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Use of Foreign Statutes of Limitations in Illinois: An Analysis of Statutory and Judicial Technique

Jane Hoffman Locke

USE OF FOREIGN STATUTES OF LIMITATIONS IN ILLINOIS: AN ANALYSIS OF STATUTORY AND JUDICIAL TECHNIQUE

*Jane Hoffman Locke**

INTRODUCTION

Kathy Keeton, a New York resident, filed suit for libel and invasion of privacy against Hustler Magazine, Inc. in Ohio, where Hustler's headquarters are located. The Ohio court dismissed the libel claim as barred by the Ohio statute of limitations, and the privacy claim as barred by the New York statute of limitations.[1]

Apparently undaunted by the setback, Ms. Keeton located the only state which had an unexpired statute of limitations for libel, New Hampshire. Fortunately for Ms. Keeton, Hustler sold 10 to 15,000 copies of its magazine in New Hampshire each month and possibly was subject to its jurisdiction on that basis even though the parties had no other contacts with the state.[2] Ms. Keeton promptly filed suit in the United States District Court for the District of New Hampshire.

The New Hampshire district court and the First Circuit held that it would be unfair to subject Hustler to New Hampshire jurisdiction because of the plaintiff's obvious forum shopping.[3] The First Circuit concluded that "the New Hampshire tail is too small to wag so large an out-of-state dog."[4]

The Supreme Court reversed the lower courts' decisions in *Keeton v. Hustler Magazine, Inc.*[5] The Court admonished the lower courts that potential unfairness to the defendant Hustler from the use of New Hampshire's statute of limitations was unrelated to New Hampshire's jurisdiction to adjudicate the claim. According to the Court, any unfairness that might arise by applying the New Hampshire statute must be dealt with as a separate choice-of-law issue.[6]

While many scholarly articles will dissect the jurisdictional holding of *Keeton,* its choice of law aspects will receive scant attention. The choice of law implications of *Keeton,* however, are significant. The Supreme Court repeatedly has refused to consider a plaintiff's choice-of-law forum shopping as a limit on permissible assertion of jurisdictional power;[7] this position was

* Assistant Professor of Law, Loyola University of Chicago School of Law. B.A., M.A, University of Michigan; J.D., Cornell University.

1. Keeton v. Hustler Magazine, Inc., 104 S. Ct. 1473, 1477 n.1 (1984).

2. *Id.* at 1477.

3. *Keeton,* 682 F.2d 33, 35 (1st Cir. 1982).

4. *Id.* at 36.

5. 104 S. Ct. 1473, 1477 (1984).

6. *Id.* at 1480.

7. *See, e.g.,* Kulko v. California Superior Ct., 436 U.S. 84, 98 (1978); Shaffer v. Heitner, 433 U.S. 186, 215 (1977); Hanson v. Denckla, 357 U.S. 235, 254 (1958).

reaffirmed in *Keeton*. The Court's refusal to relate choice of law to the permissible limits of jurisdiction encourages plaintiffs to forum shop for favorable law. Because courts routinely apply their own statutes of limitations to out-of-state claims, plaintiffs frequently forum shop for an unexpired statute of limitations—a practice implicitly endorsed by the jurisdictional holding in *Keeton*. Unfortunately, the *Keeton* Court did not address the question of whether the use of the New Hampshire limitations period was constitutional as a separate choice of law matter because that issue was not before the Court. Although the Court suggested that such a routine application of a forum's statute of limitations to a case with minimal connection to the forum was troublesome and perhaps unconstitutional, the Court is not likely to resolve this issue in the near future.[8]

How would Kathy Keeton have fared in an Illinois forum? Illinois has a Borrowing Statute[9] that employs a foreign statute of limitations to bar out-of-state claims. The intended purpose of the Borrowing Statute is to prevent forum shopping. Although by its terms, and given its purpose, it should bar a case like *Keeton*, recent judicial narrowing of the Borrowing Statute's application raises doubts as to whether it would apply.[10]

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8. 104 S. Ct. at 1480 n.10. The Court stated:

> There has been considerable academic criticism of the rule that permits a forum State to apply its own statute of limitations regardless of the significance of contacts between the forum State and the litigation. . . . But we find it unnecessary to express an opinion at this time as to whether any arguable unfairness rises to the level of a due process violation.

Id. (citations omitted).

9. Code of Civil Procedure § 13-210, ILL. REV. STAT. ch. 110, § 13-210 (1983). *See generally* Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L. REV. 33 (1962) (expressing dissatisfaction with current status of borrowing statutes); Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MTN. L. REV. 287 (1960) (discussing two extensive surveys regarding borrowing statutes). For analysis of the borrowing statutes of other states, see Grossman, *Statutes of Limitation and the Conflict of Laws: Modern Analysis*, ARIZ. ST. L.J. 1, 14 n.51 (1980) (legislatures have responded to traditional characterization of statutes of limitations as procedural by enacting borrowing statutes); Nordstrom, *Ohio's Borrowing Statute of Limitations—A Quaking Quagmire in a Dismal Swamp*, 16 OHIO ST. L.J. 183 (1955) (discussion of Ohio Borrowing Statute); Siegel, *Conflicts of Laws*, 19 SYRACUSE L. REV. 235 (1968) (analysis of New York Borrowing Statute in context of choice of laws); Comment, *Choice of Law and the New York Borrowing Statute: A Conflict of Rationales*, 35 ALB. L. REV. 754 (1971) (discussion of New York Borrowing Statute); Comment, *The Impact of Significant Contacts on the Pennsylvania Borrowing Statute*, 72 DICK. L. REV. 598 (1968) (analysis of Pennsylvania Borrowing Statute within the context of conflict of laws).

Borrowing statutes are by no means uniform. *See* R. LEFLAR, AMERICAN CONFLICTS LAW § 128, 257 (3d ed. 1977). A 1960 survey of the thirty-eight states with borrowing statutes classified those statutes in 17 separate categories. Vernon, *supra*, at 294-97. Some states limit application of the statute to cases involving only non-resident parties or non-resident plaintiffs; others bar a claim if it is barred by the law of any jurisdiction in which one, or sometimes both, the parties resided. Still other statutes are limited to certain categories of cases such as contracts, personal injury, or non-real property actions. There are numerous additional variations. *See id.*

10. *See infra* notes 22-24, 30-31, 39 and accompanying text.

This article analyzes the development of Illinois law regarding the selection of a statute of limitations for a conflicts case with multistate contacts. The analysis focuses principally on the use of the Borrowing Statute and its emergence as an obstacle to the modernization of Illinois limitations law. In addition, the article will analyze the use of foreign statutes of limitations in cases not subject to the Borrowing Statute.

BACKGROUND—THE PURPOSE OF THE BORROWING STATUTE

Illinois enacted its Borrowing Statute in the late nineteenth century and has never amended it. The statute provides that:

> When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and by the laws thereof, an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state.[11]

The statute prescribes the use of another state's statute of limitations when the court determines that the cause of action has "arisen" in that state.[12] The sole function of the statute is to bar suits which otherwise might be maintained under an unexpired Illinois statute of limitations.[13] The Borrowing Statute does not enable the court to select an unexpired foreign statute of limitations in lieu of an expired Illinois limitations period.[14]

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11. Code of Civil Procedure § 13-320, ILL. REV. STAT. ch. 110, § 13-210 (1983).

12. *See* Speight v. Miller, 437 F.2d 781, 783 n.4 (7th Cir.), *cert. denied,* 404 U.S. 827 (1971). The statute of limitations is borrowed with "all its accouterments," the tolling provisions of the foreign state, and perhaps its borrowing statute as well.

13. Generally, statutes of limitations vary according to the type of claim brought, and even among identical claims the length of the statutes may differ from state to state. To illustrate, in Illinois oral contract actions must commence within five years after the cause of action has accrued. ILL. REV. STAT. ch. 83, § 16 (1983). A ten-year limitations period applies to written contract actions. *Id.* ch. 110, § 13-206. Indiana, however, expands the time that a plaintiff may bring a claim for breach of an oral contract to six years, IND. CODE ANN. § 34-1-2-1 (Burns Supp. 1984), and breach of written contract claims, "other than those for the payment of money," may be maintained up to ten years after the cause of action has accrued, *id.* § 34-1-2-2(6). Finally, Wisconsin provides an innovative approach towards establishing a statute of limitations in contracts for sale. Under its statute, claims arising from breach of any contract for sale must commence within six years. Moreover, if both parties are merchants, they may, by the original agreement, "reduce the period of limitation to not less than one year." WIS. STAT. ANN. § 402.725(1) (West Supp. 1984-1985).

Similar variations in statutes of limitations exist among the states with respect to tort claims. For instance, in Illinois, a plaintiff bringing a product liability claim has two years to bring an action after the date on which the plaintiff knows or reasonably should have known of the existence of the personal injury. ILL. REV. STAT. ch. 110, § 13-213 (1983). The Indiana statute is virtually identical, requiring an action to commence within two years after the cause of action accrues. IND. CODE ANN. § 33-1-1.5-5 (Burns 1975). The California statute of limitations to file a product liability action, as well as many other tort claims, however, is one year. CAL. CIV. PROC. CODE § 340 (West 1973).

14. *See* Manos v. Trans World Airlines, Inc., 295 F. Supp. 1170, 1175 n.4 (N.D. Ill. 1969); Bemis v. Stanley, 93 Ill. 230 (1879); Sarro v. Maupin, 127 Ill. App. 2d 26, 261 N.E.2d 756 (1st Dist. 1970); Jackson v. Shuttleworth, 42 Ill. App. 2d 257, 192 N.E.2d 217 (3d Dist. 1963);

Unfortunately there is little legislative history pertaining to the Borrowing Statute.[15] The Illinois Supreme Court, however, provided some insight into the probable intention of the legislature. In *Hyman v. Bayne,*[16] a case decided shortly after passage of the statute, the Illinois Supreme Court stated that the Borrowing Statute was intended to overcome the courts' reluctance to use foreign statutes of limitations to bar out-of-state claims.[17] The court viewed the adoption of the Borrowing Statute as a legislative attempt to overrule decisions in which courts used a local statute of limitations for an out-of-state claim and tolled the local statute for an excessive period.

The *Hyman* court was referring to the traditional American rules regarding a court's selection of the proper statute of limitations when presented with a case involving a choice of law problem.[18] Under the traditional view, courts apply their own procedural law in such cases even though the substantive rights of the parties may be determined under another state's law.[19] While

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Horan v. New Home Sewing Mach. Co., 289 Ill. App. 340, 7 N.E.2d 401 (1st Dist. 1937); Harden v. Whitman, 109 Ill. App. 106 (1st Dist. 1917); O'Donnell v. Lewis, 104 Ill. App. 198 (1st Dist. 1902). *See generally* Comment, *Foreign Statute of Limitations: Borrowed Only to Shorten the Period of Limitations of the Forum,* 1962 U. ILL. L.F. 452, 455 (1962) (discussing majority position that action barred by forum statute of limitations is barred regardless of fact that claim is not barred in state where cause of action arose).

15. The only legislative history available is in the Senate Records. *See* 2 JOURNAL OF THE SENATE OF THE 27TH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, at 378, 513, 618, 837, 843, 870 (1871-1872) (discussing S. 398).

16. 83 Ill. 256 (1876).

17. *Id.* at 261.

18. A case with a choice of law question is a case that has factual connections with more than one state or country. Suppose, for example, that a plaintiff and defendant are involved in an auto accident in the state of Illinois, but both parties are residents of the state of Indiana. The parties' residence involves a second jurisdiction in the case, thus requiring a court to determine whether plaintiff's right to recover is to be based on Illinois or Indiana law. A court might select Indiana law if it believes that the parties' residence is more significant than the situs of the accident.

19. The definition of "substance" and "procedure" has been the subject of intense discussion by conflicts scholars. For a most perceptive analysis, see Cook, *"Substance" and "Procedure" in the Conflicts of Laws,* 42 YALE L.J. 333 (1933). Cook argued that the dividing line between the two varied depending on the purpose of the classification. In conflicts cases, Cook suggested a key judicial consideration in categorizing matters as substance or procedure is the inconvenience to the court in applying foreign law to a particular issue. *Id.* at 343-44. He suggested, for example, that the only justification for refusal to apply foreign law on burden of proof (when other issues were to be determined under foreign law, perhaps due to a foreign injury) would be forum inconvenience. *Id.* at 346. The implication of Cook's approach is that because it is not difficult for a forum to determine and use a foreign statute of limitations, these statutes should typically be classified as substantive and deferred to by other states. A different approach was advocated by Ailes in *Limitation of Actions and the Conflict of Laws,* 31 MICH. L. REV. 474 (1933). Ailes maintained that for statutes of limitations, the law of the forum should be applied as a general rule on the basis of its simplicity and convenience of use. *See also* Arnold, *The Role of Substantive Law and Procedure in the Legal Process,* 45 HARV. L. REV. 617, 643 (1932) (stating that "[t]he difference between procedural and substantive law is a moveable dividing line which may be placed wherever an objective examination of our judicial institutions indicates is necessary"); McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws,* 78 U. PA. L. REV. 933, 949 (1930) (discussion of the applicability

the substance/procedure distinction is difficult to discern for some issues, statutes of limitations generally have been viewed as procedural matters.[20] As a result, the courts often mechanically apply the local statute of limitations in a choice of law case, even though the claim arose in another state and thus may be governed in all other respects by the law of another state.[21] This policy can produce unusual results if the local statute of limitations is tolled.

While the purpose of a statute of limitations is to require a plaintiff to diligently pursue a right and afford repose to a defendant,[22] a tolling statute

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of the law of the transaction versus the law of the forum); Morgan, *Choice of Law Governing Proof,* 58 HARV. L. REV. 153, 195 (1944) (suggesting that the law of the locus should apply to all substantive matters materially influencing the outcome of litigation); Morgan, *Rules of Evidence—Substantive or Procedural?,* 10 VAND. L. REV. 467, 484 (1957) (analysis of the procedural-substantive dichotomy); Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of Irrebuttable Presumptions,* 30 UCLA L. REV. 189, 190 (1982) (traces the development of the procedural-substantive dichotomy and establishes a model distinguishing the two); Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws,* 37 N.Y.U. L. REV. 813, 822 (1962) (stating that "the outcome test of Erie may furnish a guide for the determination of the extent to which [the law of the locus] should be incorporated in dealing with a conflicts problem"); Twerski & Mayer, *Toward a Pragmatic Solution of Choice-of-Law Problems—At the Interface of Substance and Procedure,* 74 NW. U.L. REV. 781, 784 (1979) (breakdown of the procedural-substantive dichotomy).

The Restatement of Conflict of Laws (First Restatement) took the inflexible and overly-simplistic view that "[a]ll matters of procedure are governed by the law of the forum." RESTATEMENT (FIRST) OF CONFLICT OF LAWS §585 (1934). It reflected the views of its principal draftsman, Joseph Beale, who stated:

> That the statute of limitations of the forum is the applicable law of limitations is so well settled in Anglo-American law at least, as to be beyond dispute. . . . From the doctrine that statutes of limitation "relate to the remedy" it logically follows that the fact that the suit would be barred by the foreign statute if action were brought where the right arose is no defense to the action at the forum.

J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1620-21 (1935) (citations omitted).

20. *See, e.g.,* Hilberg v. Industrial Comm'n, 380 Ill. 102, 105, 43 N.E.2d 671, 672 (1942). The most frequently asserted basis for this conclusion is that a limitation affects solely the nature of the remedy to be afforded and the forum should be permitted to fashion its own remedy even though it recognizes foreign law to determine parties' rights.

21. *See, e.g.,* Goodwin v. Townsend, 197 F.2d 970 (3d Cir. 1952); Panhandle E. Pipeline Co. v. Parish, 168 F.2d 238 (10th Cir. 1948); Townsend v. Jemison, 50 U.S. (9 How.) 407 (1849).

The consequences of the forum-rule approach are twofold. Mechanistic application of the forum's statute of limitations invites forum shopping if plaintiff's claim is barred by expired limitations periods in other states. Conversely, the forum may apply its own limitations period to bar a claim that could be heard in other states. When the substantive rights of the parties are to be determined under the law of another state, the forum's denial of a remedy may work a substantial injustice to the plaintiff.

22. *See* R. LEFLAR, *supra* note 9, § 127, at 253; Ailes, *supra* note 19, at 491; Grossman, *Statutes of Limitation and the Conflict of Laws: Modern Analysis,* 1 ARIZ. ST. L.J. 1, 11 (1980); *see also* Stanley v. Chastek, 34 Ill. App. 2d 220, 180 N.E.2d 512 (2d Dist. 1962) (purpose of the statute of limitations is to serve as an affirmative defense). Multiple purposes for statutes of limitations have been suggested: (1) fairness to defendants; (2) a desire to relieve the courts of the burden of adjudicating frivolous or stale claims; and (3) the protection of

operates to suspend the running of the statute of limitations in certain situations. The rationale for tolling a statute of limitations is based upon the recognition that not every delay in filing a lawsuit is caused by a plaintiff's inaction. Delays may be caused by conditions beyond the plaintiff's control, such as the defendant's evasion or the fraudulent concealment of the cause of action. Alternatively, the delay may be caused by a plaintiff's disability.[23] Tolling statutes, however, usually are not drafted for application to cases involving choice of law questions. Few tolling statutes provide special tolling provisions for claims which arise out of state.[24] If a tolling statute tolls the forum's statute of limitations for defendants who have never been in the state, defendants may face the prospect of perpetual tolling of a state's statute of limitations until they enter that state. Suspension of the limitations period may be appropriate for local claims when a defendant leaves the state, especially in situations where the defendant has left the state to evade service of process. When lawsuits involving out-of-state claims are filed against non-resident defendants, however, the application of the tolling statute is not necessarily warranted and may be unjust in many situations.[25] When the *Hyman* case was decided, many states used local statutes of limitations, and tolled the statutes to preserve out-of-state claims indefinitely. According to the court in *Hyman,* the Illinois Borrowing Statute was intended to alleviate the plight of defendants in such actions.[26]

Examination of the legislative history of the Borrowing Statute in conjunction with the Illinois law of tolling illuminates the court's statement in *Hyman*. Prior to the passage of the Borrowing Statute, the Tolling Statute[27]

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plaintiffs. *See* Milhollin, *Interest Analysis and Statutes of Limitations,* 27 HASTINGS L.J. 1 (1975); Note, *Developments in the Law—Statutes of Limitations,* 63 HARV. L. REV. 1177, 1185 (1950).

23. *See* Code of Civil Procedure § 13-211, ILL. REV. STAT. ch. 110, § 13-211 (1983) (statute tolled until minor reaches 18 years of age or until other legal disability removed).

24. *See* Vernon, *The Uniform Statute of Limitations on Foreign Claims Act: Tolling Problems,* 12 VAND. L. REV. 971, 980 (1959) (arguing that tolling in such circumstances is outmoded, and unjust). *But see* G.D. Searle v. Cohn, 455 U.S. 404 (1982) (holding that a Tolling Statute that tolled the limitations period of an action against a foreign corporation amenable to a state's jurisdiction but which had no person or officer within the state upon whom process may be served did not violate the equal protection and due process clauses of the fourteenth amendment).

25. *See* Vernon, *supra* note 24, at 980-81.

26. 83 Ill. at 261.

27. Code of Civil Procedure § 13-208, ILL. REV. STAT. ch. 110, § 13-208 (Cum. Supp. 1984).

The first version of the Tolling Statute, enacted in 1845, provided as follows:

> If any person or persons against whom there is or shall be any cause of action . . . except real or possessory actions shall be out of this State at the time of the cause of action accruing, or any time during which a suit might be sustained on such cause of action, then the person or persons who shall be entitled to such action, shall be at liberty to bring the same against such person or persons, after his, or her or their *return to* this State, and the time of such person's absence shall not be accounted or taken as part of the time limited by this chapter.

ILL. REV. STAT. ch. 66, § 13 (1845) (emphasis added).

did not apply to defendants who had never been present in Illinois,[28] thus precluding tolling for out-of-state claims against non-resident defendants. In 1873, the same year the Borrowing Statute was enacted, the Tolling Statute was amended to toll such claims.[29] The timing of these two legislative actions suggests that the legislature realized that the use of an Illinois statute of limitations, with no provision for tolling out-of-state claims, might unfairly deprive a litigant of sufficient time to pursue a claim against an out-of-state defendant in an Illinois court. The legislature apparently recognized that such cases should be tolled in some circumstances; yet, there must be a limit to the duration of the tolled period. The simultaneous adoption of the two statutes suggests a legislative conclusion that the defendant's availability in the state where the claim arose for the duration of that state's statute of limitations should impose an outside limit on the tolling of the Illinois limitations period. The Borrowing Statute accomplishes such a result by applying the foreign state's expired statute of limitations, even though the tolled Illinois statute has not expired. Put simply, a plaintiff will not be treated more generously in Illinois than in the state where the claim arose.

Thus, the Borrowing Statute, as enacted, is a legislative decision to apply the statute of limitations of the state where a claim arose. Such legislative action was necessitated by the expanded application of tolling to out-of-state claims.[30] Consequently, the Borrowing Statute is a subsidiary to, and a narrowing of, the Tolling Statute. The primary use of the Borrowing Statute should be in cases where the Illinois statute of limitations is tolled. The Illinois courts' subsequent use of the Borrowing Statute is consistent with this premise. Most cases have presented the court with a choice between an expired foreign statute and a tolled Illinois statute of limitations.[31]

The Borrowing Statute is intended to serve an additional purpose in cases that do not involve a tolled Illinois statute of limitations. The Borrowing Statute mandates the selection of an expired foreign statute of limitations for claims which arise outside of Illinois in lieu of an unexpired, but not

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This statute was ambiguous in its application to a defendant who had never been in the state, either at the time of accrual of a cause of action or any time thereafter, but prior to commencement of the action.

28. *Hyman,* 83 Ill. at 263.

29. The amended and current version provides:

> If, when the cause of action accrues against a person, he or she is out of the state, the action may be commenced within the times herein limited, after *his or her coming into* or return to the state; and if, after the cause of action accrues, he or she departs from and resides out of the state, the time of his or her absence is no part of the time limited for the commencement of the action. . . .

Code of Civil Procedure § 13-208, ILL. REV. STAT. ch. 110, § 13-208 (Cum. Supp. 1984) (emphasis added).

30. Joseph Beale suggested that concern with indefinite tolling of a claim outside the state in which it arose was the basis for enactment of many borrowing statutes. *See* J. BEALE, *supra* note 19, at 1622; *accord* Ester, *supra* note 9, at 42; Vernon, *supra* note 9, at 297.

31. *See, e.g.,* Massman v. Duffy, 330 Ill. App. 76, 69 N.E.2d 707 (1st Dist. 1946); Book v. Eubank, 311 Ill. App. 312, 35 N.E.2d 961 (2d Dist. 1941); McGuigan v. Rolfe, 80 Ill. App. 256 (1st Dist. 1898); Story v. Thompson, 36 Ill. App. 370 (2d Dist. 1889).

tolled, Illinois statute of limitations. Accordingly, the Illinois Supreme Court recognized in *Miller v. Lockett,*[32] a case decided long after *Hyman,* that the Borrowing Statute serves to prevent forum shopping.[33] When a court routinely uses a local statute of limitations on procedural grounds to permit claims that are barred elsewhere, plaintiffs are encouraged to forum shop by filing claims that have little factual connection to the state in order to take advantage of the forum state's unexpired statute of limitations.[34] When the Illinois statute of limitations is longer than another state's, Illinois will attract additional litigation if it permits these claims to be litigated in Illinois. Conversely, when Illinois borrows a foreign statute of limitations that has expired, plaintiffs are discouraged from litigating in Illinois.[35]

Because application of the Borrowing Statute is intimately related to tolling, the current status of the Borrowing Statute must be assessed in light of recent changes in the Illinois law of tolling. Although the Borrowing Statute has never been amended, the Tolling Statute has been amended by the legislature in two significant ways. In 1973 the legislature eliminated the tolling of cases in which the defendant, although not physically present in Illinois, is subject to Illinois jurisdiction.[36] The 1973 amendment makes the

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32. 98 Ill. 2d 478, 457 N.E.2d 14 (1983).

33. *Id.* at 486, 457 N.E.2d 18; *see also* Ester, *supra* note 9, at 40 (stating discouragement of forum shopping is a policy reason for enacting a borrowing statute). As conflicts scholars have noted, a major advantage of multistate use of borrowing statutes is uniform treatment of conflicts cases irrespective of where an action is brought. If the courts in various states do not apply the same statute of limitations to a case, plaintiffs are encouraged to shop for an hospitable forum whose statute of limitations has not yet run. Many Illinois cases present obvious examples of plaintiffs forum shopping for a favorable statute of limitations. Multistate use of borrowing statutes could reduce forum shopping by requiring courts in different states to borrow the same statute of limitations for a conflicts case. This result has not occurred, however, in part because of the courts' difficulty, as exemplified in the cases in this article, in determining which statutes of limitations should be borrowed. Leflar comments that should all states adopt borrowing statutes, uniformity of treatment of limitations in conflicts cases still would not be achieved. R. LEFLAR, *supra* note 9, § 128, 257.

34. *See, e.g.,* Manos v. Trans World Airlines, Inc., 295 F. Supp. 1170 (N.D. Ill. 1969). In Manos, the non-resident plaintiffs sued Illinois corporations based on an airline crash in Italy. The Illinois and Italian statutes had not run but the statutes of plaintiffs' decedents' domiciles had run. *See id.* at 1174; *see also* Emerson v. North Am. Transp. & Trading Co., 303 Ill. 282, 135 N.E. 497 (1922) (plaintiff, a California resident, sued an Illinois corporate defendant based on an Alaskan lease transaction; Alaskan statute of limitations had run but not Illinois'); Collins v. Manville, 170 Ill. 614, 48 N.E. 914 (1897) (both parties non-residents); Glenn v. McDavid, 316 Ill. App. 130, 44 N.E.2d 84 (3d Dist. 1942) (Colorado plaintiff sued estate of Colorado resident in Illinois; Colorado statute barred the claim; Illinois statute did not).

35. The availability of obtaining a forum non conveniens dismissal does not eliminate this type of forum shopping. This type of forum shopping occurs when no other forum is available to the plaintiff due to the expiration of the statutes of limitations of other states with jurisdiction over the defendant; but Illinois courts will not grant a forum non conveniens dismissal unless an alternative forum is available. *See* Moore v. Chicago & N.W. Transp. Co., 99 Ill. 2d 73, 457 N.E.2d 417 (1983); Torres v. Walsh, 98 Ill. 2d 338, 456 N.E.2d 601 (1983).

36. The current Tolling Statute defines presence as follows:

> [N]o person shall be considered to be out of the State or to have departed from the State or to reside outside of the State during any period when he or she is subject

definition of the defendant's presence in Illinois for tolling purposes identical with the definition of a state's jurisdictional power over the defendant. Under traditional jurisdictional principles many cases arose in which plaintiffs were unable to obtain jurisdiction over defendants in a local forum due to a defendant's subsequent departure from the forum state, or, for foreign claims, due to the defendant's absence from the plaintiff's home state.[37] Under these circumstances, the Illinois tolling provisions served a necessary and valuable function by allowing Illinois plaintiffs to toll the statute of limitations until a defendant was physically present within the state and thus amenable to Illinois jurisdiction. The expansion of the permissible limits of state jurisdiction,[38] however, eliminated the vast majority of cases in which plaintiffs were prevented from pursuing claims on a timely basis because of lack of jurisdiction over defendants. The current Tolling Statute correctly relates the necessity for tolling to cases in which the plaintiff cannot obtain jurisdiction over the defendant.

While the 1973 amendment limited the range of cases subject to tolling,

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to the jurisdiction of the courts of this State with respect to that cause of action. . . .

ILL. REV. STAT. ch. 110, § 13-208(b) (Cum. Supp. 1984).

37. The traditional constitutional limitations of due process, as interpreted by the Supreme Court in Pennoyer v. Neff, 95 U.S. 714, 720 (1878), prohibited states from asserting jurisdiction over a non-resident defendant unless the defendant appeared in court voluntarily or was physically present within the state. The *Pennoyer* court concluded that, because each state posessed its own independent authority, each state had exclusive jurisdiction over all persons and property within its territory, but had no direct jurisdiction over persons or property outside its borders. *Id.* at 722.

38. The Court transformed the territorial theory of *Pennoyer* into the due process doctrine of "minimum contacts" in International Shoe Co. v. Washington, 326 U.S. 310 (1945). The theory articulated in *Pennoyer* had begun to erode prior to *International Shoe.* This doctrinal erosion was caused by the judicial creation of the fictional concepts of consent and presence, and by the statutory creation of agents upon whom service of process could be effectuated if the defendant was not found within the state. *See, e.g.*, Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (upheld statute allowing service on agents of non-resident individuals doing business in the state); Hess v. Pawloski, 274 U.S. 352 (1927) (defendant implied consent by use of highways; service of process could be effected on a state official as an agent under a non-resident motorist statute); Barrow S.S. Co. v. Kane, 170 U.S. 100 (1898) (a non-resident corporation doing business within the state deemed present for jurisdictional purposes).

In *International Shoe,* however, the Court expressly rejected physical presence as a prerequisite to obtaining an in personam judgement. 326 U.S. at 316. Indeed, the Court recognized that by conducting activities in the state, non-residents often invoke the benefits and protections of that state's laws without ever being physically present. When obligations arise from such activities or contacts a defendant can be required to appear in court without violating the due process safeguards, even though the contacts are minimal. *Id.* at 319. When the contacts are unrelated to the litigation a higher level of activity is required. *See id.* at 318.

Since *International Shoe,* the United States Supreme Court has developed a method for analyzing minimum contacts questions. First, "the relationship between the defendant, the forum and the litigation" is examined. Shaffer v. Heitner, 433 U.S. 186, 204 (1977). Regardless of the plaintiff's relationship with the forum, jurisdiction may not be asserted if the non-resident defendant does not have contacts with the forum state. Rush v. Savchuk, 444 U.S.

the Illinois Supreme Court's 1979 decision in *Haughton v. Haughton*[39] moved in the opposite direction. The *Haughton* decision declared to be unconstitutional the portion of the Tolling Statute that precluded tolling when, at the time of accrual of a claim, neither the plaintiff nor the defendant was an Illinois resident. Haughton involved a plaintiff's attempt to enforce a 1948 California judgment, which awarded support payments to the plaintiff when both the plaintiff and the defendant were California residents.[40] The Illinois statute of limitations applicable to foreign judgments of this type was a five year "catch all limitation" for civil actions. Thus, if the statute in Illinois were not tolled the plaintiff's attempt to enforce the judgment would have been barred by the statute. The plaintiff challenged the non-resident exclusion from the Tolling Statute, claiming that it violated the equal protection clause of the United States and Illinois Constitutions.[41]

The *Haughton* court struck down the non-residency clause because the court concluded that it was the plaintiff's California residence that resulted in application of the non-residency exclusion, a discrimination that the court believed was irrational and unnecessary.[42] In response to the *Haughton*

320, 327 (1980). Second, the Supreme Court has determined that a defendant's contact with the state must be such that the defendant could reasonably anticipate "being haled into court" in the forum state. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). This criteria is met when there is "some act by which defendant purposefully avails itself of the privilege of conducting activities within the State. . . . " Hanson v. Denckla, 357 U.S. 235, 253 (1958). The reasoning behind this principle is that a defendant, having availed himself or herself of the benefits and protections of a state's laws, cannot object to the legal obligations which go along with those benefits.

39. 76 Ill. 2d 439, 394 N.E.2d 385 (1979).

40. *Id.* at 443, 394 N.E.2d at 387.

41. *Id.* Plaintiff also argued that the use of a five-year limitations period for domestic judgments deprived her of equal protection of the law. Id. at 443, 394 N.E.2d at 387. In view of the disposition of the case, the court felt it unnecessary to decide this constitutional issue.

42. *Id.* at 444, 394 N.E.2d at 388. In striking down the non-residency clause the court concluded that it was plaintiff's California residence which resulted in application of the non-residency exclusion. *Id.* at 445-46, 394 N.E.2d at 388. The court was impressed that had either the plaintiff or the defendant been a resident of Illinois at the time of the California judgment, even though the cause of action might be labeled foreign, tolling nonetheless would have protected the viability of the plaintiff's judgment. The court, in what can only be characterized as a puzzling opinion, could discern no legitimate state interest or "any other rational basis" for the exclusion of such non-residency causes of action from the Tolling Statute. *Id.* at 445, 394 N.E.2d at 388. To the contrary, the court expressed concern that "deserving judgment holders" would be denied relief in the Illinois courts because they failed to anticipate the judgment debtor's future movement into the state prior to termination of the otherwise applicable Illinois statute of limitations. *Id.* at 446, 394 N.E.2d at 389.

The Supreme Court ignored the alternative issue presented in the case challenging the discriminatory statute of limitations applicable to foreign judgments. The Supreme Court has suggested that discriminatory treatment of foreign judgments is unconstitutional in several of its decisions. *See* Watkins v. Conway, 385 U.S. 188 (1966); Union Nat'l Bank v. Lamb, 337 U.S. 38 (1949); McElmoyle v. Cohen, 38 U.S. 312 (1839). Illinois' treatment of foreign judgments is an issue with potentially broad impact; therefore, resolving the validity of foreign judgments certainly is more pressing than determining the constitutionality of the tolling provision on which the court focused.

decision, the legislature's enactment of the 1983 Code of Civil Procedure omitted the non-residency exclusion from the Tolling Statute.[43]

These changes in the Illinois law of tolling are significant when assessing the continued need for the Borrowing Statute. Because the 1973 amendment has eliminated the use of tolling for cases in which the defendant is absent from Illinois but subject to Illinois jurisdiction, the necessity of borrowing as a counterbalance to tolling has been substantially reduced. For most claims, both foreign and domestic, the running of the Illinois statute of limitations will serve as an outside limit on the life of the claim in Illinois; the perpetual tolling of the Illinois statute of limitations, even for claims which arise out-of-state, will rarely occur. In all cases, if there are sufficient contacts to establish Illinois jurisdiction, the Illinois statute of limitations will begin to run.

Notwithstanding the 1973 amendment of the Tolling Statute, the Illinois limitations period may possibly be perpetually tolled in two types of cases. The first of these situations was created by the recent *Haughton* decision. When a claim arises outside Illinois between non-residents, it is unlikely that Illinois will have personal jurisdiction over the defendant. If the defendant is an individual, only later transient presence or domicile will create jurisdiction. The Illinois statute of limitations will be tolled until Illinois jurisdiction is established, which may be many years after the claim arises.[44] In such cases, the Borrowing Statute continues to serve a necessary role by providing the defendant with repose under the expired statute of limitations of the state where the claim arises.

The second type of case that might involve the perpetual tolling of the statute is a claim which arises outside of Illinois between an Illinois plaintiff and a non-resident defendant in circumstances that do not create Illinois jurisdiction. For example, suppose that a defendant injures an Illinois plaintiff in an automobile accident in the defendant's home state. The Illinois statute of limitations is tolled until the defendant enters the state, because the defendant is not subject to Illinois jurisdiction. Again, the Borrowing Statute's intended purpose is served if an expired statute of limitations of the situs of the accident is applied to bar the claim in Illinois litigation. As the subsequent discussion reveals, however, the Illinois courts have refused to apply the Borrowing Statute in this type of case.[45]

CURRENT SCOPE OF APPLICATION OF THE BORROWING STATUTE

A. Resident Exceptions from Borrowing

Although the Borrowing Statute is unqualified and its purpose is clear, the Illinois courts have struggled with it from the beginning. In part, this

43. *See* Code of Civil Procedure § 13-208, ILL. REV. STAT. ch. 110, § 13-208 (Cum. Supp. 1984).

44. *See* First Nat'l Bank v. Hurlbut, 224 Ill. App. 297 (1st Dist. 1922); O'Donnell v. Lewis, 104 Ill. App. 198 (1st Dist. 1902); Collins v. Manville, 170 Ill. 614, 48 N.E. 914 (1897).

45. *See infra* notes 84-94 and accompanying text.

struggle reflects parochial concerns. Specifically, courts have been unwilling to apply the Borrowing Statute to bar the claim of an Illinois resident. Oddly, this judicial exception for Illinois residents has been based on the Tolling Statute, which the Borrowing Statute was intended to modify.

Carving out this exception from the Borrowing Statute for all Illinois residents began with the Illinois appellate court's 1889 opinion in *Story v. Thompson*.[46] In *Story,* Illinois plaintiffs sued a Wisconsin resident in an Illinois court to enforce a promissory note. The action would have been barred by the Wisconsin statute of limitations.[47] It also would have been barred by the Illinois statute of limitations unless the Illinois statute had been tolled. Whether the Wisconsin or Illinois statute applied should have rested on a simple legal conclusion under the Illinois Borrowing Statute—where the cause of action accrued.

The court in *Story* held, on disputed facts, that the cause of action accrued in Illinois because the plaintiff was an Illinois resident.[48] The court further implied that a cause of action always arises in Illinois for purposes of the Borrowing Statute whenever the plaintiff is an Illinois resident. The court's rationale rested on an attempt to harmonize the Borrowing Statute and the Tolling Statute. The court implied that the Borrowing and Tolling Statutes must be read consistently with one another.[49] Accordingly, no case that was subject to tolling of the Illinois statute of limitations could be barred by a foreign statute of limitations under the Borrowing Statute. The Tolling Statute was intended to favor Illinois residents, the court explained, by providing them with a home forum. The court inferred from this intent that "borrowing" could never be permissible to defeat an Illinois plaintiff's tolling rights.[50] Hence, the court reasoned that the Borrowing Statute could import a foreign statute of limitations only when doing so would not cut short the Illinois statute of limitations, which had already been extended by the Tolling Statute. At the time of the *Story* decision, there was only one kind of situation that was explicitly excluded from the Tolling Statute—a case involving only non-resident parties.[51] From this express exclusion of non-residents from the Tolling Statute, the court gleaned a legislative mandate that in any case involving an Illinois resident as a plaintiff, the Illinois statute of limitations must be tolled if the defendant is not present within the state and borrowing would be precluded.

Did the *Story* court correctly interpret the relationship of the Tolling and

46. 36 Ill. App. 370 (2d Dist. 1889).

47. *Id.* at 371.

48. *Id.* at 376.

49. *Id.* at 373-74.

50. *Id.* at 373.

51. The Tolling Statute provided: "[T]his section shall not apply to any case, when, at the time the cause of action accrued, neither the party against nor in favor of whom the same accrued were or are residents of this state." ILL. REV. STAT. ch. 83, § 19 (1975) (current version at ch. 110, § 13-208 (1983)). This provision was declared unconstitutional by the Illinois Supreme Court in Haughton v. Haughton, 76 Ill. 2d 439, 444, 394 N.E.2d 385, 387 (1979).

Borrowing Statutes? The *Story* court's interpretation conflicts with the Illinois Supreme Court's interpretation as explained in *Hyman*. The *Hyman* court stated that the Borrowing Statute was not subsidiary to, but a limitation on, the term of tolling.[52] The Illinois Supreme Court's interpretation in *Hyman* is consistent with the history of the Tolling Statute. There was no non-resident exclusion in the Tolling Statute when the Borrowing Statute was enacted in 1872; the non-resident exclusion was added to the Tolling Statute a year later in 1873.[53] Applying the *Story* court's rationale to the Tolling Statute as originally enacted would make the Borrowing Statute a completely useless and unnecessary legislative act because at that time all cases were subject to the Tolling Statute, irrespective of the parties' residences. Following the *Story* court's reasoning, that the legislature intended the Borrowing Statute to exclude all cases to which the Tolling Statute applied, would thus leave no cases subject to borrowing. This result reasonably could not have been intended by the legislature.

Likewise, the Tolling Statute itself cannot fairly support the Illinois resident exception to the Borrowing Statute recognized by the *Story* court. The legislature's action in 1873 to explicitly eliminate tolling, but not borrowing, in cases involving only non-residents can be interpreted very differently from the interpretation given by the *Story* court. The Borrowing Statute functions to bar cases between non-residents only if the foreign statute of limitations is expired, and of course would not apply if the foreign statute is tolled.[54] Suits between non-resident parties are often minimally connected to Illinois and the defendant's non-presence there would toll the Illinois limitations statute. If both the Illinois and foreign statutes are tolled, the Borrowing Statute would fail to eliminate the possibility of perpetual tolling. Thus, the exclusion of non-resident cases from tolling was, consistent with *Hyman,* a completion of the legislative intent of the Borrowing Statute to preclude lengthy tolling in these out-of-state cases and discourage bringing such suits in Illinois. This interpretation of the Tolling Statute, however, does not require the implications of a plaintiff residency exclusion from the Borrowing Statute.

Later cases ignored *Story's* tortured reasoning, but adopted the *Story* court's rule—now firmly established—that Illinois plaintiffs are not subject to the Borrowing Statute. The general adoption of the *Story* rule allowed a logical extension of that rule to factual settings not envisioned by the *Story* court. In *Story,* the court refused to apply another state's limitations law to an Illinois plaintiff in a case that arose in Illinois and was tolled under the Illinois statute of limitations. The *Story* rule, however, was extended to cases that did not involve a tolled Illinois statute of limitations.[55] An additional

52. 83 Ill. at 261.

53. Act of Apr. 11, 1872, 1873-1874 Ill. Laws 121.

54. *See* Norman v. Kal, 550 F. Supp. 736 (N.D. Ill. 1982); Glenn v. McDavid, 316 Ill. App. 130, 44 N.E.2d 84 (3d Dist. 1942); Morrison v. Smart, 19 Ill. App. 656 (4th Dist. 1886).

55. *See, e.g.,* Emerson v. North Am.Transp. & Trading Co., 303 Ill. 282, 135 N.E. 497 (1922); Chicago Mill Lumber Co. v. Townsend, 203 Ill. App. 457 (1916); Nat'l Bank v. Danahy, 89 Ill. App. 92 (1899).

key distinction that later cases failed to recognize was between claims that arose in Illinois with the defendant's subsequent departure from Illinois, as in *Story,* and claims that arose outside Illinois involving a defendant who had not been in Illinois prior to the suit. While the Illinois statute of limitations may be tolled for both in- and out-of-state claims, the Borrowing Statute provides different treatment for claims that arise outside Illinois. The courts, however, have refused to apply the Borrowing Statute to either type of claim when the plaintiff is from Illinois.[56]

Whether an exclusion from the Borrowing Statute for Illinois plaintiffs exists for both in- and out-of-state claims, irrespective of tolling, was conclusively decided in 1973 by the Illinois Supreme Court in *Coan v. Cessna Aircraft.*[57] Both the plaintiff and the defendant in *Coan* were from Illinois; the plaintiff's claim arose out of the crash of a plane that the plaintiff was co-piloting in Kentucky. The Illinois suit, which would have been barred by the applicable Kentucky statute, was timely filed under the Illinois statute of limitations. Because of the defendant's Illinois residence, the Illinois statute had not been tolled. The court declared in *Coan* that the Borrowing Statute was "intended [by the legislature] to apply only to cases involving non-resident parties."[58] The *Coan* court refused to bar the suit under Kentucky law. The court's rationale was similar to that adopted in *Story.*[59] The court was troubled by the possible application of both tolling and borrowing to a case. The court resolved the conflict by holding, in effect, that the two statutes may not both be applied to the same claim. Because the only exclusion from tolling at that time was for cases between non-residents,[60] the court concluded that the Borrowing Statute should only apply to such cases. *Coan* was in essence an extension of *Story* because no issue of tolling was involved and the claim arose outside of Illinois.

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56. For cases where the plaintiff was excluded from the Borrowing Statute when the claim arose in Illinois, see Hibernian Banking Ass'n v. Commercial Nat'l Bank, 157 Ill. 524, 41 N.E. 919 (1895); Wooley v. Yarnell, 142 Ill. 442, 32 N.E. 891 (1892); Berry v. Krone, 46 Ill. App. 82 (3d Dist. 1891).

For cases where the plaintiff was excluded from the Borrowing Statute when the claim arose outside Illinois, see Delta Bag Co. v. Leyland & Co., 173 Ill. App. 38 (1st Dist. 1912); National Bank v. Danahy, 89 Ill. App. 92 (2d Dist. 1899); McGuigan v. Rolfe, 80 Ill. App. 256 (1st Dist. 1898). In McGuigan v. Rolfe, 80 Ill. App. 256 (1st Dist. 1898), the cause of action was based on a contract entered into in Michigan. The defendant moved to Kentucky after liability had accrued and then moved on to Arkansas. Meanwhile, the plaintiff moved to Illinois. Even though the case was barred under the statutes of limitations of both Kentucky and Arkansas, the court found that plaintiff's Illinois residence after the cause of action had arisen was sufficient to prevent borrowing. *Id.* at 259. Additionally, the case was tolled until defendant's entry into Illinois. *Id. McGuigan* is an example of the absurd result which can occur when the plaintiff's exclusion from borrowing and the Tolling Statute are applied in conjunction with each other to an out-of-state claim. Plaintiff was allowed to sue defendant in an Illinois forum 17 years after the contract was formed even though the contract was made in another state.

57. 53 Ill. 2d 526, 293 N.E.2d 588 (1973).

58. *Id.* at 529, 293 N.E.2d at 589.

59. *See supra* notes 46-51 and accompanying text.

60. *See supra* note 51.

The Illinois Supreme Court reaffirmed its commitment to the Illinois plaintiff's exclusion from the Borrowing Statute in *Miller v. Lockett.*[61] In *Miller,* the plaintiffs were Illinois residents who were injured in an automobile accident in Tennessee. The defendants were a non-resident individual and an Oklahoma corporation registered to do business in Illinois. The Tennessee statute of limitations had expired, but the Illinois statute had not. The court refused to depart from the *Coan* court's residence exclusion even though the rationale of *Coan* had been undercut by *Haughton,*[62] the case in which the Illinois Supreme Court decreed the non-resident exclusion from tolling to be unconstitutional. Further, the *Miller* court held that such exclusions from the Borrowing Statute did not violate the equal protection clauses of the United State and Illinois Constitutions.[63]

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61. 98 Ill. 2d 478, 457 N.E.2d 14 (1983).

62. *See supra* notes 39-42 and accompanying text. The defendants in *Miller* argued that *Haughton* had undermined the rationale of *Coan* that the Borrowing Statute applied only to cases with non-resident parties excluded from tolling. *Id.* at 482, 457 N.E.2d at 16. The defendants argued that given the post-*Haughton* absence of a non-resident exclusion from tolling, the Borrowing Statute should be expanded to cover all cases irrespective of the parties' residence. *Id.* The court responded that legislative silence regarding *Coan* was an endorsement of the resident exclusion. *Id.* at 483, 457 N.E.2d at 17; *see also* Norman v. Kal, 550 F. Supp. 736 (N.D. Ill. 1982) (federal district court reaffirmed *Coan's* rationale subsequent to *Haughton*).

63. Two Illinois cases have held resident exclusions from borrowing constitutionally valid under the equal protection clauses: Miller v. Lockett, 98 Ill. 2d 478, 457 N.E.2d 14 (1983) (plaintiff exclusion), and Panchinsin v. Enterprise Cos., 117 Ill. App. 3d 441, 453 N.E.2d 797 (1st Dist. 1983) (defendant exclusion). It is beyond the scope of this article to consider the constitutional overtones of limitations selection, but the courts' use of equal protection analysis in both cases must be noted. The Supreme Court has never considered whether the equal protection clause of the United States Constitution prevents choice-of-law discrimination against non-residents. *See* R. CRAMPTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 501 (West 3d ed. 1981); J. MARTIN, CONFLICT OF LAWS 403 (1978). Both Miller and Panchinsin are correct in their conclusions that if the discrimination bears a rational relationship to a legitimate state objective it is permissible. *See, e.g.,* Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978). The Supreme Court has held that a borrowing statute which excludes from its application cases where the plaintiff is a resident does not violate the privileges and immunities clause of the United States Constitution because a "fundamental right" is not involved. Canadian N. Ry. v. Eggen, 252 U.S. 553 (1920). A better constitutional challenge to the resident exclusions would focus not on discrimination, but on the court's failure to select a foreign statute of limitations. Illinois' refusal to select such foreign statutes of limitations, when the interest of the foreign state in application of its law is strong, may violate either the full faith and credit clause or the due process clauses of the United States Constitution. For a discussion of the cases and analysis of the constitutional roles of these clauses in choice of law selection, see Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law,* 62 CORNELL L. REV. 94 (1976), and Martin, *Constitutional Limitations of Choice of Law,* 61 CORNELL L. REV. 185 (1976). The Supreme Court has held that the forum's application of its own statute of limitations to bar a suit permissible elsewhere does not deny or violate the full faith and credit clause of the Constitution. Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953). The "crucial factor" in *Wells* was that the forum applied the same limitation to all wrongful death cases, regardless of where they arose. *Id.* at 518-19. *Wells* does not validate the Illinois resident exclusions because Illinois uses these exclusions to permit suits barred elsewhere, whereas in Wells the state of Pennsylvania used its statute to bar suits permissible elsewhere. Further, Illinois "lays an uneven hand" on suits depending both on the residence of the parties and where the cause of action arises.

The *Miller* court developed an additional rationale for a resident plaintiff's exclusion from borrowing that the *Coan* court had failed to articulate. The purpose of the Borrowing Statute, according to the *Miller* court, was to prevent forum shopping by non-residents.[64] The court presumably believed it to be justifiable to exclude an Illinois plaintiff from the Borrowing Statute because Illinois plaintiffs are unlikely to select Illinois as a forum solely because the Illinois statute of limitations has not expired. Illinois plaintiffs can be expected to file suit in Illinois for both domestic and foreign claims because a local forum is convenient and likely to be favorably disposed toward an Illinois resident.

Unlike the defendants in *Coan,* however, the defendants in *Miller* were not Illinois residents. Although the opinion is ambiguous with respect to the defendants' residence,[65] the Illinois Supreme Court in *Miller* appears willing to extend the Illinois plaintiff's exclusion from application of the Borrowing Statute to cases involving a non-resident defendant. The court's failure to recognize the different issues involved in a case that arose outside Illinois with a non-resident defendant is disappointing. This refusal to borrow an expired foreign statute of limitations has exacerbated the possibility of perpetual tolling in cases brought by an Illinois plaintiff against a non-resident defendant who is not subject to Illinois jurisdiction at the time the claim arises.

In both *Coan* and *Miller* the Illinois Supreme Court was careful to couch the language of its opinions in terms of creating an exclusion from borrowing for Illinois "residents."[66] The striking omission of any reference to the Illinois "plaintiffs" in these cases suggests that perhaps the court also intends to prohibit the Borrowing Statute's application when the defendant is an Illinois resident in suits by non-resident plaintiffs. Indeed, in a few cases the Illinois appellate courts have concluded that the defendant's Illinois residence

64. 98 Ill. 2d at 486, 457 N.E.2d at 18.

65. There is an alternative interpretation of the holding in *Miller*. The corporate defendant was a foreign corporation registered to do business in Illinois. The individual defendant had not been served, and thus was not before the court. The court did not expressly determine whether the corporate defendant was an Illinois resident or a non-resident. Corporations which are registered to do business in Illinois have been treated as residents. *See infra* text accompanying notes 79-80. If the corporate defendant was viewed as an Illinois resident and the individual defendant was not before the court, then *Miller* would be identical to *Coan* in that only Illinois parties were involved. In *Miller* the court consistently referred to the creation of "resident exceptions." *See Miller,* 98 Ill. 2d at 486, 457 N.E.2d at 18 (court concluded that the Illinois limitations period would be applied to actions involving Illinois residents). Thus, it is possible that *Miller* only reaffirms the earlier conclusion in *Coan,* that the Borrowing Statute does not apply when all parties are Illinois residents. If this is the case, then the opinion represents a painstaking effort by the court to conceal the nature of that conclusion.

Another mystery in *Miller* is the court's failure to refer to the appellate court's opinion in Panchinsin v. Enterprise Cos., 117 Ill. App. 3d 441, 453 N.E.2d 797 (1st Dist. 1983), decided two months earlier, which created a resident defendant exclusion from borrowing. *See infra* notes 66-68, 73 and accompanying text.

66. *See Miller,* 98 Ill. 2d at 480, 457 N.E.2d at 15; *Coan,* 53 Ill. 2d at 529, 293 N.E.2d at 589.

should prevent application of the Borrowing Statute.[67] The Illinois Supreme Court has suggested its willingness to adopt an exception for Illinois defendants, but has not yet explicitly ruled on this point.[68]

In 1983 the Illinois Appellate Court for the First District directly considered the applicability of the Borrowing Statute to a suit involving Illinois defendants in *Panchinsin v. Enterprise Cos.*[69] The plaintiffs in *Panchinsin* were California residents who sued for injuries suffered in California, caused by a product formulated, made, and sold by some of the corporate defendants in Illinois. Other corporate defendants, not doing business in Illinois, had supplied some of the chemical components for the product.[70] The plaintiffs could have sued all the defendants in California under the California long-arm statute,[71] but the one-year California statute of limitations had already expired. Illinois provided an attractive alternative since its two-year statute of limitations had not yet expired, and all the defendants were subject to Illinois jurisdiction.[72]

The defendants attempted to convince the court that the Borrowing Statute mandated selection of the expired California statute because the claim accrued in California. The defendants argued (1) that the Illinois Supreme Court's decision in *Coan* related only to the application of the Borrowing Statute to resident plaintiffs, and (2) that an exception from the Borrowing Statute for Illinois defendants, but not non-resident defendants, in suits by non-resident plaintiffs violated the equal protection clauses of the Illinois and United States Constitutions.

The First District believed that it was bound by *Coan* to hold that suits against resident defendants were not subject to the Borrowing Statute. The court also determined that the defendants would not be denied equal protection of the laws if subjected to the Illinois statute of limitations.[73] Curi-

67. *See* Chicago Mill & Lumber Co. v. Townsend, 203 Ill. App. 457 (2d Dist. 1916); Delta Bag Co. v. Leyland & Co., 173 Ill. App 38 (1st Dist. 1912); Nat'l Bank v. Danahy, 89 Ill. App. 92 (2d Dist. 1899); Hibernian Banking Ass'n v. Commercial Nat'l Bank, 157 Ill. 524, 32 N.E. 891 (1895). *But see* Sarro v. Maupin, 127 Ill. App. 2d 26, 261 N.E.2d 756 (1st Dist. 1970); Hayward v. Sencenbaugh, 141 Ill. App. 395 (2d Dist. 1908). Unfortunately, the opinions are not well-written, and it is not always possible to determine whether the courts' refusal to apply the Borrowing Statute is based on the defendant's residence or the fact that the claim itself arose in Illinois.

68. *See* Emerson v. North Am. Transp. & Trading Co., 303 Ill. 282, 135 N.E. 497 (1922). In *Emerson,* plaintiff was attempting to collect on a certificate of deposit issued in Alaska by a corporation which had its principal office in Illinois. The court refused to apply the Alaska statute of limitations to bar the case because the court concluded both that the cause did not accrue in Alaska (and thus did not trigger application of the Borrowing Statute) and that the defendant's Illinois residence precluded application of the statute. *Id.* at 289, 135 N.E.2d at 500.

69. 117 Ill. App. 3d 441, 453 N.E.2d 797 (1st Dist. 1983).

70. Brief for Appellant at 6, Panchinsin v. Enterprise Cos., 117 Ill. App. 3d 441, 453 N.E.2d 797 (1st Dist. 1983).

71. *Id.* at 12.

72. *See supra* note 13.

73. The court held that the discrimination against resident defendants bore a rational relationship to a legitimate legislative purpose and hypothesized that the reason for such

ously, the court sidestepped an explanation of why all the corporate defendants were considered to be Illinois residents.

Apparent judicial hostility toward the Borrowing Statute may have motivated the creation of these sweeping resident exceptions to the Borrowing Statute. If the Illinois Supreme Court accepts *Panchinsin's* resident defendant exclusion, the only instances in which the Borrowing Statute will be used is in suits involving non-resident parties. It is unlikely that the legislature intended such a limited use of the statute.

In addition to the question of whether resident exceptions comport with the intentions of the legislature, one must question whether the judically created resident exclusions are appropriate from a policy perspective. The answer must be a qualified no for the following reasons:

1. The broad application of a plaintiff's resident exclusion undermines the legislative objective of eliminating unlimited tolling of the Illinois statute of limitations and may be unjust to non-resident defendants.

2. The resident exclusions invite forum shopping.

3. Residency cannot be defined with sufficient precision for use in these cases.

4. The determination of residence, and emphasis on its role, diverts attention from other factors in the case.

1. Resident Plaintiff Exclusions—Problems of Perpetual Tolling and Fairness to Defendants

The failing of the *Coan* and *Miller* decisions lies in the Illinois Supreme Court's refusal to distinguish between foreign claims brought against Illinois defendants and foreign claims brought against non-resident defendants. In the former instance, as in *Coan,* application of the Borrowing Statute is not appropriate when all parties are from Illinois. In most cases between Illinois parties the choice of law will lead to the application of Illinois substantive law[74] and, in such cases, the limitations period also should be governed by Illinois law. Kentucky's involvement with the parties in *Coan* was purely fortuituous, and to bar that suit under Kentucky law would have been unjust. Further, the choice of Illinois law will not lead the court to a tolled Illinois statute of limitations; the defendant's Illinois residence will prevent tolling.

A non-resident defendant sued on a foreign claim, however, has a greater right to the protection of a foreign statute of limitations because of the

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discrimination was (1) to protect Illinois residents and (2) to stimulate Illinois residents to maintain high safety standards. *Id.* at 447, 453 N.E.2d at 801. The analysis of the court seems strained. Even if Illinois residents are most likely to injure other residents, such cases are excluded from borrowing by the exception for Illinois plaintiffs. The *Panchinsin* court asserted an interest in the safety of products supplied to Illinois residents, and the control of defendant's behavior. *Id.* Neither interest, however, was triggered in *Panchinsin* since not all the defendants conducted activities in Illinois and plaintiffs were all non-residents.

74. *See, e.g.,* Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593 (1972).

defendant's substantial ties to the state where the claim arose. This is especially true if the defendant is a resident of the foreign state. Such cases may require the application of foreign substantive law because of the defendant's non-Illiinois residence and the accrual of the claim outside Illinois. The justifiable use of the Illinois limitations period in these cases, as in *Miller,* is less obvious than in *Coan.* Further, these cases present the potential for perpetual tolling of an Illinois statute because the non-resident defendant in an out-of-state claim may not be subject to the jurisdiction of Illinois courts.[75] If eliminating the possibility of perpetual tolling is the primary goal of the Borrowing Statute, then *Miller* was incorrectly decided.

2. Resident Exclusions—Forum-Shopping

The exclusion of both resident plaintiffs and resident defendants from the Borrowing Statute will encourage forum shopping by both plaintiffs and defendants. In particular, after *Panchinsin* non-resident plaintiffs will be encouraged to file claims in Illinois against resident defendants that are barred by the statute of limitations in other states and that have no connection with Illinois other than it being the defendant's residence. Further, a plaintiff may be encouraged to assert Illinois residence in marginal cases in order to litigate in Illinois claims barred elsewhere by taking advantage of the Illinois statute of limitations. The amount of forum shopping will depend on the breadth of the definition of "residence" in Borrowing Statute cases,[76] and will be especially troublesome in claims brought by and against corporate defendants.

3. Corporate Residence Definition

In the *Panchinsin* decision the court appeared willing to treat all corporate defendants as residents, apparently because of their qualification to do business in Illinois. Some of the defendants, however, actually conducted no business in Illinois.[77] If such a broad definition of corporate residence is

75. The statute of limitations is not tolled if the defendant is subject to Illinois' jurisdiction. *See* Code of Civil Procedure § 13-208, ILL. REV. STAT. ch. 110, § 13-208 (Cum. Supp. 1984).

76. Technically the legal definitions of residence and domicile differ; a party may have several residences but only one domicile. R. CRAMPTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 49 (West 3d ed. 1981). Domicile refers to the place where one tends to reside permanently, while a residence may be a place where one lives temporarily, such as a summer home or military post. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §11 comment k (1971). Illinois courts, as is typical of many states, use the terms interchangeably to refer to a party's domicile. Thus, the resident exclusion from the Borrowing Statute for an individual applies to parties domiciled in Illinois.

77. *See, e.g.,* Brief for Appellant at 8, Panchinsin v. Enterprise Cos., 117 App. 3d 441, 453 N.E.2d 797 (1st Dist. 1983). Residence is determined at the time the claim arises. As a general rule in conflicts cases the courts are reluctant to allow a party's change of residence after a claim has arisen to be taken into account in the choice of law treatment of a case. The problems of forum shopping that may be encouraged by opportunistic plaintiffs or defendants in large part are responsible for this judicial view. *See, e.g.,* Reich v. Purcell, 67 Cal. 2d 551,

followed in subsequent cases, Illinois will provide an attractive forum for many cases with no connection to Illinois other than the plaintiff or defendant's alleged residence in the state. Illinois residence would easily be established for a large, national corporation, which frequently will qualify to do business in all states.

No Illinois case arising under the Borrowing Statute has articulated a legal standard for the definition of corporate residence. Several cases assume that the corporate domicile, the state of legal incorporation, determines residence for borrowing purposes without further inquiry as to whether the corporation conducts any business in that state.[78]

Under a prior version of the Tolling Statute (when residence affected tolling), a corporation was considered an Illinois resident if it was subject to the jurisdiction of the state.[79] Three difficulties arise in attempts to apply

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432 P.2d 727, 63 Cal. Rptr. 31 (1967); *see also* Note, *Post Transaction or Occurrence Events in Conflict of Laws,* 69 COLUM. L. REV. 843 (1969) (discussing Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967)). *But see* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

In the application of the Borrowing Statute, Illinois courts similarly have taken the view that residence is measured at the time the cause of action accrues, and subsequent moves of the parties are not taken into account. *See* Hibernian Banking Ass'n v. Commercial Nat'l Bank, 157 Ill. 524, 41 N.E. 919 (1895); Wetzel v. Hart, 41 Ill. App. 2d 371, 190 N.E.2d 619 (2d Dist. 1963); First National Bank v. Hurlbut, 224 Ill. App. 297 (1st Dist. 1922). *Contra* McGuigan v. Rolfe, 80 Ill. App. 256 (1st Dist. 1898); Berry v. Krone, 46 Ill. App. 82 (3d Dist. 1892).

78. *See, e.g.,* Bernard Food Indus., Inc. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969), *cert. denied,* 397 U.S. 912 (1970); Mitchell v. United Asbestos Corp., 110 Ill. App. 3d 485, 426 N.E.2d 350 (5th Dist. 1981).

79. Illinois case law has established that a corporation available for service of process could invoke the protection of an Illinois statute of limitations. For example, when a corporation has a registered agent for service of process in the state, the statute is not tolled. *See* Bernard Food Indus., Inc. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969); *see also* Hubbard v. United States Mortgage Co., 14 Ill. App. 40 (1st Dist. 1883) (defendant not subject to jurisdiction in Illinois through presence of agents viewed as non-resident); Pennsylvania Co. v. Sloan, 1 Ill. App. 364 (1st Dist. 1878) (defendant deemed an Illinois resident because it conducted extensive business in the state). *Contra* Thornton v. Nome & Sinook Co., 260 Ill. App. 76 (1st Dist. 1931). In *Thornton,* the corporate defendant's principal place of business was Illinois when the cause of action accrued. The plaintiff was a non-resident of Illinois. The court refused to toll the statute when the defendant ceased business operations in Illinois, since the plaintiff was not an Illinois resident. *Id.* at 81-83.

Most of the cases discussed above, however, were decided before the Supreme Court's decision in International Shoe Co. v. Washington, 326 U.S. 310 (1945), where the Supreme Court established the "minimum contacts" test for state courts' assertion of personal jurisdiction. Prior to *International Shoe* the courts required a finding that the corporate defendant transacted enough business within the state to be present or to have consented to suit there. *See supra* notes 36-37. Currently, some states assert jurisdiction over a corporate defendant if it merely causes effects within a state. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 reporter's note (1971).

A number of Illinois cases have held that the Illinois long-arm statute is co-extensive with the due process clause of the United States and Illinois Constitutions. *See, e.g.,* Hass v. Fancher Furniture Co., 156 F. Supp. 564 (N.D. Ill. 1957); Baltimore & O.R.R. v. Mosele, 67 Ill. 2d 321, 368 N.E.2d 88 (1977); Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); Servo Instruments Inc. v. Fenway Mach. Co., 92 Ill. App. 3d 509, 415 N.E.2d 34 (3d Dist. 1980).

these cases to the Borrowing Statute. First, the tolling cases that equated corporate residence with amenability to jurisdiction were decided many years ago, when the level of corporate activity necessary to subject a corporation to a state's jurisdiction was much greater than that necessary under current jurisdictional principles.[80] Under current jurisdictional standards, most large corporations would be viewed as Illinois residents. Second, the analogy to Tolling Statute cases itself may be inappropriate. The treatment of a corporation as a resident under the Tolling Statute eliminates the tolling of a suit brought against a corporate defendant and decreases the likelihood of a plaintiff forum shopping for a state with a tolled statute of limitations. As *Panchinsin* demonstrates, however, the categorization of a defendant corporation as an Illinois resident under the Borrowing Statute may promote forum shopping. Third, and most important, the shortcoming of a general jurisdictional definition of residence for the Borrowing Statute is that it does not distinguish between actual corporate activities within the state as opposed to mere qualification to do business or legal incorporation. The qualification to do business may subject a corporation to jurisdiction of the state,[81] but this activity, without more, should not automatically subject the corporate defendant to the Illinois statute of limitations. For the same reason, a corporate plaintiff should not be permitted to claim exclusion from the Borrowing Statute (as an Illinois resident) by merely qualifying to do business in Illinois.

Aside from corporate qualification to do business, the other elements of a jurisdictional definition of corporate residence are appropriate. Corporate domicile (legal incorporation) represents a deliberate attempt by a corporation to benefit from a legal association with the state of incorporation, even though the corporation may transact no business within that state. The corporate domiciliary is not unlawfully burdened by the use of a local statute of limitations for all claims, including those which arise out of the state. Similarly, a corporation's continued transaction of business within a state, sufficient to establish general jurisdiction, also signifies a substantial corporate presence and justifies the application of a local statute of limitations to both in- and out-of-state claims against that defendant.[82]

The Illinois Supreme Court has refined this position by its recent pronouncement that the Illinois long-arm statute "should have a fixed meaning without regard to the changing concepts of the 'minimum contacts' test under the due process clause of the Constitution." Green v. Advance Ross Elec. Corp., 86 Ill. 2d 431, 436, 427 N.E.2d 1203, 1206 (1981).

80. *See, e.g.*, Simon v. Southern Ry., 236 U.S. 115 (1915); Moulin v. Trenton Mut. Life & Fire Ins. Co., 25 N.J.L. 57 (1855).

81. Business Corporation Act, ILL. REV. STAT. ch. 32, § 5.25 (Supp. 1984), provides for service of process on a foreign corporation having a certificate of authority to transact business by service of its registered agent or the Secretary of State.

82. While location of corporate headquarters within the state establishes general jurisdiction, a less substantial level of corporate activity also suffices. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Maunder v. Dehavilland Aircraft of Canada Ltd., 102 Ill. 2d 342, 466 N.E.2d 217 (1984); Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1969); *see also* Manos v. Trans World Airlines, Inc., 295 F. Supp. 1170, 1175

When a corporation is subject only to long-arm jurisdiction of the state, a more limited definition of residence is appropriate. If the corporation is subject to long-arm jurisdiction of a state for a particular claim, the minimum contacts with the state, which establish jurisdiction for that claim, also justify treating the corporation as a resident *for that claim.* Under the jurisdictional test, the court must ascertain that the corporation's "minimum contacts" with the state are related to the claim.[83] The same nexus should be required for application of a local statute of limitations as is required to find jurisdiction.

These alternate definitions of corporate residence, while admittedly broad, avoid the imposition of a nationwide corporate residence under a "qualification to do business" definition. In addition to being fairer to the corporate defendant, these definitions would reduce the amount of forum shopping both by corporate plaintiffs and against corporate defendants.

4. Diversion of Judicial Attention

The discussion thus far has suggested that the residence exclusions operate too broadly, without allowing the courts to focus on other factors in statute of limitations selection. In *Miller,* for example, the plaintiff's residence exception was extended without any consideration of the foreign states' competing interests in protecting the defendant parties from application of a longer Illinois limitations period. All of the cases demonstrate a blind refusal to consider the policy implications underlying the residence exceptions. The following discussion will consider other relevant factors which also should be considered in the limitations selection decision.

B. Where Does a Claim Arise?

The Illinois Borrowing Statute directs the court to borrow the expired statute of the place where a claim "arises," but does not define the term "arises." The statute was enacted when American choice of law rules, including the Illinois rule, reflected an assumption that parties acquired vested rights based on the territorial situs of a particular transaction.[84] Since

(N.D. Ill. 1969) (adopting a "doing business" definition of residence); 28 U.S.C. §1332(c) (1982) ("principal place of business" definition of residence is used to establish diversity jurisdiction). The "principal place of business" definition of corporate residence is not without problems. It can be difficult to ascertain the principal place of business of a large national company. M. GREEN, BASIC CIVIL PROCEDURE 22 (2d ed. 1979).

83. *See, e.g.,* Green v. Advance Ross Elec. Corp., 86 Ill. 2d 431, 427 N.E.2d 1203 (1981); People v. Parsons Co., 122 Ill. App. 3d 590, 461 N.E.2d 658 (2d Dist. 1984); Loggans v. Jewish Community Center, 113 Ill. App. 3d 549, 447 N.E.2d 919 (1st Dist. 1983).

84. The originator of the vested rights approach was A.V. Dicey, the English scholar and jurist. *See* A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO CONFLICT OF LAWS ch. 1 (1st ed. 1896). The American version was developed by Joseph Beale, who gave Dicey's vested rights concept a territorial status. *See* D. CAVERS, THE CHOICE-OF-LAW PROCESS 5-7 (1966). Beale was primarily responsible for the First Restatement which places heavy territorial emphasis on choice of law principles. R. CRAMPTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 6 (West 3d ed. 1981).

most rights were transitory, a plaintiff could seek recognition of the right in any forum that had jurisdiction over the necessary parties. Once the court attached a situs to the key event in an occurrence or transaction, a plaintiff's rights, if any, could be determined and enforced under the law of the "situs" state.[85] For example, for many years American courts accepted the maxim that in a personal injury suit a plaintiff's vested rights were determined by the law of the state where a harmful force impinges upon the plaintiff's body, commonly known as a "last events" test.[86] Under a vested rights approach, the validity of a contract was assessed under the law of the state where the contract was signed.[87]

In early cases under the Borrowing Statute, courts interpreted "the place where a claim arose or accrued," using accepted principles of vested rights theory, to refer to the geographic situs of a transaction. The concept of accrual in the Borrowing Statute thus coincided with the general framework of choice of law rules for substantive rights of recovery as established by vested rights principles. Although in the abstract the rule seems easy to apply, in many cases the elements of a claim do not center on one state. As a result, it has been difficult for the courts to agree on the meaning of where a claim "arises."

Many cases under the Borrowing Statute were actions brought on written obligations in debt.[88] These cases present a good case study of the difficulty the courts have encountered in defining the situs of a claim; it is difficult to attach a single situs to these transactions because the elements of the claim may relate to several states.[89] The courts have been unable to pinpoint the precise moment in the stream of events when a claim has arisen.

Some courts have concluded that the place of accrual is the place where an obligation is entered into and made payable, if both these events take place in the same state.[90] Other courts conclude that the plaintiff's residence

85. One author commented: "The foundation principle of the Conflict of Laws is situs. Every element in every transaction known to the law has a situs somewhere, and the law of the situs will regulate and control the legal effect of the element." R. MINOR, CONFLICT OF LAWS 51 (1901).

86. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §377 (1934).

87. *Id.* §332.

88. *See, e.g.*, Glenn v. McDavid, 316 Ill. App. 130, 44 N.E.2d 84 (3d Dist. 1942); First Nat'l Bank v. Hurlbut, 224 Ill. App. 297 (1st Dist. 1922); Hayward v. Sencenbaugh, 141 Ill. App. 395 (2d Dist. 1908).

89. It is possible that different states may be the situs of a) the negotiation; b) the formal execution of the obligation; c) the delivery of the consideration; and d) the site where repayment is due. It is unclear whether the claim arises where the contract is formed or where the debtor or creditor is located when the debt becomes due.

90. *See, e.g.*, Collins v. Manville, 170 Ill. 614, 48 N.E. 914 (1897). In Collins, the plaintiff was a resident of New Jersey when the note in question was executed, but later moved to Colorado, residing there at the time the note was due. The defendant was a citizen of New York. The court concluded that the cause of action accrued in New York, the state in which the note was made and executed, and applied the New York statute of limitations to bar the suit. *Id.* at 615, 48 N.E. at 914-15. In First Nat'l Bank v. Hurlbut, 224 Ill. App. 297 (1st Dist. 1922), the plaintiff, a Colorado resident, was suing the defendant on notes executed, delivered

determines where a debt arises when the creditor/plaintiff is an Illinois plaintiff.[91] Some Illinois courts have adopted yet a different approach to defining accrual in debt cases—that the most important element to determine the location of a claim's accrual is the location of the debtor at the time the obligation becomes due.[92] When both the plaintiff and the defendant are not Illinois residents at the time a cause of action has accrued, the courts have defined accrual as occurring in any state in which the debtor is amenable to a court's jurisdiction for the duration of that state's limitations period.[93] Thus, if the defendant has resided in any state after the accrual of the action for the duration of such state's statute of limitations, the case is barred by "borrowing" that state's statute of limitations.

Perhaps these divergent definitions of situs merely reflect the logical difficulty of assigning a single situs to a multistate transaction. Arguably, the debtor's residence, creditor's residence, and the location of the loan transaction all relate to the claim in equal fashion. The inherent ambiguity of situs has prevented the courts from using situs as a criterion to apply the Borrowing Statute consistently from case to case; the shortcomings of situs as a criterion for determining where a claim arises extend not just to debt cases, but also to tort and general contract claims.[94]

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and payable in Colorado. The defendant, a Colorado resident at the time the notes became due, later moved to Illinois. Under the rationale of Collins, the court concluded that the cause of action accrued in Colorado due to defendant's execution and delivery of the notes in Colorado. *Id.* at 298-300.

91. *See, e.g.*, Berry v. Krone, 46 Ill. App. 82 (3d Dist. 1891); Story v. Thompson, 36 Ill. App. 370 (2d Dist. 1889).

92. *See* National Bank v. Danahy, 89 Ill. App. 92 (2d Dist. 1899); Great W. Tele. Co. v. Stubbs, 55 Ill. App. 210 (1st Dist. 1894); *see also* Wooley v. Yarnell, 46 Ill. App. 112, *aff'd*, 142 Ill. 442, 32 N.E.2d 891 (1891) (Illinois statute of limitations applied even though neither creditor nor debtor were Illinois residents at the time the suit actually commenced).

93. *See, e.g.*, Strong v. Lewis, 204 Ill. 35, 65 N.E. 556 (1903); Hyman v. McVeigh, 10 Chicago Legal News, Jan. 21, 1878, at 157, col. 1 (Ill. Sup. Ct. 1878); Hyman v. Bayne, 83 Ill. 256 (1876). *But see* McGuigan v. Rolfe, 80 Ill. App. 256 (1st Dist. 1898). In *McGuigan*, the defendant incurred a debt in Michigan where both he and the plaintiff resided. After the claim accrued, the plaintiff moved to Illinois. *Id.* at 257. The defendant resided in two separate states, Kentucky and Arkansas, for longer than their respective limitation periods. However, the court held that only the running of the Michigan statute could bar the action since that was the state where the debt accrued. *Id.* at 259-60.

94. Delta Bag Co. v. Leyland & Co., 173 Ill. App. 38 (1st Dist. 1912), is a fitting example of the difficulty courts encounter in attaching a situs or place of accrual to some torts. In Delta, the plaintiff claimed that his cargo had been damaged while being transported from Liverpool, England to New Orleans, Louisiana. *Id.* at 39. The court did not discuss the point at which the injury occurred, although from the facts it appeared that the damage to the goods occurred on the high seas. Apparently the point of injury was not dispositive, however, because the court found that the Illinois statute of limitations applied because the defendant was an Illinois resident. *Id.* at 41. In another case, Janeway v. Burton, 201 Ill. 78, 66 N.E. 337 (1903), the defendant in a replevin suit argued that the action had accrued in New Jersey, where the wrongful taking of his goods had occurred, and thus the New Jersey statute barred the action. *Id.* at 78-79, 66 N.E. at 337. The court, however, decided without discussion that the claim had arisen in Illinois presumably due to the plaintiff's residence there. *Id.* The plaintiff thus benefited from the tolled Illinois statute of limitations.

Yet another example of judicial manipulation of the accrual definition which favors a domestic

The divergent definitions of situs, however, reflect an additional consideration. The thread that weaves the debt cases together is the courts' obvious opposition to the use of the Borrowing Statute to bar an Illinois resident's claim. In many cases, the courts have focused upon the factual element of the transaction that allows the courts to conclude that the claim arose in Illinois, and thus avoid using the Borrowing Statute.[95] When the plaintiff is a non-resident, the courts are more inclined to find a non-Illinois situs and select a foreign statute of limitations to bar the claim in Illinois.[96] Indeed, in some cases with non-resident plaintiffs and defendants the courts have applied the situs rule very broadly to find that the claim arose in any jurisdiction in which a limitations period has expired due to the defendant's presence there, and have consequently applied that state's limitations period to bar the claim.[97]

The situs cases, like the residence cases, reveal judicial antagonism toward the use of the Borrowing Statute. The difference between the cases is merely technique. Some courts have openly refused to borrow foreign statutes in cases with Illinois plaintiffs;[98] other courts have used the less direct, but equally effective, method of manipulating the situs of a claim.[99]

The vested rights/last events rule was a primary reason for the courts' difficulty in deciding where a claim arose in older cases. The principle of attaching a location to a claim is appropriate for choice of law purposes, but the vested rights attempt to attach geographic location to a claim on the basis of a set of rigid rules failed. Later Borrowing Statute cases in Illinois suggest displeasure with a simple vested rights approach to determining the location of a claim's accrual and indicate a search for broader rules.

In general, enormous change in judicial thought respecting conflicts problems has taken place in Illinois in recent years.[100] In 1971, the Illinois Supreme Court jettisoned the last events test in selecting the law in a torts case in

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plaintiff in a contract case is Orschel v. Rothschild, 238 Ill. App. 353 (1st Dist. 1925). The plaintiff and defendant had entered into an indemnity contract in Michigan when defendant was a Michigan resident and plaintiff an Illinois resident. *Id.* at 354-56. The defendant later became liable for losses under the contract, triggered by the plaintiff's liability endorsement of commercial paper in Illinois, and his later liability for losses arising out of the endorsement. The court concluded that the action accrued in Illinois when the plaintiff, an Illinois resident, made his last payment upon the endorsement. *Id.* at 357. It would seem just as logical, however, to conclude that the claim arose in Michigan, as a result of the defendant's default in Michigan.

95. *See supra* note 56; *see also* Janeway v. Burton, 201 Ill. 78 (1903) (although taking of property occurred in New Jersey, court concluded cause of action accrued in Illinois).

96. *Compare* First Nat'l Bank v. Hurlbut, 224 Ill. App. 297 (1922) (claim barred under Colorado law where defendant moved to Illinois after cause of action accrued) *with* McGuigan v. Rolfe, 80 Ill. App. 256 (1st Dist. 1898)(court refused to borrow and concluded claim accrued in Illinois when plaintiff moved to Illinois after accrual of a debt claim).

97. *See supra* note 93 and accompanying text.

98. *See supra* notes 46-51, 55-68 and accompanying text.

99. *See supra* notes 90-97 and accompanying text.

100. *See, e.g.*, Conviser, *Conflict of Laws: Inching Forward Slowly*, 23 DE PAUL L. REV. 89 (1973); Conviser, *Conflict of Laws: Alas, Confusion Still Reigns*, 22 DE PAUL L. REV. 16 (1972); Polelle, *Conflict of Laws—One Inch Forward, A Half Inch Backward*, 24 DE PAUL L. REV. 320 (1975).

favor of the law of the state with the most significant relationship to the claim,[101] which in turn is based on the Restatement (Second) of Conflict of Laws (Second Restatement) most significant relationship analysis. The Second Restatement supplants rules with standards that require consideration of values that typically were ignored under vested rights rules. The many factual contacts of a case with various states, together with the policies of the states, are now analyzed to determine the applicable law in a case with multistate contacts.[102] As one Illinois court stated:

> The desire to isolate and analyze the actual interests of the various jurisdictions in the litigation has given rise to a three-step process: " . . . first to isolate the issue, next to identify the policies embraced in the laws in conflict, and finally to examine the contacts of the respective jurisdictions to ascertain which has a superior connection with the occurrence and thus would have a superior interest in having its policy or law applied."[103]

The most significant relationship analysis has clearly influenced the judicial definition of claim accrual in some Borrowing Statute cases. For some courts the state where a claim arises is the state with the most significant relationship to the claim—the state whose law properly determines the substantive rights of the parties. The courts, however, have had difficulty understanding the Second Restatement analysis in the Borrowing Statute context. As a result, their opinions have not usually provided predictable or satisfactory resolution of Borrowing Statute issues.

The only state court decision to use a most significant relationship analysis of claim accrual was the Illinois Appellate Court for the Fifth District in

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101. *See, e g.*, Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593 (1970); *see also* Ehrman v. Cook Elec. Co., 468 F. Supp. 98 (N.D. Ill. 1979) ("most significant relationship" test applied to contracts case); Champagnie v. W.E. O'Neil Constr. Co., 77 Ill. App. 3d 136, 395 N.E.2d 990 (1st Dist. 1979) (public policy doctrine, which would have precluded application of Wisconsin law despite injury occurring in Wisconsin, was rejected in favor of "most significant relationship" test). Federal courts in diversity cases are required to apply the choice-of-law rules of the state in which they sit. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). This result is dictated by the principle of state and federal court uniformity of Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

102. The Restatement (Second) of Conflict of Laws (Second Restatement) was adopted by the American Law Institute in 1969. For each subject matter area—torts, contracts, property—the Second Restatement requires location of specific factual connections of the state to a case. For torts, § 145(2) requires the court to determine (a) where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) place where the parties' relationship is centered. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971). The contacts are evaluated according to their relative importance with respect to the particular issue, and in light of the principles of § 6, which includes (a) the relevant policies and interests of the forum and other states; (b) protection of justified expectations of the parties; (c) basic policies underlying a particular field of law; and (d) certainty, predictability, and uniformity of result. Id. § 6.

103. Mitchell v. United Asbestos Corp., 100 Ill. App. 3d 485, 494, 426 N.E.2d 350, 356-57 (5th Dist. 1981) (citations omitted).

Mitchell v. United Asbestos Corp.[104] The plaintiff in *Mitchell* brought a wrongful death action for her husband's death from asbestosis. The disease allegedly developed while her husband, a Missouri resident who died in Missouri, worked for various employers in Illinois and Missouri installing asbestos products made by the defendants.[105] The defendants were foreign corporations that did business in Illinois. The Missouri statute of limitations had expired, but the Illinois statute had not. In *Mitchell*, the court would not have been able to locate the place of accrual of the claim under a last events/vested rights test. Under a last events test, the decedent's exposure to the harmful material, rather than his death,[106] would constitute the last event but the decedent's exposure to asbestos was evenly divided between Illinois and Missouri. Thus, the court turned to the most significant relationship analysis to decide where the claim accrued under the Borrowing Statute.[107]

The *Mitchell* court first concluded that the Illinois Wrongful Death Statute[108] would govern the substantive elements of the plaintiff's claim, such as the amount of statutory damages recoverable, because Illinois law directly furthered both Illinois' and Missouri's "policies of recovery."[109] According to the court, it would be inconsistent to find that the claim arose outside of Illinois for purposes of the Borrowing Statute once it had determined that Illinois law would control the substantive issues in the case.[110] Thus, the *Mitchell* court adopted a system by which both the substantive and limitations laws would be drawn from the same juridiction. The law chosen to govern the substantive issues controlled the limitations choice by dictating where the claim arose.

This method of limitations selection has been referred to as the "controlling jurisdiction" analysis.[111] It avoids the blind selection of the limitations law where fortuitious events transpired under a situs test. Accordingly, the *Mitchell* court favored the law of the state found to be the state with the most substantial relationship to substantive matters in the suit. The *Mitchell* court's broader perspective, however, eliminates separate consideration of the statute of limitations issue and, as a result, loses flexibility.

The federal courts in Illinois diversity suits have used the most significant

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104. 100 Ill. App. 3d 485, 426 N.E.2d 350 (5th Dist. 1981).

105. *Id.* at 489, 426 N.E.2d at 353.

106. *Id.* at 491-94, 426 N.E.2d at 354-57.

107. *Id.* at 499, 426 N.E.2d at 360.

108. ILL. REV. STAT. ch. 70, §§ 1, 2 (1983).

109. 100 Ill. App. at 496-97, 426 N.E.2d at 358-60. The court concluded that Illinois' interest in deterring such conduct and in permitting full recovery outweighed Missouri's interest in limiting recovery and thus applied Illinois law. *Id.*

110. *Id.* at 500, 426 N.E.2d at 360.

111. The "controlling jurisdiction" approach has been suggested by several scholars. It was originated by Ernest Lorenzen, the author of Comment, *The Statute of Limitations and the Conflict of Law*, 28 YALE L.J. 492 (1919). *See also* Note, *An Interest-Analysis Approach to the Selection of Statutes of Limitation*, 49 N.Y.U. L. REV. 299, 304-06 (1974) (suggesting that failure to borrow a foreign jurisdiction's longer statute of limitations may be contrary to the principles of federalism).

relationship analysis in conjunction with the Borrowing Statute in three cases, two before the district court and one before the Seventh Circuit.[112] While none of the cases is a model of Second Restatement analysis, the Seventh Circuit opinion in *Hamilton v. General Motors Corp.*[113] is the weakest of the three.

The decedent in *Hamilton,* a California resident, had provided services to the defendant, a national corporation. These services included consultation and testifying on the defendant's behalf in an antitrust lawsuit brought against the defendant. The plaintiff, decedent's wife, sought to recover for the services the decedent had provided. The Illinois statute of limitations was five years; the California statute of limitations was two years and had expired. The decedent had met with the defendant's attorneys both in California and Illinois in preparation for the trial. His deposition was taken in California; he never testified in Chicago.[114] The court concluded that the contract's place of accrual under the Borrowing Statute should be determined under a most significant relationship test.[115] Without explanation, unfortunately, the court concluded that the state with the most significant relationship to the case was Illinois, because the decedent provided services in connection with a trial in that state.

The parties' many California contacts, which the court ignored, implied substantial California involvement and should have triggered an analysis of the clash between Illinois and California law. That additional policy analysis might have changed the court's limitations decision. Given California's short statute of limitations, it can be concluded that California did not appear overly concerned with the ability of its plaintiff to recover and thus presumably would select its expired statute of limitations to bar the suit in California. Illinois had little reason to provide a forum for the enforcement of a service contract pursuant to which the primary services were rendered outside Illinois. In light of the apparent disinterest of both states, a preferable result may have been the selection of the California statute to dismiss the claim under the Borrowing Statute.

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112. *See infra* notes 114-30 and accompanying text; *see also* Templeman v. Baudhuin Yacht Harbor, Inc., 608 F.2d 916 (1st Cir. 1979) (court stated that significant factors should be weighed, yet failed to weigh Illinois' condiderations except to favor a resident-plaintiff). Templeman was decided under Illinois law after being transfered to the First Circuit, and the court applied the Illinois Borrowing Statute. Illinois residents brought tort and contract actions against a Wisconsin yacht seller over a yacht which sank in Puerto Rico while on a voyage from Puerto Rico to the Virgin Islands. *Id.* at 916. The statutes of limitations of Illinois, Wisconsin, Michigan (situs of delivery), and Florida (situs of repairs) all would have permitted the case; the Puerto Rico statute of limitations had expired. The court explicitly rejected the "last events" test for accrual, which would have given the claim a Puerto Rican situs. *Id.* at 917-18. Accrual of both the contract and tort claims were decided under a "most significant relationship" test. Although the court did not conclude which state had the most significant relationship to the case, it reasoned that Puerto Rico had the "least significant" relationship and thus its statute of limitations could not be selected to bar the claims. *Id.* at 918.

113. 490 F.2d 223 (7th Cir. 1973).

114. *Id.* at 225-26.

115. *Id.* at 225 n.1.

The United States District Court for the Northern District of Illinois used the most significant relationship test to define the place of accrual of a tort claim for borrowing purposes in *Klondike Helicopters, Ltd. v. Fairchild Hiller Corp.*[116] While the *Klondike* court's analysis of the facts was superior to the *Hamilton* court's analysis, like *Hamilton, Klondike* failed to address the broader policy issues concernining limitations selection. The plaintiff in *Klondike* sued the defendant, a helicopter manufacturer, in tort and contract for damages he suffered in the crash of a helicopter that he had purchased from the defendant.[117] The defendant manufactured the helicopter in California. The contract of sale was executed, and the aircraft was delivered, in California. The plaintiff, a British Columbian citizen, used the aircraft in British Columbia, where the accident occurred. The corporate defendant was domiciled in Maryland and shortly after the delivery of the aircraft terminated its California operations. The California statute of limitations had expired, but the statutes of British Columbia and Illinois had not. For the tort claim the court used the most significant relationship analysis under the Borrowing Statute to determine, not how the states were related to the claim, but where the parties' relationship with each other was centered. According to the court, the parties' relationship originated in California when the aircraft was delivered, and shifted to British Columbia when the plaintiff used the plane there with the defendant's knowledge.[118] British Columbia's relationship to the claim buttressed the court's conclusion that the tort "arose" in British Columbia and was maintainable under British Columbian law. In contrast with that approach, however, the contract claim was subjected to the territorialist contract "place of execution and delivery" rule, seemingly because the court did not believe that an Illinois court would apply a Second Restatement analysis to contract claims. Applying the situs rule, the court dismissed the contract claim because of the expired California statute of limitations.[119]

Klondike illustrates why the Second Restatement analysis, with its broader consideration of the many factual elements in a conflicts case, is preferable to the last events rule for defining where a claim arises. In *Klondike,* the

116. 334 F. Supp. 890 (N.D. Ill. 1971).

117. *Id.* at 893.

118. *Id.* at 894.

119. *Id.* at 896. *Klondike* was decided the year after the Illinois Supreme Court adopted the most significant relationship principles in a tort case. Thus, the court's reluctance to utilize the theory in a contract case without express state decisional guidance is understandable. *Cf.* Manos v. Trans World Airlines, Inc., 295 F. Supp. 1170 (N.D. Ill. 1969) (court refused to "stretch the guidelines" leaving the job to the Illinois Supreme Court or Illinois legislature). In *Manos,* the Northern District of Illinois pointedly refused to abandon the "last events" definition of where a claim arose. *Id.* at 1175-76. Manos was decided, however, prior to the Illinois Supreme Court's adoption of the "most significant relationship" analysis in Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593 (1970). Currently, the federal courts may be less reluctant to adopt a Second Restatement analysis for contract claims given the continuing failure of the Illinois Supreme Court to decide this issue. *See, e.g.,* Overseas Dev. Disc Corp. v. Sangamo Constr. Co., 686 F.2d 498, 511 (7th Cir. 1982) (concluding that Illinois was "about to adopt" such analysis for contracts).

court considered not just where the accident occurred, but also where events preceding the crash took place. These preceding contacts would be omitted from a vested rights analysis. Although *Klondike's* analysis was more extensive than *Hamilton's,* the factual analysis was far from complete. Because residence plays a major role in a Second Restatement analysis, the court also should have discussed how the parties' residences related to the statute of limitations selection.[120] The parties' residences may have been as significant as where the parties negotiated with each other because limitations periods are thought to reflect a state's solicitude for repose and the rights of particular parties. For example, California may have had no reason to apply its limitations period to bar either the contract or tort claim because there was no California resident defendant to protect. On the other hand, British Columbia had very direct involvement both with the accident and with one of the parties, the plaintiff. Accordingly, British Columbian law properly governed the limitations period applicable to the tort claim.[121]

Although the most significant relationship definition of place of accrual of a claim has the advantage of a less rigid determination of situs, its application led to surprising results when the court in *Nutty v. Universal Engineering Corp.*[122] engaged in simple contact counting.[123] The Second Restatement, with its reliance on multiple factual elements in a case, sometimes encourages a court to engage in contact counting for choice of law issues. This is a process in which the court simply selects the law of the state with the most factual ties to the claim regardless of the contact's significance. For example, in *Nutty* an Illinois plaintiff brought a products liability suit in Illinois for injuries he suffered from equipment manufactured by the defendant Universal. The plaintiff was taken to a Missouri hospital where he was treated by the hospital and its physicians. The hospital and the physicians were added as defendants just short of four years after the injury.[124] The Borrowing Statute was not applicable to the plaintiff's claim against the newly added defendants because of the plaintiff's Illinois residence. Although the Illinois statute had expired, the court invoked the doctrine of equitable estoppel to deny the defendants' defense under Illinois limitations law.[125]

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120. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 comment e (1971).

121. Under a Second Restatement analysis, significant factual contacts in the contracts count differed and were evenly divided. The factors to be taken into account would have included: (a) the place of contracting (California); (b) the place of performance (California); (c) the location of the contract's subject matter (California); and (d) the place of the parties' business and residence (California, British Columbia, and Maryland). *Id.* § 188(2). In light of the diversity of contacts, California law may have best reflected its more direct involvement with the commercial elements of the case, and resultant interest in regulating the rights of parties who have transacted business in California. Thus, the contracts claim may have been properly dismissed under California law, but the court's analysis for the contract claim ignored this type of policy-based consideration of the proper law.

122. 564 F. Supp. 1459 (S.D. Ill. 1983).

123. *See supra* note 102 (discussion of the Second Restatement's § 145 contact counting).

124. 564 F. Supp. at 1461.

125. *Id.* at 1464.

After the plaintiff added the hospital and the doctor as defendants, defendant Universal filed a third-party complaint seeking contribution. To determine whether the contribution claim arose in Illinois or Missouri for the selection of a statute of limitations under the Borrowing Statute, the court considered the contribution claim as a separate issue. Unlike the plaintiff's claim, the contribution claim was presumably subject to the Borrowing Statute because all the parties were treated as non-residents.[126] Although the court considered it possible that the contribution claim arose "in the courtroom of . . . [the Illinois] court,"[127] thus giving the contribution claim an Illinois locus, the court concluded that the claim arose in Missouri, the state with the most significant relationship. According to the *Nutty* court, Missouri had a closer relationship to the claim because: (a) the plaintiff's injury occured in Missouri; (b) the third-party defendants' conduct occured in Missouri; and (c) the third-party defendant-hospital was a Missouri corporation doing business exclusively in Missouri.[128] Significantly, the choice of Missouri law included its limitations period. Although in some states the limitations period for a contribution claim begins after adjudication of liability,[129] the court determined that under Missouri case law, contribution claims against physicians and hospitals must be commenced within two years of the occurrence of the original negligent act. The defendant Universal had little, if any, opportunity to file a contribution claim against the medical defendants within two years of the alleged negligent act because the plaintiff's initial action was filed one year and nine months after his injury, and the additional defendants were not added by the plaintiff until almost four years after his injury.[130] Thus, under the guise of selecting a statute of limitations, the court determined the third-party plaintiff's right to contribution under Missouri law. Use of the Missouri limitations period for the non-resident third-party plaintiff's contribution claim, and Illinois law for the resident plaintiff's claim, resulted in dismissal of the medical defendants only from the contribution action. This selective dismissal left the third-party plaintiff potentially liable for the plaintiff's entire claim without a determination of the relative fault of the defendant in a contribution lawsuit. This selective

126. *Id.* The court treated defendant Universal as a non-resident without any basis for this conclusion.

127. *Id.*

128. *Id.*

129. Illinois law has changed recently. The Illinois Supreme Court ruled in November 1984 that contribution claims must be filed by a defendant during the original action. Laue v. Leifheit, 105 Ill. 2d 191, 473 N.E.2d 939 (1984). Prior to *Laue* the statute of limitations on the contribution claim ran from either the judgment date against the defendant or payment by the defendant. *See* Sherman House Hotel Co. v. Butler St. Foundry & Iron Co., 168 Ill. App. 549, 554 (1st Dist. 1912) (statute of limitations did not apply because it was not an action to recover damages for an injury). *But see* Tisoncik v. Szczepankiewicz, 113 Ill. App. 3d 240, 446 N.E.2d 1271 (1st Dist. 1983).

130. 564 F. Supp. at 1466. The defendants thus had three months to discover the third-party defendants' involvement and join these parties. However, that possibility seemed theoretical since the plaintiff had not yet discovered their involvement.

dismissal, while probably the result of judicial inadvertence, suggests the court's discrimination on behalf of a resident plaintiff.

The Second Restatement analysis in *Nutty* fails because the court mechanically applied the analysis only to the contribution action, without investigation of how the clash of Illinois and Missouri limitations policies might have been reconciled as a general matter for both claims. Missouri may have wished to extend the protective policy reflected in its short statute of limitations to all out-of-state claims against its resident medical defendants, including both the contribution and underlying claims. Thus, the Missouri court might have dismissed the entire suit had it been filed in Missouri. According to the court, Illinois wished to preserve the plaintiff's claim even though the Illinois limitations statute had expired. The issue that the *Nutty* court did not address was whether the solution to preserving the plaintiff's claim, involving equitable estoppel, extended also to the non-resident defendant/third-party plaintiff Universal. The result in *Nutty* suggests the court's contrary opinion that Illinois lacked concern for the non-resident plaintiff, while having obvious concern for the resident plantiff. This would explain the court's use of Missouri law for Universal's claim and Illinois law for the plaintiff's claim. If the differing concerns for residents and non-residents explains the use of different law, then the result in *Nutty* may be acceptable, but dissapointing. The better approach would have been for the court to admit that statute of limitations decisions differ depending on the residence of the plaintiff.

A consistent definition of where a claim arises is crucial to proper application of the Borrowing Statute. A framework for analysis, whether the vested rights or Second Restatement rules, must be available to the court; without such guidance the Borrowing Statute presents opportunity for judicial manipulation or avoidance. Neither the traditional rules nor the Second Restatement have provided the necessary guidance.

The vested rights/last events rule fails because of its rigidity and superficiality. The court's attempt to pinpoint a sole factual element in a case with multistate contacts to determine the proper limitations period is inappropriate. The Borrowing Statute neglects to define which events are "key" factors. Left to their own devices, the courts quite naturally have differed in their views concerning which factors give rise to a claim. The hollowness of this approach rests principally on the courts' failure to look beyond a single event to a multiplicity of factual connections of the states in these cases.

The Second Restatement cases attempt a broader analysis of claim accrual, yet fall short of attaining a preferable result for more complex reasons. The Second Restatement, in theory, requires elaborate policy analysis. In the Borrowing Statute cases, for example, the court might consider whether a state wishes that its statute of limitations be applied to a claim that has some factual connection with the state, such as the helicopter delivery in *Klondike,* but involves only non-resident parties. Examination of the factual connections of a case to a state, and the relationship of these connections

to the policies expressed in a state's law, should reveal the state with the most significant relationship to the statute of limitations issue.

The Illinois cases that used Second Restatement analysis evidence broadened judicial discretion to look at multiple factual elements in a case, but failed to relate factual events to policy concerns. In *Klondike* the court examined the relationship between the parties, and in *Nutty* the court examined where the defendants' conduct occurred. Neither analysis would be correct under a last events definition of where the case arose. For this reason alone, the Second Restatement analysis is preferable to the vested rights rule. The courts are unable, however, to accurately articulate and apply the policies underlying a statute of limitations. These policies include repose for defendants, judicial economy, and protection of plaintiffs. The discussion of these policies was lacking in *Nutty, Hamilton,* and *Klondike.* It was used in *Mitchell* only to determine the substantive choice of law in the case, with the statute of limitations choice following that determination without separate consideration. Thus, the influence of the Second Restatement on the Borrowing Statute has been to engage the courts in contact, not policy, analysis.

The Borrowing Statute has caused this failure to engage in policy analysis by distracting the courts away from employing a policy approach and instead directing the courts to determine where a claim arose. The language of the statute itself has hindered the integration of policy considerations into the Borrowing Statute analysis. Thus, even courts that acknowledge a desire to incorporate the Second Restatement into a borrowing analysis appear unable to do so.

Use of Foreign Statutes of Limitations To Permit Suits Barred Under Illinois Law

The Borrowing Statute has a narrow purpose: the prevention of forum shopping and perpetual tolling. It was not intended to provide a general approach to the selection of a statute of limitations in all conflicts cases. Even so, the Borrowing Statute may have hampered the growth of choice of law rules for cases outside the scope of the statute. The Borrowing Statute states that foreign statutes of limitations are to be selected to bar cases in Illinois, but the statute is silent on the use of foreign statutes of limitations to permit suits barred by Illinois law. This silence may have prevented Illinois state courts from developing satisfactory solutions to this issue.

Most jurisdictions treat statutes of limitations as procedural matters to be decided by forum law, even though the cause of action may have arisen in another state whose law will determine the substantive rights of the parties.[131] In certain circumstances, however, a foreign statue of limitations may be so entwined with the foreign substantive right that to recognize the foreign right requires the forum to also recognize and incorporate the foreign statute of limitations.[132] Judicial exceptions to the usual procedural label for a limita-

131. *See supra* note 19.

132. *See* O'Neal v. Nat'l Cylinder Gas Co., 103 F. Supp. 720 (N.D. Ill. 1952); Smith v. Toman, 368 Ill. 414, 14 N.E.2d 478 (1938); Jackson v. Shuttleworth, 42 Ill. App. 2d 257, 192

tions statute are used both to permit suits barred by a forum's own statute of limitations, and to bar a suit otherwise permissible under forum law even in states that have borrowing statutes.[133]

The use of foreign statutes of limitations under the substance/procedure dichotomy in Illinois is meager and inconclusive.[134] No case in Illinois state courts has applied this rationale and utilized a foreign statute of limitations. The sole Illinois case that has defined the type of foreign limitations period that may be used in an Illinois case is *Jackson v. Shuttleworth*.[135] In *Jackson*, an Illinois plaintiff brought a common law personal injury suit against an Illinois defendant arising from a Missouri automobile accident. The suit was barred under the applicable Illinois statute, but was permissible under the Missouri five-year statute. The plaintiff argued that "comity" required use

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N.E.2d 217 (3d Dist. 1963). The exceptions to the procedural characterization have taken four principal forms. The principal exception occurs when a new statutory right is created in derogation of the common law, and the statute itself contains a statute of limitations. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 143 comment c (1971). The most typical example is a statutory action of wrongful death. *See, e.g.*, ILL. REV. STAT. ch. 70, § 2 (1983). This type of limitation is regarded as so "inextricably intertwined" with the right itself that it should be recognized by any forum enforcing the right. Ailes, *Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392, 410 (1941). The leading American case is The Harrisburg, 119 U.S. 199 (1886). In other cases, courts have reasoned that a foreign statute of limitations might be specifically aimed at a limitation of a particular legal right as to warrant saying that it qualified the right. Davis v. Mills, 194 U.S. 451, 454 (1904); *see also* Markakis v. S.S. Volendam, 475 F. Supp. 29, 32 (S.D.N.Y. 1979) (recent application of the specificity test to Panamanian law); R. LEFLAR, *supra* note 9, § 127, at 254 n.15. Other cases have analyzed the language of a foreign limitations statute in order to discern whether the legislature created a procedural or substantive limitation. Thus, a statute of limitations that merely provides that "an action shall not be maintained" has been viewed as affecting the availability of a remedy, not the qualification of the right; alternatively, a statute that provides that the right "shall be extinguished" would be substantive. This is the "attributes test." *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 143 reporter's note (1971); R. MINOR, CONFLICTS OF LAWS § 210 (1901). This technique appears in older writings and cases and appears to be falling into disuse as more modern analyses develop. Finally, a forum might look to the courts of the state of enactment for an interpretation of whether the statute of limitations is substantive or procedural. *See, e.g.*, Anderson v. Linton, 178 F.2d 304, 310 (7th Cir. 1949).

133. For example, assume that a state has a borrowing statute that applies only in the event that all parties are non-residents of the forum state. The court may be presented with a case involving a non-resident plaintiff who seeks to recover against a resident defendant for a wrongful death which occurred in another state. The suit is not barred under the forum's statute of limitations but is barred under the statute of the other state. The borrowing statute would not be available due to the defendant's residence in the forum. The court might, nonetheless, be willing to apply the shorter statute of limitations of the place of the wrongful death if that state's statute of limitations is part of the wrongful death statute. The result assumes that the court desires to resolve substantive issues in the case under the foreign state's law as an initial matter. Thus, this result would follow if the forum state uses a "place of wrong" theory in a conflicts case. *See, e.g.*, Ramsay v. Boeing Co., 432 F.2d 592 (5th Cir. 1970); *cf.* Toomes v. Continental Oil Co., 402 S.W.2d 321 (Mo. 1966) (involving a resident plaintiff and non-resident defendant).

134. *See* Kalmich v. Bruno, 553 F.2d 549, 554 (7th Cir. 1977) (Seventh Circuit stated that it would be "less than candid" to say that this analytical problem had been resolved in Illinois). For a full discussion of *Kalmich*, see *infra* notes 148-58 and accompanying text.

135. 42 Ill. App. 2d 257, 192 N.E.2d 217 (3d Dist. 1963).

of the Missouri limitations period. The court refused to apply the Missouri statute because it held that the application of foreign statutes of limitations is permissible only for statutory rights, not recognized by the common law, that incorporate time limitations.[136] Common law actions clearly fall outside this rule and, as a result, are subject to the procedural laws of the forum state. Thus, other courts following *Jackson* have refused to use foreign limitations periods to permit common law claims barred by the Illinois statute of limitations.[137]

The Illinois Supreme Court has not addressed the characterization of a statute of limitations for choice of law purposes. In *Smith v. Toman*,[138] however, a case that did not involve multistate contacts, the court stated that a statute that creates a right unknown at common law, and in which time is made "an inherent element" of the right, is not a statute of limitations.[139] The implication of *Smith* for conflicts decisions is that a foreign statute of limitations applicable to a statutory right could be viewed instead as a substantive law recognized by Illinois courts. Thus, *Smith* implicitly endorses the holding of *Jackson*.

Federal courts in Illinois diversity suits have acknowledged *Jackson's* holding that only foreign statutes of limitations incorporated into statutorily created rights may be adopted in Illinois cases.[140] The federal courts' application of *Jackson*, however, has not been as restrictive as the standard announced in *Jackson*, which requires that a plaintiff's right be contained in the statute itself.

The substance/procedure analysis turns on an exceedingly technical reading of the specific wording of the foreign limitations statute, as demonstrated by the analysis of *Anderson v. Linton*.[141] Anderson reveals the court's concern with the degree of specificity of the foreign statute of limitations, expressly referred to in some cases as a "specificity" test. In *Anderson,* a non-resident plaintiff filed suit in Illinois, seeking damages under the Iowa Wrongful Death Statute for a death which occurred in Iowa. The case was barred under the Illinois limitations period. The Iowa Wrongful Death Statute did not contain a limitations period; the general two-year Iowa limitations statute had not expired. The court in *Anderson* refused to apply Iowa law because it concluded that a general statute of limitations related only to a permissible

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136. *Id.* at 260, 192 N.E.2d at 218

137. *See, e.g.*, Wetzel v. Hart, 41 Ill. App. 2d 371, 190 N.E.2d 619 (2d Dist. 1963) (although alleged injury by Oklahoma doctor to Oklahoma resident occurred in Oklahoma, Illinois procedural law applied when suit was subsequently brought in Illinois); Horan v. New Home Sewing Mach. Co., 289 Ill. App. 340, 7 N.E.2d 401 (1st Dist. 1937) (common law action governed by procedural law of the forum state, Illinois, despite fact that injury occurred in New York).

138. 368 Ill. 414, 14 N.E.2d 478 (1938).

139. *Id.* at 420, 14 N.E.2d at 481-82.

140. *See* Speight v. Miller, 437 F.2d 781, 782 n.3 (7th Cir. 1971); Bernard Food Indus., Inc. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969).

141. 178 F.2d 304 (7th Cir. 1949).

remedy, not the substance of the rights.[142] The court's conclusion hinged on a literal reading of the foreign statute of limitations, which did not expressly refer to wrongful death claims.[143]

Later federal cases have moved away from the narrow analysis employed in *Anderson*. In *O'Neal v. National Cylinder Gas Co.*,[144] California residents filed a wrongful death action in Illinois, based on conduct which occurred in Arizona. The court applied the Arizona statute of limitations, even though the Arizona Wrongful Death Statute did not include a limitations period. A section of the Arizona Code, separate from the Wrongful Death Statute, provided a period of limitations for "injuries done to the person of another where death ensued from such injuries."[145] Although not a part of the Wrongful Death Statute itself, the court concluded that the Arizona provision "qualifie[d] the right,"[146] and was to be applied even though the case would have been barred under the one-year Illinois statute for wrongful death actions. The court's conclusion was based not only on the specific language of the statute of limitations, but also on a conclusion that the Arizona legislative history of the statute of limitations in wrongful death actions allowed the court to infer that the legislature intended to qualify the right.[147] *O'Neal* thus developed an approach that relies both on statutory language and legislative intent, an expansion of the *Anderson* rationale.

The most significant decision concerning the application of foreign limitations periods in Illinois is *Kalmich v. Bruno*,[148] a difficult case that nonetheless merits careful study. The plaintiff, now a Canadian resident, attempted to recover damages he suffered over thirty years earlier when the defendant, now an Illinois resident, seized and appropriated the plaintiff's business during the Nazi occupation of Yugoslavia during World War II. The plaintiff's action was based on rights granted by a Yugoslavian law enacted in 1946[149] that provided a civil cause of action for persons whose belongings were confiscated during the German occupation. The Yugoslavian provision did not include a limitations period. The case would have been barred if the five-year Illinois statute of limitations for real and personal property actions was applied.[150] The plaintiff contended that the applicable statute of limitations was supplied by article 134(a) of the Yugoslavian Criminal Code,

142. *Id.* at 310.

143. The Iowa statute involved, IOWA CODE ANN. § 614.1 (West 1946), was a general two-year limitation that had been interpreted by Iowa courts to bar a remedy, but not extinguish a cause of action. 178 F.2d at 310.

144. 103 F. Supp. 720 (N.D. Ill. 1952).

145. *Id.* at 723.

146. *Id.* at 726. This is an application of the specificity test discussed supra note 132.

147. The Arizona statute, ARIZ. CODE ANN. § 29-202(5) (1939), referred solely and specifically to wrongful death. The court inferred that because prior editions of the Arizona Code had included the limitation period in the Wrongful Death Act itself, the legislature intended the limitations period to specifically qualify the statutory right to file a wrongful death action. 103 F. Supp. at 726.

148. 404 F. Supp. 57 (N.D. Ill. 1975), *rev'd*, 553 F.2d 549 (7th Cir. 1977) *cert. denied*, 434 U.S. 940 (1977).

149. 404 F. Supp. at 60.

150. *Id.* at 63.

which was amended in 1965 to provide that there was no statute of limitations for persons accused of confiscating property for non-military purposes during World War II.[151] A 1953 amendment to the Yugoslavian Statute of Limitations (section 20) made article 134(a) applicable to civil cases, providing that the statute of limitations for criminal actions would serve as the statute of limitations in civil actions if the defendants' conduct in the civil action would subject them to criminal prosecution.[152]

The district court explicitly employed the specificity test, as enunciated in *O'Neal,* to decide whether the Yugoslavian limitations period applied. As the court stated, "the premise underlying this . . . test is one of comity: a court enforcing a foreign statute . . . should recognize the express intention of the foreign legislature."[153] The court's use of the specificity test was quite precise, and led to the conclusion that the statute of limitations of section 20 was not specifically directed to the 1946 Yugoslavian property law statute for three reasons: (1) the property law itself contained no statute of limitations; (2) the civil/criminal statue of limitations (section 20) was enacted seven years after the property law and contained no "apparent reference" to the property law, but applied broadly to all civil actions based on criminal acts; and (3) the unlimited statute of limitations, which on its face was applicable to all war crimes, was viewed by the court as a "general" statute of limitations because it applied without differentiation to all criminal acts.[154]

The Seventh Circuit reversed,[155] agreeing that the proper test was the specificity approach of *O'Neal* rather than the literal inclusion test of *Jackson.*[156] The court concluded that the provisions of Yugoslavian law, when read together, adequately qualified the plaintiff's right. The court was not troubled by the fact that the civil/criminal limitation was enacted before passage of the unlimited limitation for war crimes.[157] The court suggested that there was a "necessary implication" that article 134(a) would, through section 20, automatically create an unlimited statute of limitations for civil actions involving war crimes.[158] Further, the Seventh Circuit found no difficulty in meeting the specificity test even though it had read the three separate statutory provisions together in order to ascertain the proper statute of limitations.

Under the *Kalmich* approach, then, the limitations period need not be in the same statute, nor even in *existence* at the time that the particular foreign substantive right is created. Further, *Kalmich* does not require the particular right to be specifically referred to in the limitations statute. In *Kalmich,* the general civil/criminal reference of section 20 and the "war crimes" reference

151. *Id.* at 60.
152. *Id.* at 61.
153. *Id.* at 64.
154. *Id.*
155. *Kalmich,* 553 F.2d 549 (7th Cir. 1977).
156. *See supra* notes 135-37 and accompanying text.
157. 553 F.2d at 555.
158. *Id.*

of article 125 together qualify the property right at stake. Although a statutory right was at issue in *Kalmich,* the specificity approach may not necessarily be limited to statutory causes of action. The rationales of *O'Neal* and *Kalmich* suggest that if a foreign statute of limitations addresses a particular right, even though the right is based on the common law, a court may recognize and apply the foreign statute if it believes that is the wish of the foreign state's legislature.

In sum, the use of a foreign statute of limitations in cases not covered under the Borrowing Statute has been rare in Illinois state and federal courts. The courts have left many questions unanswered under the substance/procedure approach used in those rare cases. No Illinois state court decision has addressed the question of whether the limitations period must be contained in the same provision of the statute creating the right; whether it may be in a separate provision, but in the same statute; or whether it may be in an entirely different statute. No opinion has considered whether a foreign substantive limitations period may be used to bar a suit when the Borrowing Statute does not apply due to a resident exception. Further, no opinion has considered whether a foreign statute of limitations in a common law suit may be substantive. The paucity of cases perhaps is caused in part by the misapprehension of judges and attorneys that the Borrowing Statute is the sole means by which a foreign statute of limitations may be used in an Illinois suit.[159] As a result, the few parties who attempt to use a foreign statute of limitations have little precedent to rely on for guidance.

Older Illinois cases that have selected foreign statutes of limitations to permit suits in Illinois distinguish between substantive and procedural statutes of limitations by restrictive statutory interpretation, a method that scholars maintain is outmoded and too narrow.[160] This outmoded analysis is different from the analysis used to define where a case arises under the Borrowing Statute. The most striking distinction is the complete absence of the Second Restatement policy analysis in cases selecting foreign statutes to permit suits in Illinois. On the other hand, the legislative awareness test of *O'Neal* and *Kalmich* opens the door to the Second Restatement approach that has been seen in some of the Borrowing Statute cases. The courts may use the legislative awareness approach as a device to choose the law of the state which has the most significant relationship to the parties' substantive rights.

PROPOSED RESOLUTION: REPEAL OF THE BORROWING STATUTE

The few cases reported under the Borrowing Statute in recent years demonstrate a reduced need for the statute. This is principally due to the 1973 amendment to the Tolling Statute, which sharply reduced the incidence of tolling the Illinois limitations periods, and hence also reduced the current need for borrowing foreign limitations periods. The creation of broad resi-

159. *See, e.g.,* Manos v. Trans World Airlines, Inc., 295 F. Supp. 1170, 1175 (N.D. Ill. 1969).

160. *See supra* note 19; *see, e.g.,* Haefer v. Herndon, 22 F. Supp. 523 (S.D. Ill. 1938); Coffman v. Wood, 5 F. Supp. 906 (N.D. Ill. 1934).

dence exceptions also has contributed to the declining use of the Borrowing Statute. The courts and the legislature together have accomplished an indirect repeal of the Borrowing Statute. That action, together with the rare use of foreign statutes of limitations outside the Borrowing Statute, suggest that nearly all Illinois cases are subject to Illinois limitations law.

The infrequent use of the Borrowing Statute indicates that it should be repealed. If the Borrowing Statute is rarely used there will be little opportunity to develop better judicial analysis of how it should be interpreted and when it should be applied. The poor analyses of the cases themselves stands for such a proposition.

There are additional reasons to conclude that Illinois would be better off without the Borrowing Statute. As this article has demonstrated, the concept of where a claim arises is confusing and difficult to determine. Further, the question of where a claim arises is a remnant of the vested rights principle in conflicts of law, a theory that Illinois courts have abandoned in other conflicts issues. The recent cases discussed in this article demonstrate that the courts' attempt to modernize the concept of claim accrual has been unsuccessful. Even though few cases presently address Borrowing Statute issues, the concept of claim accrual is unduly difficult for the court to use.

If Illinois were to repeal its Borrowing Statute, it is possible that the courts would view the repeal as a legislative imprimatur for application of an Illinois statute of limitations in all cases. It is also possible that the courts would do so arbitrarily, by labeling a statute of limitations as a procedural matter. Nevertheless, if such a scenario unfolds, the Illinois conflicts law of limitations would not be much different from where it currently stands. Alternatively, the courts might begin to look at each case independently and tailor the selection of a statute of limitations to the specific factual and legal elements of each case. In essence, the courts might engage in a deeper level of Second Restatement analysis than has been previously applied.

Further, the repeal of the Borrowing Statute may stimulate the courts to develop a better analysis of foreign statutes of limitations to permit a suit that is barred under an Illinois limitations statute. This area of Illinois law is undeveloped. *O'Neal* and *Kalmich* are significant cases and may signal increased use of foreign statutes to permit suits barred by the Illinois statute of limitations in Illinois federal courts.

CONCLUSION

If Illinois retains its Borrowing Statute, there remain two significant issues for judicial determination: (1) Should the resident defendant exclusion of *Panchinsin* be adopted? and (2) How should residence be defined? This article has maintained that a defendant resident exclusion from borrowing is inappropriate because it will encourage forum shopping, and that Illinois residence should be narrowly defined. This article has advocated that these questions be answered in light of the legislative purposes underlying the Illinois Borrowing Statute—the prevention of indefinite tolling and forum shopping. If the Illinois Supreme Court re-discovers *Hyman,* and if the

Illinois Supreme Court is true to its statement in *Miller* that forum shopping concerns are relevant, then perhaps the Borrowing Statute may emerge as an instrument of change in the law and not as an obstacle to its development.

An answer to these questions would be crucial to determine the outcome of Kathy Keeton's claim in Illinois.[161] Assuming an unexpired Illinois statute of limitations, the success of her claim would hinge on the court's conclusion that borrowing an expired statute of limitations (perhaps the Ohio statute) was precluded because either the claim arose in Illinois or the defendant Hustler was an Illinois resident. A reader of this article is well aware that on either point, as is typical in a conflicts case, there is enough ambiguity in the law for the court to do exactly as it wishes.

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161. *See supra* text accompanying notes 1-8.