and the place of a franchise’s operation for franchise contracts.⁸⁸ The statute honors “effective choice by the parties,”⁸⁹ but contracts not otherwise addressed in the statute are governed by the broad standard set forth in Section 9: “the law, in light of the multistate elements of the contract, that is the most appropriate for a resolution of that issue.”⁹⁰ In making that determination, courts should identify “the states that have a relevant connection with the transaction or the parties,” identify their underlying policies, and evaluate

the relative strength and pertinence of these policies in . . . meeting the needs and giving effect to the policies of the interstate and international systems; and . . . facilitating the planning of transactions, protecting a party from undue imposition by another party, giving effect to justified expectations of the parties . . . and minimizing adverse effects on strong legal policies of other states.⁹¹

The Oregon commission considered not only the varied judicial decisions concerning choice of law in Oregon but also other models including “the Rome Convention of the European Union, German law, Swiss law, a Puerto Rican draft law, and the Louisiana law.”⁹² It remains to be seen whether the new law will achieve its goals.

Several observations can be made about these two state projects. They clearly signal that some have given up on the notion that a

85. 2001 Or. Laws 164 § 3(2); H.B. 2414, 71st Leg. § 3(2) (Or. 2001).

86. H.B. 2414 §§ 3(3) & 3(4), 71st Leg. (Or. 2001).

87. *Id.* § 10.

88. *Id.*

89. *See id.* §§ 7, 8.

90. *Id.* § 9.

91. *Id.*

92. Nafziger, *supra* note 80, at 399.

national or federal approach to choice of law is imminent or, perhaps, wise. In both cases, academic scholars led the projects, relying on their familiarity with other modern methodologies including those used internationally. They reviewed the state's judicial opinions involving choice of law but did not feel bound by such decisions. In the end, they relied heavily on aspects of modern methodologies and arrived at what they believe are new and improved versions. In the case of Louisiana, that meant heavy reliance upon the Restatement (Second) and Baxter's comparative impairment approach. For Oregon, it meant reliance upon the presumptive-rule-combined-with-mandated-policy-considerations approach of Restatement (Second).

IV. GIVING JUDGES THEIR DUE: JURISPRUDENCE-BASED LEGISLATION

My proposal is different. It builds on the efforts of Louisiana and Oregon by suggesting that each state adopt a general choice of law code. It differs in these respects:

- States should begin their codification process by engaging in careful empirical research involving statistical analysis of all available cases in the state (including federal district and circuit court cases);
- States should adopt legislation founded on that state's jurisprudence rather than on academic theoretical models;
- The state's choice of law code should reflect a rules-based regime rather than relying on a less precise approach or set of standards;
- The new rules should be based on real cases in that state's courts, rather than created from whole cloth.

1. *Empirical Research*

It has been suggested that empirical research should precede any attempt to draft a Third Restatement of Conflict of Laws.⁹³ I believe empirical research should precede attempts to draft state legislation as well. Until recently the only empirical research involving choice of law consisted of an annual survey of all American cases focusing primarily on the methodology used.⁹⁴ But recently, "a new type of

93. See, e.g., Patrick J. Borchers, *Empiricism and Theory in Conflicts Law*, 75 Ind. L.J. 509 (2000); Richman & Reynolds, *supra* note 29, at 434.

94. See, e.g., Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey*, 51 Am. J. Comp. L. 1 (2003); Symeon C. Symeonides, *Choice of Law in the American Courts in 2001: Fifteenth Annual Survey*, 50 Am. J. Comp. L. 1 (2002).

scholarship has begun to emerge. Unlike the theoretical work, it is inductive, rather than deductive. . . . It reasons from multiple results in actual cases toward choice-of-law rules of thumb that courts actually follow."⁹⁵ This kind of empirical research conducted state by state might yield surprising results that can be helpful in fashioning a new approach to choice of law.

The process would begin with the establishment of a body of interested people—lawyers, judges, legislators, and scholars—who are entrusted with the work of empirical research and drafting a new choice of law code.⁹⁶ Such research should examine the entire body of choice of law cases within the individual state.

In addition to the type of empirical research that simply reviews all state cases in order to determine whether choice of law rules might emerge, another type of empirical research involves statistical analysis of choice of law decisions.⁹⁷ Two such studies have yielded interesting results that can guide statewide projects.

The first study attempted to determine whether critics of modern choice of law methodologies are correct.⁹⁸ Such critics believe that modern approaches lack predictability and ease of application and that they are "pro-resident, pro-forum-law, pro-recovery."⁹⁹

The study's author divided the fifty states into two groups: "those fourteen states expressly retaining the traditional *situs* [or *lex loci*] approach, and the remaining thirty-six"¹⁰⁰ that had adopted some form of modern methodology. He examined only "published private tort cases . . . in state supreme courts or the United States Courts of Appeals, from January 1, 1970, to June 30, 1988"¹⁰¹ The findings were significant: modern approaches favor plaintiffs, forum law, and residents.¹⁰²

The study's author suggested that states resisting the trend toward modern approaches consider the study's implications before making

95. Richman & Reynolds, *supra* note 29, at 427.

96. A number of states already have commissions in place for revising state laws. See Nafziger, *supra* note 52, at 1189 n.1 ("In 1997, Oregon became 'at least' the sixteenth state to establish a commission for revising local law"). The Oregon Commission solicited law reform project proposals, selected one, and thereafter formed a specialized "study group" to work on the project. *Id.* at 1189-90.

97. Richman & Reynolds, *supra* note 29, at 427-28.

98. Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 Ga. L. Rev. 49 (1989).

99. *Id.* at 50 (quoting L. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 Mich. L. Rev. 392, 398 (1980)).

100. *Id.* at 78.

101. *Id.* at 81. He notes that "those courts are the ones with the highest publication rates and are generally conceded to undertake most of the law development function." *Id.* at 82.

102. *Id.* at 86-89.

a change: "modern theories of choice of law, at least in application, are inevitably pro-recovery."¹⁰³

The second study utilizing statistical analysis also examined various conflicts methodologies to determine whether they favored forum law, recovery for plaintiffs, or local parties.¹⁰⁴ Limited like the first to tort cases, this study included all reported decisions, state and federal, trial and appellate.¹⁰⁵ Unlike the first study, it differentiated among the various "modern" approaches and included over 800 reported tort cases dating back to 1960.¹⁰⁶ This study's author categorized the cases state by state, indicating the methodology each purported to follow. He concluded that

the great divide in American choice of law is still between the First Restatement and everything else. With respect to the degree to which the competing methodologies favor forum law, only the First Restatement shows a statistically significant variation from the other approaches. . . . Similarly, the First Restatement shows a statistically significant propensity to apply recovery-favoring rules less often.¹⁰⁷

Although not as clearly different from modern methodologies, "the First Restatement is probably the least generous to locals."¹⁰⁸ The author also concluded that modern approaches are not that much different from one another. They all favor forum law, plaintiffs, and residents.¹⁰⁹

Furthermore, the author concluded that because each different modern choice of law methodology "should yield different patterns of results in tort cases,"¹¹⁰ the fact that they do not means that they "do *not* work as they should."¹¹¹ Assuming that each state adopts a particular methodology to achieve a particular purpose or to fulfill a particular state policy, it is significant that the choice of methodology makes little difference in the result. The author concludes that "[t]he reason . . . that all of the modern approaches perform nearly identically in practice is that none of them is much of a check on

103. *Id.* at 93.

104. Patrick J. Borchers, *The Choice of Law Revolution: An Empirical Study*, 49 Wash. & Lee L. Rev. 357 (1992).

105. *Id.*

106. *Id.* at 358 n.11.

107. *Id.* at 377.

108. *Id.*

109. *Id.* at 377-78. See also Borchers, *supra* note 93, at 509.

110. Borchers, *supra* note 104, at 364.

111. *Id.* at 378 (emphasis in original).

judicial discretion.”¹¹² Courts will do whatever it takes to reach the preferred substantive result.¹¹³ One might also add then that the fuss among scholars about the best method seems, well, academic. The study’s author urges courts to “admit candidly—as do courts in states that follow Leflar’s [better law] approach—that substantive preferences control results in multistate cases.”¹¹⁴

This article proposes to take empirical research one step further in order to arrive at a proposal for state-by-state transformation of choice of law methodology. If, as it appears, it does not matter too much what modern methodology courts follow (in contrast to traditional or First Restatement methods), and if substantive preferences drive choice of law results, then it makes sense to have this out in the open.

The approach would begin with statewide empirical research and analysis of that research, thereafter transforming the result into statutory law after legislative discussion and approval. Using what courts have created and the legislature has approved would at least encourage respect for the end product.

2. *Legislation Founded on Jurisprudence*

My proposal suggests a closer adherence to state-by-state jurisprudence, relying not so much upon academic scholarly opinion as on time-tested opinions of the state’s own judiciary. I am not alone in suggesting that non-academic authors might well come up with a workable approach to choice of law. Others have suggested that we should leave choice of law scholars out of the process altogether and permit lawyers and judges to resolve the issue. Professor Michael Gottesman argues that, “from the trenches, most [conflicts scholars] look alike. Each waxes eloquent about the search for the perfect solution—the most intellectually and morally satisfying choice of law for each dispute—and each ends the theorizing by embracing some proposition that will prove wholly indeterminate in practice.”¹¹⁵ He states that scholars made the attempt once before, and it led to the Second Restatement,

an approach incorporating all their conflicting proposals: a cacophonous formula of formulae, a blend of indeterminate indeterminacy [a] total disaster in practice Now, they’re at it again. They propose to clean up their last mess by concocting another. The mistake last time, they think, was

112. *Id.* at 379-80.

113. *Id.* at 382.

114. *Id.*

115. Gottesman, *supra* note 16, at 527.

that they compromised with each other. Now it's time to adopt one single-minded indeterminate formula, and each proclaims that it should be "mine!"¹¹⁶

Instead, he proposes that

the new vehicle should be built by a different crowd. Let judges, lawyers and/or legislators—those who live in the real world and have to suffer the consequences of the choices made—have a hand at formulating a new solution, one that would contain determinate choice of law formulae that work in practice.¹¹⁷

Many judges have already played a significant role in formulating choice of law rules through years of jurisprudence. Clearly, courts are well suited to making such individual determinations. After all, their task is to interpret the law, and this process inevitably involves choosing one law's interpretation over another. Often the real value of judicial decision-making is that over time the decisions form a body of law that then serves as a guide, providing society with predictability and uniform application of the law. If choice of law decisions have not accomplished this, perhaps it is because modern approaches to choice of law are too complex and open-ended to provide adequate guidance to busy judges. If that is the case, as it appears to be, then continuing to rely on case-by-case decision-making will not improve the situation. But if judges have not arrived at a clear choice of law methodology, who should?

It makes little sense to permit only legal scholars, many of whom have never practiced law or served as judges, to define the methodology that courts should follow. Because legal scholars control the academic conversation, and because they eagerly step forward when reform is in the air, they may be tempted to disregard years of judicial decision-making in the area of choice of law. It is important to note that both the Louisiana and Oregon projects involved not only legal scholars but also members of the bench and bar.¹¹⁸ In both cases, the projects began with an examination of state judicial decisions related to choice of law. In Oregon, the drafters found that courts used a variety of methodologies but were able to elicit some general principles that appeared in the cases. In the end, however, the Oregon drafters replaced "the jumble of rather ambiguous and unstable jurisprudence created by Oregon courts"

116. *Id.*

117. *Id.*

118. See Symeonides, *supra* note 54, at 684 n.35; Nafziger, *supra* note 52, at 1190 n.4.

with their own “clear, comprehensive set of choice-of-law rules.”¹¹⁹ In Louisiana, though the new code purports to “codif[y], update[], and streamline[] Louisiana conflicts jurisprudence,”¹²⁰ it also draws heavily on jurisprudence outside of the state, on pre-existing Louisiana Civil Code provisions, and on developments in other parts of the country and world.

Given the history of these two state projects, one might be tempted to assume that it is futile to attempt a state “restatement” of the law and that one should instead start from scratch. I do not agree. I believe that incorporating as much as possible existing jurisprudence and then seeking legislative approval for the product is more likely to ensure predictability, sound substantive results, and ease of application.

3. Codification Based on Rules

As noted, two states, Louisiana and Oregon, have adopted broad-ranging choice of law statutes. Both rely upon an “approach” methodology combined with choice of law rules. This makes sense, since no proposal can possibly anticipate the myriad of factual circumstances that may demand choice of law resolution. My proposal, while acknowledging the need for a fallback principle to resolve the unforeseen, favors rules primarily because common law “approach” methodologies have not resulted in predictability or even state-wide uniformity, and I believe it is unlikely that pure “approach” legislation would fare much better. Such methodologies simply leave too much to the discretion of those applying them without providing adequate guidance.

Choice of law scholars tend to fall into one of the two camps. Those who favor an approach rather than rules reject rigid rules, such as application of the law of the place of injury for tort and place of making for contract. They note that the First Restatement consisted largely of rules, and it has been soundly condemned by the majority of conflicts scholars as well as the majority of states.¹²¹ They argue that such rules do not fairly consider policy and frequently ignore the significant contacts that the parties and events may have with one particular jurisdiction.¹²² They generally favor less rigidity and more judicial discretion.¹²³

119. Nafziger, *supra* note 80, at 398; *see also* Nafziger, *supra* note 52, at 1194-95.

120. Symeonides, *supra* note 54, at 678.

121. *See, e.g.*, Gottesman, *supra* note 17, at 2-11.

122. *See, e.g.*, Joseph William Singer, *Real Conflicts*, 69 B.U. L. Rev. 1 (1989).

123. *See, e.g.*, Hill, *supra* note 16; Juenger, *Choice of Law, supra* note 16, at 198-208.

Those who advocate an approach rather than rules might be most satisfied with something like a modified Restatement (Second) with its presumptive rules eliminated. This approach would take into consideration not only the place of injury or place of contracting but also the forum's interest, the interest of all the parties, policies of the substantive area of the law, domiciles of all involved, and other factors illustrated throughout the current Restatement (Second).¹²⁴ Individual courts would consider all of these factors to arrive at the law of the state which has the most significant relationship to the events and parties (as the current Restatement (Second) states), or the law of the state whose policies would be most impaired if its law was not applied (as Louisiana's choice of law code provides), or some similar standard. This way, approach adherents argue, all factors, policies and interests have been considered, and only after that can a court make a well-reasoned choice of law decision.

My proposal rejects an "approach" methodology and favors rules. However, it differs significantly from the First Restatement whose territorial rules were not founded on policy or state interest; rather they were based on the notion that a right "vests" upon some specific occurrence and the place of vesting determines the applicable law, regardless of other circumstances and events. Thus, in *Alabama Great Southern Railroad Co. v. Carroll*,¹²⁵ an Alabama railroad employee working for an Alabama employer was denied the application of Alabama law when he was injured after another Alabama employee negligently failed to fix a defective train car link in Alabama.¹²⁶ Though the negligence occurred in Alabama, the link itself did not give way until the train entered Mississippi.¹²⁷ Under Mississippi law, the injured employee could not sue for his co-employee's negligence.¹²⁸ A rule based on vesting considers only the place of injury.

A body of rules that instead has already taken into consideration a number of other contacts, interests, and policies would surely be preferable to one based only upon vesting. If such a rule is based upon the state's prior rulings and thoughtful reasoning, it is certainly arguable that it already takes into account such factors.

For example, a New York woman is injured when a tire falls off her car in New Jersey. A New York mechanic improperly installed the tire in New York. Under traditional choice of law rules, the right

124. See, e.g., Restatement (Second) of Conflict of Laws §§ 6 (Choice-of-Law Principles), 145 (Tort—The General Principle), & 188 (Contract—Law Governing in Absence of Effective Choice by the Parties).

125. 11 So. 803 (Ala. 1892).

126. *Id.*

127. *Id.* at 804.

128. *Id.* at 809.

to sue vested in New Jersey, and New Jersey law would apply. A New York choice of law rule, drawn from New York jurisprudence,¹²⁹ might apply the law of the common domicile, i.e., the law of the state in which both the plaintiff and defendant are domiciled. Thus, New York law would apply, and that choice is not merely arbitrary. Both parties have chosen to make New York their home. They have accepted the rights and privileges associated with that choice, and they should accept the responsibilities as well. Furthermore, it should come as no surprise to them (a key due process concern) that New York law would apply to their actions. Thus a choice of law rule based on policy and reasoning provides not only a fairer, more just result, but it offers certainty and predictability to the parties and their attorneys, as well as to the court system. In addition, the legislature, by adopting such a rule, adds its own imprimatur. The rule is simple and just and it is based on judicial reasoning and legislative approval.

In fact, one scholar notes that “[t]heoretical support for bringing back rule-orientation to American tort conflicts law has recently come forth from an academic quarter that for a long time neglected choice of law as an object of research: law and economics” because “clear choice of law rules increase efficiency by enabling parties to determine, at low cost and *ex ante*, the law that applies to their activities.”¹³⁰ Judge Richard Posner has observed that “the economic objective of any procedural system is to reduce two types of costs: judicial error and judicial system transaction costs.”¹³¹ Transaction costs rise when the law is uncertain,¹³² and modern choice of law “approach” methodologies have not led to certainty. Judge Posner has also opined,

[t]he opponents of mechanical rules of conflict of laws may have given too little weight to the virtues of simplicity. The new, flexible standards, such as “interest analysis,” have caused pervasive uncertainty, higher cost of litigation, more forum shopping (a court has a natural inclination to apply the law it is most familiar with – the forum’s law – and will find it easier to go with this inclination if the conflict of laws rules are uncertain), and an uncritical drift in favor of plaintiffs.¹³³

129. New York’s “Neumeier rules” evolved from a well-known New York case, *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972).

130. Jan Kropholler & Jan von Hein, *From Approach to Rule-Orientation in American Tort Conflicts?*, in *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren* 325 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002).

131. Solimine, *supra* note 98, at 59 (citing R. Posner, *Economic Analysis of Law* 553-54 (3d ed. 1986)).

132. *Id.* at 59-60.

133. *Kaczmarek v. Allied Chem. Corp.*, 836 F.2d 1055, 1057 (7th Cir. 1987).

A rules approach does not mean that the First Restatement will be revitalized. Instead, the new rules should incorporate a state's policies and interests as reflected in prior choice of law decisions, thereby respecting judicial reasoning and incorporating important state goals. One international scholar has noted that European countries, unlike the United States, favor choice of law rules. He notes, "The certainty of rules is deemed more important than their flexibility in continental Europe."¹³⁴ He adds, "This does not mean that interests, practical concerns, and desirability of results play no role in European conflicts law."¹³⁵ Instead, they are "taken into account at the rule-making stage."¹³⁶

4. *Rules Based on Jurisprudence*

In order to implement state interests and policies in the new rules, I propose that they be based on the findings of the analysis described above. The analysis would focus on ferreting out a choice of law rule, even in its nascent stage, rather than on the court's specific methodology. Careful analysis may reveal rules though the court has not yet articulated them as such. At least one can ascertain in the opinions an articulation of state policy that should be honored if feasible. Reviewing the cases carefully can produce answers to some of the questions raised in the two earlier empirical studies: Are this state's choice of law decisions pro forum? Pro-plaintiff/pro-recovery? Pro-local resident? If so, does the court provide a rationale for such biases? Reviewing all state cases individually is a sound beginning to the formulation of a new choice of law statute for that state. It reflects the sense of the court, which may well reflect legislative policy.

My proposal for a state-by-state rules-based choice of law codification based on the state's jurisprudence should lead to predictability, to just and even-handed results, and to rules that reflect state interests and policies. Courts will find it easier to apply a simplified code bound by legislative mandate, and because the code is founded on judicial reasoning and results, it reflects the involvement of both the judicial and legislative branches rather than simply the theoretical constructs of academic scholars. The next section demonstrates how my proposal might work.

134. Mathias Reimann, *Conflict of Laws in Western Europe: A Guide Through the Jungle* 13 (1995).

135. *Id.* at 11.

136. *Id.*

V. STATE-BASED EMPIRICAL RESEARCH

I have chosen to use the state of Wisconsin as my example. In 1965 the state's highest court rejected traditional choice of law principles in favor of a new analytical standard.¹³⁷ Since that time the Court has at times utilized the Restatement (Second),¹³⁸ interest analysis,¹³⁹ grouping of contacts,¹⁴⁰ Leflar,¹⁴¹ and a combination of two or more of these modern approaches. To date, Wisconsin seems to follow Leflar for tort (most of the time) and parts of the Restatement (Second) for contract (most of the time).¹⁴² Though the Court, as early as 1965, expressed hope that its new approach would be "practical and workable,"¹⁴³ that has not occurred. Instead, in any given case, one can predict neither the result nor the methodology the Court will employ.

One of the earlier studies, conducted by law professor Patrick J. Borchers, examined some of the Wisconsin tort choice of law cases.¹⁴⁴ Professor Borchers found that Wisconsin's state courts demonstrated a strong preference for forum law, for recovery, and for local parties, but its federal courts did not.¹⁴⁵

137. See Wiegand, *supra* note 5, at 761. The change occurred in *Wilcox v. Wilcox*, 133 N.W.2d 408 (Wis. 1965).

138. Restatement (Second) of Conflict of Laws (1971).

139. Interest analysis refers to the methodology developed by Brainerd Currie in the early 1960s. See Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Law Method*, 25 U. Chi. L. Rev. 227 (1958); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L.J. 171; Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963).

140. The grouping of contacts approach does not have clearly delineated parameters. It generally involves a listing of contacts between the relevant states, parties, and events, then determining the strength of those contacts in order to arrive at the state with the most significant contacts. It most closely resembles a superficial Restatement (Second) analysis. In a number of cases, the line between a grouping of contacts analysis and Restatement (Second) is blurred. In those cases, the author considered whether or not the court specifically cited to the Restatement (Second) and, if so, whether it appeared to apply any portion of the Restatement. If it did so, the author labeled the analysis Restatement (Second). If it did not, and if it instead simply listed the contacts and analyzed them, then the analysis was labeled grouping of contacts.

141. In a number of cases, the court does not refer to Leflar; rather, it refers to the "choice-influencing considerations" utilized in the Leflar analysis. See Leflar, *supra* note 15. At other times it calls these considerations the "Heath factors," referring to an early Wisconsin case that adopted this analysis. See, e.g., *Diesel Serv. Co. v. AMBAC Int'l Corp.*, 961 F.2d 635, 640 (7th Cir. 1992).

142. See Wiegand, *supra* note 5, for an analysis of Wisconsin's choice of law history.

143. *Wilcox v. Wilcox*, 133 N.W.2d 408, 410 (Wis. 1965).

144. See Borchers, *supra* note 104.

145. *Id.* at 372. His figures are as follows:

forum preference: 8/10 state cases, 5/10 federal cases

I determined to analyze all available¹⁴⁶ choice of law cases from the Wisconsin state and federal courts, including tort, contract, and property issues, and including the federal trial and appellate courts and all available state decisions since 1965.¹⁴⁷ My goal was to determine if, overall, the cases reflected the bias found in the earlier study but also, more importantly, to determine whether one might extrapolate choice of law rules from the courts' decisions, rules that might form the basis of a state-wide choice of law code.

My search revealed eighty-seven cases, thirty-eight from state courts and forty-nine from federal courts.¹⁴⁸ They involved thirty-seven tort issues, forty-one contract issues, four tort/contract mixed issues,¹⁴⁹ and five miscellaneous issues. Some cases involved more than one choice of law issue. Most of the contract issues involved insurance.

As noted above, Wisconsin courts tend to use Leflar for tort and parts of the Restatement (Second) or a "grouping of contacts" test for contract issues.¹⁵⁰ The grouping of contacts method, also called the center of gravity or most significant relationship test, resembles the Restatement (Second) approach in that it takes into consideration one or more of the factors listed in the Restatement (Second), either in section 6 or in the section related to the type of issue (section 145 for tort, for example), but it does not cite to the Restatement at all and ignores any Restatement presumptive rule.¹⁵¹ When Wisconsin courts apply what they term Restatement (Second), they refer to one or more Restatement sections, but rarely conduct a thorough Restatement (Second) analysis. I analyzed each of the cases and

preference for recovery: 8/10 state cases, 6/10 federal cases

preference for local party: 2/2 state cases, 3/5 federal cases

146. By "available" I mean all cases, reported and unreported, available through an online LEXIS search.

147. I searched LEXIS using the terms "(choice or conflict) w/2 law" and specified cases from January 1, 1965, to the present.

148. My initial search produced 415 "hits," but many of the cases did not require courts to make choice of law decisions. It is not surprising that federal cases outnumber state cases. First of all, choice of law cases often involve out of state parties, circumstances that are more likely to provide federal diversity jurisdiction in the federal courts. Second, it is much more likely that federal *trial* decisions will be reported rather than state trial decisions. Nevertheless, under the requirements of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938) and *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020 (1941), federal courts are obligated to apply the choice of law methodology of the state in which they sit. Thus the results should conform with results in state courts.

149. These are cases in which the court found both tort and contract aspects in the issue and did not clearly determine which was dominant.

150. See *supra* note 142 and accompanying text.

151. See, e.g., *State Farm Mut. Auto Ins. Co. v. Gillette*, 641 N.W.2d 662 (Wis. 2002); *Albert Trostel & Sons Co. v. Employers Ins.*, 551 N.W.2d 63 (Wis. Ct. App. 1996); *Urhammer v. Olsen*, 159 N.W.2d 688 (Wis. 1968).

categorized the actual methodology used (regardless of what the court called it). The methodologies fall into one of the following, with the number of decisions employing such methodologies in parentheses:¹⁵²

- Grouping of contacts, center of gravity, most significant relationship (35)
- Leflar's choice-influencing considerations (39)
- Restatement (Second) (21)
- Officious intermeddling¹⁵³ (6)
- Miscellaneous cases in which the methodology is uncertain (4)

My first inquiry had to do with bias in choice of law methodology. My analysis revealed the following:

1. *Forum Preference*

All but the federal appellate court reflected a strong forum preference. The Wisconsin Court of Appeals applied forum law sixty-four percent of the time. The Wisconsin Supreme Court applied it seventy percent of the time and the two federal district courts seventy-three percent of the time. The state's courts have frequently articulated a forum law presumption, though at times it is merely a "weak presumption,"¹⁵⁴ at other times a strong presumption,¹⁵⁵ and at times it has rejected forum preference altogether.¹⁵⁶ The Seventh Circuit Court of Appeals decided only eight choice of law cases during this period and applied forum law in three of them (thirty-eight percent).

I next determined whether the courts' methodology affected the preference for forum law. As noted, choice of law decisions by the

152. A number of cases were subjected to two or more methodologies, sometimes because they involved two or more separate issues, but often because the court used one methodology first, and then another methodology as its total analysis.

153. This is a unique creation. See Wiegand, *supra* note 5, at 790-93. The phrase refers to a constitutional hurdle. In *Hunker v. Royal Indemnity Co.*, 204 N.W.2d 897 (1973), the court noted that it should apply choice of law analysis only if "the facts on their face reveal that to apply any of multiple choices of law would not constitute mere officious intermeddling, in the constitutional sense . . ." *Id.* at 902.

154. See *Zelinger v. State Sand & Gravel Co.*, 156 N.W.2d 466, 469-70 (Wis. 1968).

155. See *Conklin v. Horner*, 157 N.W.2d 579, 582 (Wis. 1968). See also *Sharp v. Case Corp.*, 573 N.W.2d 899 (Wis. Ct. App. 1997), *aff'd*, 595 N.W.2d 380 (Wis. 1999).

156. "[W]hile it may be difficult to dispel innate parochial preference, the resolution of a conflict ought not be skewed by a forum preference." *Hunker*, 204 N.W.2d at 903.

Seventh Circuit Court of Appeals do not indicate a strong forum preference. In the four cases in which it employed Wisconsin's "grouping" or "significant relationship" test, this court applied forum law only once (twenty-five percent). However, when a Wisconsin state or federal district court employed this methodology, it applied forum law in seventy-one percent of the cases (twenty-two out of thirty-one cases). Since 1990, Wisconsin state and federal district courts applied forum law in *every* case in which they employed the "grouping" or "significant relationship" method, a total of thirteen cases.¹⁵⁷ One should also note, however, that most of the thirty-one cases involved contract rather than tort issues (only six tort issues were subject to this methodology and all occurred in the 1960s during a period of transition and evolution in conflict of law theory), and over half of the contract issues involved insurance contracts, many of them for automobile insurance. When an insurance policy is issued in the state to cover a vehicle garaged in the state, Wisconsin courts are virtually certain to apply Wisconsin law, not unlike the courts of other states. In fact, Restatement (Second) section 193 recommends this result.¹⁵⁸ Thus it is safe to say that since 1970, Wisconsin courts have applied the grouping of contacts or significant relationship test to contract rather than tort issues, and have generally applied forum law.

As for tort issues, Wisconsin courts routinely apply Leflar's choice-influencing considerations, either alone or combined with some other method. The choice-influencing considerations, with their focus on the forum's governmental interest and application of

157. Since 1990, the Wisconsin Supreme Court has decided only two choice of law cases, *Beloit Liquidating Trust v. Grade*, 677 N.W.2d 298 (Wis. 2004) and *State Farm Mut. Auto. Ins. Co. v. Gillette*, 641 N.W.2d 662 (Wis. 2002). The first case involved a tort issue. The Court applied Leflar. *Beloit Liquidating Trust*, 677 N.W.2d 298. The second case involved both tort and contract choice of law issues. The Court applied Leflar to the tort issue and "most significant contacts" to the contract issue. *State Farm*, 641 N.W.2d 662. Since 1990 both the Wisconsin Court of Appeals and the federal district courts have applied the "grouping" methodology to six cases and in all of them applied forum law. See *Bradley Corp. v. Zurich Ins. Co.*, 984 F. Supp. 1193 (E.D. Wis. 1997); *Select Creations, Inc. v. Paliapito America, Inc.*, 828 F. Supp. 1301 (E.D. Wis. 1992); *Glaeske v. Shaw*, 661 N.W.2d 420 (Wis. Ct. App. 2003); *Albert Trostel & Sons Co. v. Employers Ins.*, 551 N.W.2d 63 (Wis. Ct. App. 1996); *Berington v. Wausau Underwriters Ins. Co.*, 552 N.W.2d 899 (Wis. Ct. App. 1996); *Am. Family Mut. Ins. Co. v. Powell*, 486 N.W.2d 537 (Wis. Ct. App. 1992).

158. "The validity of a contract of . . . casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless . . . some other state has a more significant relationship . . ." Restatement (Second) of Conflict of Laws § 193. "So, in the case of an automobile liability policy, the parties will usually know beforehand where the automobile will be garaged at least during most of the period in question." *Id.* cmt. b.

the “better law,” make no mention of consideration of other states’ governmental interests and thus tend to favor forum law. That is certainly the case in Wisconsin. When the state and federal courts, including the Seventh Circuit,¹⁵⁹ applied Leflar methodology,¹⁶⁰ either to tort or contract cases, they favored forum law seventy-six percent of the time (thirty-one of forty-one cases). Since 1990, the courts have applied forum law sixty-eight percent of the time (thirteen of nineteen cases).

Application of the Restatement (Second) led to different results. When the Restatement (Second) was utilized either as the sole method of analysis or combined with another method, Wisconsin state and federal courts, including the Seventh Circuit, applied forum law only forty-eight percent of the time (ten of twenty-one cases). The Seventh Circuit employed it in five cases and applied forum law in only one of them.¹⁶¹ Thus, excluding the Seventh Circuit, Wisconsin state and federal courts applying the Restatement (Second) favored forum law fifty-six percent of the time (nine of sixteen cases), still a lower rate than when utilizing other methods of analysis. Cases decided in 1990 or later (a total of eight) did not yield significantly different results. Excluding the Seventh Circuit, in which all three cases held in favor of non-forum law, courts favored forum law sixty percent of the time (three of five instances).

2. *Pro-Recovery*

In addition to concerns about modern methodologies favoring forum law, earlier studies indicated that modern methodologies favor plaintiffs. A review of one state’s cases disputes this assertion.

Since 1965, choice of law decisions by Wisconsin state and federal courts favored the plaintiff only forty-seven percent of the time.¹⁶² The Wisconsin Supreme Court was the most pro-recovery

159. The Seventh Circuit applied the Leflar analysis in three cases and applied forum law in two of them. *See* *Kuehn v. Childrens Hospital*, 119 F.3d 1296 (7th Cir. 1997) (forum law); *Diesel Serv. Co. v. AMBAC Int’l Corp.*, 961 F.2d 635 (7th Cir. 1992) (non-forum law); *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985) (forum law).

160. At times they combined Leflar methodology with other methodologies.

161. *See* *Sybron Transition Corp. v. Security Ins. Co.*, 107 F.2d 1250 (7th Cir. 1997) (non-forum law); *Hystro Prods., Inc. v. MNP Corp.*, 18 F.3d 1384 (7th Cir. 1994) (non-forum law); *Diesel Serv. Co. v. AMBAC Int’l Corp.*, 961 F.2d 635 (7th Cir. 1991) (combined with Leflar analysis, non-forum law); *Paulson v. Shapiro*, 490 F.2d 1 (7th Cir. 1973) (non-forum law); *Geehan v. Monahan*, 382 F.2d 111 (7th Cir. 1967) (relying on an earlier Wisconsin state case that itself relied upon Draft No. 9 of the Restatement (Second), forum law).

162. Decisions favored plaintiffs in thirty-seven of the seventy-eight cases. In eight cases, the court’s decision was unrelated to plaintiff recovery.

court with its decisions favoring plaintiffs seventy-one percent of the time. The Wisconsin Court of Appeals was the least pro-recovery, favoring plaintiffs only twenty-four percent of the time.

The Leflar methodology was the most likely to lead to pro-recovery results. Fifty-nine percent of those cases went to the plaintiff, although this figure changes significantly when one omits the Wisconsin Supreme Court's decisions in which it favored recovery eighty-three percent of the time that it utilized Leflar. Without the Supreme Court's decisions, the Leflar methodology favored recovery only forty-eight percent of the time.

Grouping of contacts analysis led to pro-recovery results in only thirty-four percent of the cases, while analysis utilizing Restatement (Second) favored plaintiffs thirty-seven percent of the time. Thus, other than the decisions of a strong pro-recovery state supreme court, none of the modern methodologies favor plaintiffs. This is surprising, given that plaintiffs choose the forum. In the future, they might be better off opting for another state's courts and thereby benefiting from that state's choice of law methodology.

The Wisconsin Supreme Court has been blatant in its preference for recovery in tort cases, even though other courts in that state seem to have disregarded this preference. As early as 1965, the Court noted, "It is the policy of our law to provide compensation to a person when he has been negligently injured."¹⁶³ For this reason, the Court disfavored guest statutes. "[I]t is the policy of this state to compensate guests for injuries sustained as the result of the ordinary negligence of their hosts."¹⁶⁴ It disfavored interspousal immunity for the same reason,¹⁶⁵ and this generosity extends not only to Wisconsin residents, but also to those from other states.¹⁶⁶ Because the Court has applied Leflar analysis in most of its cases and that analysis implicates only five "choice-influencing considerations," one of which is advancement of the forum's governmental interests, the forum's interest in recovery will necessarily be advanced.

One might question whether more recent cases reflect different recovery trends. The state's highest Court has decided only two choice-of-law cases since 1990, and in the first it reaffirmed the state's "strong interest in compensating its residents who are victims of torts" and applied Wisconsin's pro-recovery law.¹⁶⁷ But in the second case, in a suit by corporate creditors against the officers and

163. *Wilcox v. Wilcox*, 133 N.W.2d 408, 415 (Wis. 1965).

164. *Id.* at 417.

165. *See Zelinger v. State Sand & Gravel Co.*, 156 N.W.2d 466, 472-73 (Wis. 1968).

166. *Heath v. Zellmer*, 151 N.W.2d 664, 674 (Wis. 1967).

167. *See State Farm Mut. Auto. Ins. Co. v. Gillette*, 641 N.W.2d 662, 677 (Wis. 2002).

directors of a company whose principal place of business was Wisconsin, the Court found for the defendants under Wisconsin law, thus denying recovery but favoring forum law.¹⁶⁸ In all other Wisconsin state and federal cases from 1990 on, courts have held in favor of recovery only forty-five percent of the time, a percentage in line with cases decided earlier.

3. *Pro-Local Party*

Earlier studies indicated that modern odologies favor local residents. This was not the case in Wisconsin state and federal courts. Excluding those cases in which both parties were local or in which neither party was local, the courts favored local parties nearly half of the time (twenty-seven out of fifty-five cases). Methodology did not seem to matter.

4. *Officious Intermeddling*

One final unique Wisconsin choice of law approach must be reviewed. "Officious intermeddling" was first introduced in a 1973 case¹⁶⁹ in which the Wisconsin Supreme Court explained that it could eliminate from choice of law analysis the law of any state whose application would "constitute mere officious intermeddling, in the constitutional sense."¹⁷⁰ Although it did not elaborate, it presumably meant that the court could not choose the law of a state when that choice would result in violation of the due process or equal protection clauses, an assertion more fully developed in well-established United States Supreme Court cases.¹⁷¹

Since that time courts in the state have utilized this device six times to resolve choice of law issues. The Wisconsin Supreme Court recently relied upon this device to hold in favor of forum law and its local corporate defendant.¹⁷² The Wisconsin Court of Appeals in four cases held in favor of forum law twice, in favor of recovery only once, and in favor of a local party not at all. The federal district court utilized this analysis only once, favoring neither forum law nor recovery. In that case, neither party was local. Thus, based on an

168. See *Beloit Liquidating Trust v. Grade*, 677 N.W.2d 298 (Wis. 2004).

169. *Hunker v. Royal Indem. Co.*, 204 N.W.2d 897 (Wis. 1973).

170. *Id.* at 902.

171. See, e.g., *Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S. Ct. 338 (1930); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S. Ct. 633 (1981); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965 (1985). For a general discussion of Wisconsin's "officious intermeddling" approach, see Wiegand, *supra* note 5, at 789-94.

172. *Beloit Liquidating Trust*, 677 N.W.2d 298.

admittedly small number of cases, the officious intermeddling analysis does not appear to favor forum law, recovery, or local parties.

5. *Research Conclusions*

Based on this eighty-seven case analysis, what can we conclude about choice of law methodology in this one state? First and most obviously, the results in this state confirm earlier findings that most modern choice of law methodologies are pro-forum, but that the Restatement (Second) approach is less so. The results refute the assertion that modern methodologies favor recovery and local parties. It is true that the state's highest court demonstrated a pro-recovery bias when it utilized Leflar, but neither the Wisconsin Court of Appeals nor the federal courts reflected this bias. And none of the state or federal courts demonstrated a bias for local parties.

Before any state undertakes an attempt to draft choice of law legislation, it would be helpful to know whether its judicial decisions incorporate a bias so that the state can determine if it wishes to retain such a bias in its work.

For example, it may be that the body in charge of drafting proposed legislation in Wisconsin determines that the new code should incorporate the Wisconsin Supreme Court's policy in favor of recovery for tort victims. Or perhaps the code should reflect a preference for forum law. Although some may deride forum preference as parochial and self-interested, it can certainly be argued that forum preference is not in itself necessarily bad. Plaintiffs choose the forum, and in a multistate case, they generally have more than one option. They would be foolish to choose a forum whose law is biased in favor of the defendant. As Professor Weinberg notes,

[t]oday's comity theorists, in a very old tradition indeed, propose "neutral" rules of choice, applied uniformly by all states, and independent of the policy of any one state. . . . The trouble with forum law, from the comity theorists' perspective, is that it is not neutral; it is law at the plaintiff's option. But by the same measure, foreign law is not neutral either. . . . In *Schultz*, for example, foreign law meant what it usually does: a win for the defendant. Indeed, defendant bias in choice of law will tend to impact more seriously on litigation than plaintiff bias will. When a plaintiff wins on a conflicts point, the likely consequence is only that the plaintiff will be allowed to try to prove its case under local law. But when a defendant wins on a conflicts point, the

likely consequence is dismissal or a nonsuit or judgment for the defendant.¹⁷³

The drafters of any proposed state choice of law code must consider carefully not only the state's jurisprudential history of forum preference (if it exists) but also the arguments both for and against such a built-in preference.

No matter what they decide, they will make their determination in light of informed review of prior cases and will subject their substantive choices to legislative review. In other words, both the judicial and legislative branches will have played a role in the new framework.

Another conclusion one can draw from this analysis is that sometimes the type of modern methodology makes a difference, but usually it does not. For example, in Wisconsin, except for the Second Restatement's disinclination to favor forum law, the methodology seems to have little effect on substantive results. Thus it may not matter so much which analysis is used, so long as one is able to predict with some accuracy which state's law the court is likely to apply.

If the type of analysis is irrelevant, it makes sense to adopt the simplest methodology in the interest of simplifying the judicial task and saving attorneys time and other transaction costs. Furthermore, with the body of choice of law cases available in each state, it is not too difficult a matter to ferret out a substantial number of substantive choice of law rules for the majority of cases and leave only the rest subject to a simple choice of law analysis.

VI. PATTERN-BASED CHOICE OF LAW RULES

To demonstrate this point, we can return to our earlier example. Wisconsin courts have decided at least eighty-seven choice of law cases since traditional rules were rejected. Carefully reviewing each of them reveals some patterns that may be instructive to those entrusted with the task of drafting state legislation.

For example, in Wisconsin state courts alone, eleven Supreme Court and Court of Appeals cases involved automobile insurance issues.¹⁷⁴ Consideration of what the courts have actually done in

173. Louise Weinberg, *Against Comity*, 80 Geo. L.J. 53, 64 (1991).

174. See *State Farm Mut. Auto. Ins. Co. v. Gillette*, 641 N.W.2d 662 (Wis. 2002); *Handal v. American Farmers Mut. Cas. Co.*, 255 N.W.2d 903 (Wis. 1977); *Haines v. Mid-Century Ins. Co.*, 177 N.W.2d 328 (Wis. 1970); *Urhammer v. Olson*, 159 N.W.2d 688 (Wis. 1968); *Peterson v. Warren*, 143 N.W.2d 560 (Wis. 1966); *American Fam. Mut. Ins. Co. v. Powell*, 486 N.W.2d 537 (Wis. Ct. App. 1992); *Schlussler v. American Fam. Mut. Ins. Co.*, 460 N.W.2d 756 (Wis. Ct. App. 1990); *Belland v. Allstate Ins. Co.*, 410 N.W.2d 611 (Wis. Ct. App. 1987); *American*

these cases might lead to a rule that has received judicial deliberation and will as well be subject to legislative scrutiny as part of the statutory approval process. Such a choice of law rule might read:

The validity of an automobile insurance liability contract and the rights created thereby are determined by the local law of the state in which the automobile will be garaged at least during most of the term of the insurance policy.¹⁷⁵

This rule reflects the decision in nine of the ten cases considered. In the tenth case,¹⁷⁶ the Wisconsin Supreme Court refused to apply Minnesota law to an insurance policy issued to a Minnesota resident. However, in that case the resident was employed in Wisconsin, lived directly across the border from Wisconsin, purchased the insurance in Wisconsin from a Wisconsin insurance company, and paid the premium in Wisconsin. Furthermore, the Court noted that Minnesota had since invalidated the law at issue so that its law at the time of decision was the same as Wisconsin's.¹⁷⁷ Adopting my proposed choice of law rule would not appear to offend the Court's prevailing notion of justice.

Another area in which the legislature might adopt a choice of law rule (or, rather, a choice of law *clarification*) based on the court's jurisprudence involves the Wisconsin Fair Dealership Law (WFDL),¹⁷⁸ an issue that has raised choice of law questions in federal district court at least five times¹⁷⁹ and twice in the Seventh Circuit

Standard Ins. Co. v. Cleveland, 369 N.W.2d 168 (Wis. Ct. App. 1985); Martin v. State Farm Mut. Auto. Ins. Co., 368 N.W.2d 847 (Wis. Ct. App. 1985); Pitts v. Mutual Serv. Cas. Ins. Co., 318 N.W.2d 23 (Wis. Ct. App. 1981).

In fashioning rules drawn from state decisions, one might consider decisions only of state courts. The role of a federal court in determining choice of law issues is to apply the state's choice of law rules, Klaxon Co. v. Stentor Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 1021 (1941), and to reach a decision based on what it believes the state courts would do. *See also* Tillet v. J.I. Case Co., 756 F.2d 591, 594 (7th Cir. 1985) ("The district court correctly stated and applied Wisconsin's choice-influencing considerations to resolve this conflict"). In drafting choice of law legislation, I believe it preferable to consider only what the state courts have done, provided there are sufficient numbers of state decisions from which to draw conclusions.

175. This language has been adopted from similar language in Restatement (Second) of Conflict of Laws § 193.

176. *Haines*, 177 N.W.2d at 328.

177. *Id.* at 332-33.

178. Wis. Stat. ch. 135 (2002).

179. *See* Praefke Auto Elec. & Battery Co. v. Tecumseh Products Co., 110 F. Supp. 2d 899 (E.D. Wis. 2000), *rev'd*, 255 F.3d 460 (7th Cir. 2001); Generac Corp. v. Caterpillar, Inc., 1996 U.S. Dist. LEXIS 20855 (W.D. Wis. 1996), *rev'd*, 172 F.3d 971 (7th Cir. 1999); CSS-Wisconsin Office v. Houston Satellite Sys., Inc., 779 F.Supp. 979 (E.D. Wis. 1991); Brosahd of Milwaukee, Inc. v. Dion Corp., 1990 U.S. Dist. LEXIS 19992 (E.D. Wis. 1990); Process Accessories Co. v. Balston,

Court of Appeals.¹⁸⁰ In 1999, the Seventh Circuit Court of Appeals held that, when determining whether or not the WFDL applies, it is unnecessary to engage in a choice of law analysis because the statute itself contains a choice of law provision.¹⁸¹ The WFDL provides that “[n]o grantor [of a dealership] . . . may terminate, cancel, fail to renew or substantially change the competitive circumstances of a dealership agreement without good cause” and that the “burden of proving good cause is on the grantor.”¹⁸² Although the definition of “dealership” draws no geographical boundaries, “dealer” is defined as “a person who is a grantee of a dealership *situated in this state*.”¹⁸³ Thus, the Seventh Circuit reasoned, the WFDL applies to all those dealerships located within Wisconsin’s borders but not to dealerships outside of those borders.¹⁸⁴ Both the Seventh Circuit and two federal district courts had previously engaged in choice of law analysis in WFDL cases, finding or assuming that the statute itself did not contain a choice of law provision.¹⁸⁵ One district court did so even after the Seventh Circuit’s definitive holding.¹⁸⁶ A choice of law rule that clearly states the geographical boundaries of the WFDL would cement the Seventh Circuit’s holding, adding clarification to an arguably ambiguous statute. Obviously, if the legislature determines that its statutory language has been misinterpreted, it may reject the proposed rule.

Wrongful death statutes present another area in which a choice of law rule would be helpful. Here, Wisconsin federal courts have

Inc., 636 F. Supp. 448 (E.D. Wis. 1986). This issue has not received choice of law analysis in the state courts. Because federal courts have been left to guess at what state courts would do under the mandate of *Erie* and *Klaxon*, this area is well suited to a choice of law rule.

180. *Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971 (7th Cir. 1999); *Diesel Serv. Co. v. AMBAC Int’l Corp.*, 961 F.2d 635 (7th Cir. 1992). The Wisconsin Supreme Court applied the WFDL in *Bush v. National School Studios*, 407 N.W.2d 883 (Wis. 1987), but that case focused primarily on whether or not the parties’ contractual choice of law provision would be given effect. Once the Court determined that it would not, it applied the WFDL because the defendant effectively conceded that the WFDL would govern if the contractual choice of law provision did not apply. *Bush*, 407 N.W.2d at 888.

181. *See Generac*, 172 F.3d at 971.

182. Wis. Stat. § 135.03 (2002).

183. *Id.* § 135.02 (emphasis added).

184. *See Generac*, 172 F.3d at 976.

185. *See Diesel Serv. Co. v. AMBAC Int’l Corp.*, 961 F.2d 635 (7th Cir. 1992); *Generac Corp. v. Caterpillar, Inc.*, 1996 U.S. Dist. LEXIS 20855 (W.D. Wis. 1996); *CSS-Wisconsin Office v. Houston Satellite Sys., Inc.*, 779 F.Supp. 979 (E.D. Wis. 1991); *Brosahd of Milwaukee, Inc. v. Dion Corp.*, 1990 U.S. Dist. LEXIS 19992 (E.D. Wis. 1990); *Process Accessories Co. v. Balston, Inc.*, 636 F. Supp. 448 (E.D. Wis. 1986).

186. *See Praefke Auto Elec. & Battery Co. v. Tecumseh Products Co.*, 110 F. Supp. 2d 899 (E.D. Wis. 2000).

fashioned their own unique approach. In some respects, the state's wrongful death statute resembles the WFDL in that it arguably contains a choice of law rule:

Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action . . . then and in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; *provided, that such action shall be brought for a death caused in this state.*¹⁸⁷

As far back as 1968, one court noted: "Wisconsin does not apply its wrongful death statute . . . to a death caused outside of the state of Wisconsin. Thus, there really is no conflict of laws question here, and it is unnecessary for the court to consider the recent choice-of-law rules of the Wisconsin supreme court [sic]."¹⁸⁸ That has not deterred other courts from applying a choice of law analysis to determine whether the state's wrongful death statute applies. In Wisconsin's federal courts, wrongful death actions have arisen at least five times since the 1968 decision. Specific issues include the amount of damages in wrongful death actions¹⁸⁹ and statutes of limitation for such actions.¹⁹⁰

These courts generally employ a combination of center of gravity analysis and Leflar's choice-influencing considerations¹⁹¹ with emphasis on the latter, but one court recently (and curiously) applied Illinois' Restatement (Second) approach to a Wisconsin case, because "Illinois and Wisconsin choice-of-law judicial decisions 'seem

187. Wis. Stat. § 895.03 (2002) (emphasis added).

188. *Shaver v. Soo Line R.R. Co.*, 284 F. Supp. 701, 702 (E.D. Wis. 1968); *see also Schnabl v. Ford Motor Co.*, 195 N.W.2d 602 (Wis. 1972).

189. *See Boomsma v. Star Transport, Inc.*, 202 F. Supp. 2d 869 (E.D. Wis. 2002); *Snow v. Continental Products Corp.*, 353 F. Supp. 59 (E.D. Wis. 1972); *Satchwill v. Vollrath Co.*, 293 F. Supp. 533 (E.D. Wis. 1968). In each case, Wisconsin's wrongful death statute limited damages more than the law of the other involved state. Currently, Wisconsin's law permits damages for pecuniary injury and for miscellaneous expenses, with "[a]dditional damages not to exceed \$500,000 per occurrence in the case of a deceased minor, or \$350,000 per occurrence in the case of a deceased adult, for loss of society and companionship . . ." Wis. Stat. § 895.04(4), (5) (2002).

190. *See Tillett v. J.I. Case Co.*, 580 F. Supp. 1276 (E.D. Wis. 1984), *aff'd* 756 F.2d 591 (7th Cir. 1985). Wisconsin's three-year personal injury statute of limitations applies specifically to wrongful death actions. *See* Wis. Stat. § 893.54(2) (2002).

191. *See Tillett*, 580 F. Supp. 1276; *Snow*, 353 F. Supp. 59; *Satchwill*, 293 F. Supp. 533.

roughly in accord'"¹⁹² The result in all five cases favored forum law.

A clear wrongful death choice of law rule would address the ambiguity in this area. The new rule might mandate that Wisconsin's wrongful death statute applies to any death caused in the state and might include the following elaboration: "It is immaterial where the death occurred, so long as it resulted from a wrongful act, neglect or default *in this state*. . . . The test is . . . whether the defendant's negligence *in this state* was a substantial factor in contributing to the result."¹⁹³ This definition, incorporating a holding from the state's highest court and language from the statute itself, reflects the will of both the judicial and legislative branches and is thus preferable to a rule created from whole cloth by legal academics or other experts in the field.

Medical malpractice is another area in which a choice of law rule would be helpful. Conflicts scholar, Professor Symeon Symeonides, states that "[I]n the absence of unusual circumstances, most conflicts cases involving medical malpractice claims apply the law of the state in which the medical services were rendered."¹⁹⁴ He cited one judge's reasoning: "Health care providers should not be put in the position of having to differentiate on the basis of the patients' domicile, while 'patients are inherently on notice that journeying to new jurisdictions may expose them to [unfavorable] rules.'"¹⁹⁵

A medical malpractice rule would have been helpful in the recent case of *Stupak v. Hoffman-La Roche, Inc.*¹⁹⁶ In that case, a Michigan teenager committed suicide after taking medication prescribed by a Wisconsin physician at a Wisconsin clinic. His parents alleged that the drug contributed to his death. Although the court applied a forum preference rule along with *Leflar's* choice-influencing considerations to determine that Wisconsin law applied, the court could have dispensed with that analysis under a choice of law rule. The court recognized the wisdom of applying the law of the state in which the negligent act occurred: the physician "is licensed by, and practices in" the state, he "examined and treated" the teenager in the state, and the state "has a strong interest in medical malpractice claims filed against [its] doctors."¹⁹⁷ Wisconsin's legislature intended its medical

192. *Boomsma*, 202 F. Supp. 2d at 873 n.1 (quoting language from one of the parties).

193. *Schnabl v. Ford Motor Co.*, 195 N.W.2d 602, 607 (Wis. 1972) (quoting *Kinsman v. Panek*, 162 N.W.2d 27 (Wis. 1968)). I added the phrase "in this state."

194. Symeonides, *supra* note 2, at 33.

195. *Id.* (quoting *Bledsoe v. Crowley*, 849 F.2d 639, 647 (D.C. Cir. 1988) (Williams, J., concurring)).

196. 287 F. Supp. 2d 968 (E.D. Wis. 2003).

197. *Id.* at 969-71.

malpractice statute “to be applied to *Wisconsin* health care providers.”¹⁹⁸ Applying *Wisconsin* law is in accord with the parties’ expectations as well, since the teenager sought medical treatment in the state. Both he and his parents, as well as the physician, would have expected *Wisconsin* law to apply. A choice of law rule that applies the law of the state in which the medical services were rendered simply affirms this reasoning.

Slip and fall cases present yet another opportunity for a clear rule: apply the law of the state in which the fall occurred. In both *Burns v. Geres*¹⁹⁹ and *Johnson v. Travelers Ins. Co.*²⁰⁰ a *Wisconsin* resident traveled outside state borders and was injured when he slipped and fell while there.²⁰¹ In both cases, the court applied the law of the *situs*, because the court determined that applying *Wisconsin* law would “constitute officious intermeddling.”²⁰² The reasoning is clear; “[t]he duty of a property owner to maintain his property should not vary with the residence of the person who enters the [property],” and to “apply *Wisconsin* law would be an attempt to say that *Wisconsin* has some legitimate interest in regulating property in [another state].”²⁰³ Thus a choice of law rule stating that the law of the *situs* governs in such cases makes sense.

In fact, the *situs* rule can be adopted in other instances as well. It has a long-standing history; in determining the question of interest in real property, the law of the *situs* has withstood all modern choice of law methodologies. “[I]t is a firmly established principle that questions involving interests in immovables are governed by the law of the *situs*.”²⁰⁴ Extending this principle not only to slip and fall cases but to other real property cases not only makes sense, but it also supports the court’s prior rulings.

Wisconsin has already taken a significant step by statutorily adopting the *situs* rule for construction contracts. For “contracts for the improvement of land in this state,” *Wisconsin* statute section 779.135 voids any contract provision “making the contract subject to the laws of another state”²⁰⁵ Thus, in *McCloud Construction, Inc. v. Home Depot U.S.A., Inc.*,²⁰⁶ the court found void a contractual choice of law provision specifying that Home Depot’s domicile law

198. *Id.* (quoting from defendant’s brief).

199. 409 N.W.2d 428 (Wis. Ct. App. 1987).

200. 486 N.W.2d 37 (Wis. Ct. App. 1992).

201. *Burns*, 409 N.W.2d at 428; *Johnson*, 486 N.W.2d 37.

202. *Burns*, 409 N.W.2d at 430; *Johnson*, 486 N.W.2d at 37 (identical language in both cases).

203. *Burns*, 409 N.W.2d at 430-31.

204. Restatement (Second) of Conflict of Laws Property ch. 9, *Immovables Topic 2* (introductory note).

205. Wis. Stat. § 779.135 (2003).

206. 149 F. Supp. 2d 695 (E.D. Wis. 2001).

applied to a contract for construction on Wisconsin real property. It cited the statute and stated that Wisconsin law applied because of important state public policies. The “contract has its most significant relationship with the state of Wisconsin; this is where the property is located and the work performed.”²⁰⁷

In two other cases, the court held that Wisconsin law applied to contracts for the sale of land in the state because “of a state’s special interest in its own land.”²⁰⁸ The court noted that the Restatement (Second) of Conflict of Laws supports this position. It provides:

The validity of a contract for the transfer of an interest in land and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the land is situated unless . . . some other state has a more significant relationship under the principles stated in § 6²⁰⁹

Thus, a *situs* rule reflects current practice and prior court decisions.²¹⁰

Product liability actions pose another opportunity for state choice of law rules. Commentators have proposed a variety of choice of law approaches for product liability actions, such as a new Restatement, model rule, or federal law, and, as we have seen, Louisiana’s new choice of law code includes its own rule²¹¹ and Oregon’s tort section of its code will no doubt do the same.²¹²

Four product liability actions in Wisconsin’s courts resulted in the application of Wisconsin law, but only two of them contained choice of law analysis related to product liability actions.²¹³ In *Smith v.*

207. *Id.* at 700-01.

208. *Wyss v. Albee*, 515 N.W.2d 517, 524 (Wis. Ct. App. 1994), *rev’d on other grounds*, 532 N.W.2d 444 (Wis. 1995) (citing *Triple Interest, Inc. v. Motel 6, Inc.*, 414 F. Supp. 589, 594 (W.D. Wis. 1976)).

209. Restatement (Second) of Conflict of Laws § 189 (1971).

210. A *situs* rule for all cases involving real property is not recommended. At times the contact with real property may be peripheral, and merely having *something* to do with real property is not sufficient to subject an issue to that state’s law. At other times, it may be that more than one *situs* is involved. For example, in *Albert Trostel & Sons Co. v. Employers Ins.*, 551 N.W.2d 63 (Wis. Ct. App. 1996), environmental contamination affected eleven different sites, only three of them in Wisconsin. *Id.* In that case, the court relied upon additional factors, including that the plaintiff first chose Wisconsin as its forum and now argued against using Wisconsin law, the plaintiff was a Wisconsin corporation, and the insurance policies in question were “sold, issued and delivered in Wisconsin.” *Id.*

211. See *supra* text accompanying note 70.

212. See *supra* text accompanying notes 83-84.

213. The four are all from the Eastern District of Wisconsin federal court. *Stupak v. Hoffman-La Roche, Inc.*, 287 F. Supp. 2d 968 (E.D. Wis. 2003); *Smith v. Meadows Mills, Inc.*, 60 F. Supp. 2d 911 (E.D. Wis. 1999); *Tillett v. J.I. Case Co.*, 580 F. Supp. 1276 (E.D. Wis. 1984); *Decker v. Fox River Tractor Co.*, 324 F.

Meadows Mills, Inc.,²¹⁴ the court applied Leflar's choice-influencing considerations to find that Wisconsin law applied. Plaintiff was a Wisconsin resident who was injured in Wisconsin while employed by a Wisconsin employer, and his medical care took place in Wisconsin. The product at issue (an edger saw) was "manufactured in North Carolina almost two decades before the accident," and the manufacturer and employer "negotiated an asset purchase agreement, to which plaintiff was not a party, in North Carolina . . . years before the accident."²¹⁵ That contract contained a North Carolina choice of law provision.²¹⁶

In *Decker v. Fox River Tractor Co.*,²¹⁷ the court again opted for Wisconsin law after applying the choice-influencing considerations. However, here the plaintiffs were Pennsylvania residents, the injury occurred there, and the product was purchased there, but the product was manufactured in Wisconsin.²¹⁸ At the time, Pennsylvania contributory negligence law created a total bar to recovery in contrast to Wisconsin's comparative negligence law. Wisconsin had also "effectively abolished assumption of risk as a specific defense . . ."²¹⁹ In focusing solely on the last two choice-influencing factors, advancement of the forum's governmental interests and the better rule of law, the court had little trouble finding that Wisconsin law should apply. The state's governmental interests would be best served by applying the law that "has remained virtually unchanged for forty years and represents a legislative decision that a plaintiff's own negligence need not act as a complete bar to recovery . . ."²²⁰ Furthermore, Wisconsin's is the better law; despite the fact that "only ten states have enacted some form of comparative negligence law. . . . Contributory negligence has been described as a 'discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight.'"²²¹

Supp. 1089 (E.D. Wis. 1971). In *Stupak*, the court first conducted a choice of law analysis for a medical malpractice claim against a physician and determined that Wisconsin law applied. Then, because the product liability claim against the drug manufacturer was "inextricably intertwined" with the medical malpractice claim, it held that Wisconsin law would also apply to it. *Stupak*, 287 F. Supp. 2d at 971-72. The court did not apply choice-of-law analysis to the product liability claim. *Id.* In *Tillett*, the court, in a very brief analysis, determined that Wisconsin's comparative negligence law would apply because it is "better" than Indiana's contributory negligence law. *Tillett*, 580 F. Supp. at 1276.

214. 60 F. Supp. 2d at 911.

215. *Id.* at 915.

216. *Id.*

217. 324 F. Supp. at 1089.

218. *Id.* at 1090.

219. *Id.*

220. *Id.* at 1091-92.

221. *Id.* (quoting *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 74 S. Ct. 202,

It is clear that Wisconsin courts have not systematically applied choice of law analysis to product liability cases. A choice of law rule might bring predictability to this area as well as eliminate parochial choices that lead to forum law. Because the courts themselves have provided little guidance in this area, a new choice of law rule might be fashioned from whole cloth, without disrespecting the state's jurisprudence.

Suggested alternatives offer a good starting point and a comparison with one's own state jurisprudence. The Hague Convention on Products Liability²²² provides that the

applicable law shall be the internal law of the State of the place of injury, if that State is also . . . the place of the habitual residence of the person directly suffering damage, or . . . the principal place of business of the person claimed to be liable, or . . . the place where the product was acquired by the person directly suffering damage.²²³

In addition,

[n]otwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also . . . the principal place of business of the person claimed to be liable, or . . . the place where the product was acquired by the person directly suffering damage.²²⁴

If neither of these applies, then the applicable law is "the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury."²²⁵ Finally, the law provides that none of the above apply if the defendant "establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels."²²⁶

205 (1953)).

222. Hague Convention on the Law Applicable to Products Liability, 11 I.L.M. 1283 (1972). This Convention has been signed by at least thirteen European states. Hague Conference on Private International Law, *Status Table: Convention of 2 October 1973 on the Law Applicable to Products Liability*, at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=84 (Last visited on Dec. 12, 2004).

223. *Id.* art. 4, available at http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=84.

224. *Id.* art. 5.

225. *Id.* art. 6.

226. *Id.* art. 7.

A simpler proposal might be taken from the Swiss Federal Statute.²²⁷ There, the plaintiff has the option of choosing the

law of the State in which the tortfeasor has his place of business or, in the absence of a place of business, his place of habitual residence; or [t]he law of the State in which the product was purchased unless the tortfeasor proves that the product was marketed in the State without his consent.²²⁸

That law also provides that even if foreign law applies under the statute, "no awards may be made in Switzerland in excess of those which would have been awarded for such damage under Swiss law."²²⁹

One might also consult Louisiana's new conflicts law for guidance. There Louisiana law applies when a resident suffers an injury in the state or "when the product was manufactured, produced, or acquired in this state and caused injury either in this state or in another state to a person domiciled in this state" unless "neither the product that caused the injury nor any of the defendant's products of the same type were made available in [Louisiana] through ordinary commercial channels."²³⁰

In addition to those statutes already in use, numerous proposals are also available from academic scholars.²³¹ Some will likely be found too complicated for use in a statute focusing on simplicity. Whether any of these rules are reflected in a state's jurisprudence will determine whether they are most appropriate for legislative adoption, under my proposal advocating judicial and legislative support for choice of law rules.

I have examined only a few areas of the law that would benefit from choice of law rules. Obviously, drafting a new code would entail many others, and it would be the drafters' responsibility to determine the level of specificity for such rules. Would they include a rule specifically for traffic accidents, or would a rule address torts more generally? Would individual rules address specific kinds of

227. Swiss Federal Statute on Private International Law (PIL Statute), *in* Switzerland's Private International Law Statute 1987: The Swiss Code on Conflict of Laws and Related Legislation (Pierre A. Karrer & Karl W. Arnold eds. & trans., 1989).

228. *Id.* art. 135.

229. *Id.*

230. La. Civ. Code art. 3545 (2003).

231. See, e.g., Phaedon John Kozyris, *Conflicts Theory for Dummies Après le Déluge, Where Are We on Producers Liability?*, 60 La. L. Rev. 1161, 1176-77 (1999-2000). He urges that his proposal constitute part of a Restatement (Third). *Id.* at 1182. See also Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of That Analysis in Products Liability Cases*, 46 Ohio St. L.J. 493 (1985).

contracts, or would contracts be considered generally? Because the Wisconsin courts have indicated approval of the Restatement (Second) methodology in the past (though not adhering to it faithfully or consistently), that methodology could surely provide guidance to the drafters. Perhaps they would wish to adopt its practice of treating specific torts and contracts individually and leaving others to be subsumed by general tort and contract sections. In addition, in the spirit of drafting rules most helpful to the individual state and most respectful of its jurisprudence, the drafters could examine the kinds of issues that seem to occur most often within that particular state and create rules most appropriate to those issues. The drafters might also wish to address legal issues that are certain to arise in the future but have not yet drawn considerable judicial attention, such as internet issues. In such cases, however, the drafters should be ever cautious to rely upon the court's jurisprudence to determine how this branch of government might approach such issues. Analysis of the court's statements of policies and interests in analogous situations would serve as a sound guide.

And yet, no set of rules can address every issue that might arise and anticipate all possible circumstances. "Every rule system that has ever been proposed or used as a basis for choice-of-law decisions requires the addition of standards to make the rule system determinate in a nonarbitrary way."²³² As we have seen, one of the reasons that the First Restatement both succeeded and failed is that a number of "escape devices" emerged to avoid unfair or unpopular results.²³³ Without such devices, rigid rules offer no escape from the exceptional case in which nearly all circumstances direct the court to the law of one jurisdiction though the rules direct it to another. On the other hand, the "escape devices" employed to avoid the First Restatement's rigidity also led to its demise in most states. The frequent need for such escapes demonstrated the scant attention the rules gave to any considerations other than territorial boundaries. The rules as applied often failed to consider competing states' policies and interests, as well as the parties' domiciles and other significant relationships. The rules-based code that I propose is based on years of judicial experience with real cases and on judicial

232. Joseph William Singer, *Real Conflicts*, 69 B.U. L. Rev. 1, 8 (1989).

233. The most notable of these is the public policy exception, clearly illustrated in *Paul v. National Life*, 352 S.E.2d 550 (W. Va. 1986), in which the West Virginia court reaffirmed its adherence to the First Restatement while applying its own law instead of the law of the place of injury because of its strong state public policy. *Id.* Other devices employed to avoid the rigidity of the traditional rules include recharacterization of the issue, e.g., labeling it a tort rather than a contract; treating it as procedural rather than substantive; and use of renvoi. See Wiegand, *supra* note 5, at 763-64.

reasoning, and would thereby incorporate other considerations and policies. Rarely should a court find the applicable rule unworkable. When it does, however, the code itself should provide written standards to cabin wide-ranging judicial discretion.

The drafting of such standards must be an integral part of the drafting process, and there are certainly a variety of standards from which to choose, ranging from the most significant relationship standard to that of comparative impairment or "better law." No matter which standard is chosen, it should strive for simplicity and ease of application and be bound by sound guidelines. Furthermore, the code must make it clear that fallback standards do not displace the applicable rule unless there are exceptional circumstances under which application of the rule would lead to shocking or clearly unfair results. The rules must be more than presumptions, because the Second Restatement's history demonstrates how easily such presumptions can be overcome, rendering them meaningless. Requiring courts to explain clearly why the rules are inapplicable in any particular case and why the case is truly exceptional ensures that the rules will not easily be ignored.

VII. CONCLUSION

In this article, I offer a new approach to choice of law analysis, one that can be described as a true "restatement" of law. It advocates a state-by-state approach rather than either a national or federal approach, both of which seem unrealistic and neither of which demonstrate respect for the individual state's prior rulings and rationale. I also propose that the choice of law methodology consist primarily of rules rather than employing an "approach" to choice of law. This, I believe, will result in more predictability and uniformity than has heretofore been seen in this area. The rules to be adopted should not be created from whole cloth; rather I propose that they be drawn from the state's own jurisprudence as much as possible. When this is not entirely possible, the drafters should at least honor the policies and interests articulated in that state's judicial opinions. The rules should be subjected to legislative debate. The end product will then have endured judicial and legislative review and deliberation, and should thereby reflect the state's policies and interests, as well as commanding respect among the bench and bar. A final written product—a new choice of law code—will provide parties and their attorneys as well as the judiciary with a clear, easily accessible, simple means of making choice of law determinations early in the litigation.

I have not attempted to draft new choice of law rules for Wisconsin or for any other state. In fact, I have examined only some

of the significant areas of law for which a choice of law statute might be helpful.

This approach to choice of law will not be easy. It requires analytical and empirical research based on each state's jurisprudence. However, the end product will have been time-tested; it will reflect the policies, interests, and concerns of the judiciary in the area of choice of law; it will undergo considerable legislative discussion and debate; and it will bear the stamp of approval of both the judiciary and legislature. This, it seems to me, is superior to approaches designed solely by legal academics and superior also to the current common law approach to this significant area of the law. The end result will be a true restatement of the state's law.

