Choice of Law in Cross-Border Torts: Why Plaintiffs Win, and Should

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CHOICE OF LAW IN CROSS-BORDER TORTS:  
WHY PLAINTIFFS WIN AND SHOULD

By  
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ABSTRACT

This Article is the first comprehensive study of how American courts have resolved conflicts of laws arising from cross-border torts over the last four decades. This period coincides with the confluence of two independent forces: (1) a dramatic increase in the frequency and complexity of cross-border torts generated by the spectacular expansion of cross-border activity now known as globalization; and (2) the advent of the American choice-of-law revolution, which succeeded in demolishing the old regime in forty-two U.S. jurisdictions, but failed to replace it with anything resembling a unified system.

One of the findings of the Article is that, despite using different approaches and invoking varied rationales, courts that have joined the revolution have reached fairly uniform results in resolving cross-border tort conflicts: they have applied the law of the state of either the injurious conduct or the resulting injury, but, in the vast majority of cases (86 percent), they have applied whichever of the two laws favored the tort victim. Another finding is that the vast majority of recent conflicts codifications around the world (a total of 20) have adopted the same solution: they apply whichever law favors the victim, by authorizing either the court or the victim directly to make the choice.

The Article concludes by examining whether the results of the American cases can be compressed into new content-sensitive, result-selective choice-of-law rules which would be free of the vices of the old rules and would be easy for judges to apply. It answers the question in the affirmative and, to prove the point, it offers three options for such rules.

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I. INTRODUCTION

Cross-border torts, namely, those in which the injurious conduct and the resulting injury occur in different states or countries, have been constantly on the rise. For example, according to the Federal Trade Commission, the number of complaints involving fraud across the U.S. border rose by more than 500 percent in a recent four-year period. Similarly, as the publishers of the Wall Street Journal have learned the hard way, the international connectivity of the Internet has brought not only expanded readership, but also new risks of being haled into court in far-away countries like Australia and being subject to unfavorable foreign

1. Any tort that can be committed from a distance (Distanzdelikt), such as environmental pollution, defamation, fraud, invasion of privacy, and products liability, can be a cross-border tort if the injurious conduct and resulting injury occur in different states.

2. From 2000 to 2004, the number of complaints involving fraud across the U.S. borders has grown from 12,208 to 61,744, an increase of 506 percent. These numbers do not include fraud across state borders within the United States. See Federal Trade Commission, Consumer Sentinel: Cross-Border Fraud Trends, January–December 2004, 4 (2005), available at http://www.ftc.gov/bcp/conline/edcams/crossborder/PDFs/Cross-BorderCY-2004.pdf [C]onsumers in the U.S. and other countries lose billions of dollars each year to telemarketers operating from ‘boiler rooms’ across the border who pitch bogus products, services and investments. They also lose money to Internet scam artists who operate anonymously from places outside the U.S.” FTC statement at “Cross Border Fraud” web site, http://www.ftc.gov/crossborder/ (last visited July 26, 2008).
laws. This dramatic increase in the frequency and complexity of cross-border conflicts has occurred at a time when American courts are experimenting with new methods and approaches for resolving conflicts of laws. This Article reports the results of the first comprehensive study of how American courts have discharged the difficult task of resolving cross-border tort conflicts and offers some suggestions for the future.

The increase in the frequency and complexity of cross-border torts began even before “globalization” became a term du jour. As early as 1961, the Illinois Supreme Court observed in an oft-quoted statement in Gray v. Am. Radiator & Standard Sanitary Corp. that new means of product distribution and increased cross-border commercial activity had “largely effaced the economic significance of State lines.” What the court said then about state borders within the United States is also true today of international borders. In Gray, the question was whether Illinois could exercise jurisdiction over a foreign corporation that had manufactured a safety valve in Ohio for a water heater manufactured by another defendant in Pennsylvania and then sold in Illinois, where it exploded and injured the plaintiff. As the Asahi case illustrates, the Illinois case has been replicated many times across national borders.

Both Asahi and Gray involved only the question of judicial jurisdiction over the foreign defendant. This Article focuses on the next step, choice of law, which courts consider only after affirmatively answering the jurisdictional question. From a choice-of-law perspective, cross-border torts have always been problematic, even in the simpler days of the nineteenth century, before the First Conflicts Restatement pushed the difficulties under the rug by subjecting all cross-border torts to the law of the place of injury (the lex loci delicti rule). Thus, the

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3. In Dow Jones & Co. v. Gutnick, (2002) 210 C.L.R. 575 (Austl.), the High Court of Australia held that Australian courts had jurisdiction and could apply Australian law in a defamation action brought by an Australian citizen against a U.S. publisher for allegedly defamatory remarks contained in an online publication (Barron’s Online) posted at a New York web site. Because of its inherently transnational nature, the Internet can generate many cross-border torts, like the ones mentioned in the previous note, and also provides an easier conduit for defamation. Indeed, it has been characterized as “a defamation prone zone.” Lilian Edwards, Defamation and the Internet: Name Calling in Cyberspace, in LAW AND THE INTERNET: REGULATING CYBERSPACE ___ (Lilian Edwards & Charlotte Waelde, eds., 2008), available at http://www.law.ed.ac.uk/it&law/c10_main.htm (last visited July 26, 2008). See also id. (“Because of the international connectivity of the Internet, its speedy transmission of huge amounts of data simultaneously to multiple destinations, and general lack of respect for national borders, it is extremely easy for an individual to make a defamatory comment via a computer situated in [one country] and attached to the Internet, which can then be read by thousands if not millions of people similarly equipped in multiple other national jurisdictions - where . . . the law of, and defences to, defamation may be very different . . .”).


5. Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102 (1987) (product liability action against a Japanese defendant who manufactured a valve assembly in Japan and sold it to a Taiwanese manufacturer who incorporated the valve into a motorcycle tire and sold it in California, where it exploded and injured the plaintiff).

6. See infra text accompanying notes ___.

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Illinois court could proclaim in full confidence that “[t]he law of Illinois will govern the substantive questions”\(^7\) in *Gray*.

However, such proclamations were soon to become more difficult, or at least far less categorical. Two years after *Gray*, in *Babcock v. Jackson*,\(^8\) the New York Court of Appeals launched what has since become known as the American choice-of-law revolution.\(^9\) One change brought about by the revolution was that the choice of law should no longer be based on rules, such as the *lex loci delicti* or, for that matter, a single connecting factor, such as the place of conduct or the place of injury. Rather, the choice should be based on multiple factors, contacts, and policies, including the policies embodied in the substantive laws of the states involved in the conflict and their respective wishes or “interests” in having their laws applied. Although this change has increased the rationality quotient of choice-of-law decisions, the common complaint is that it has also increased their complexity while decreasing their predictability.

The revolution has also produced an abundance of new and sophisticated scholarship, and this production continues unabated. What has been missing, however, is a systematic study of how courts have handled choice-of-law decisions during and since the revolution. Without denying the important role of academic theory in the development of American conflicts law—including the instigation and guidance of the revolution—this Article turns the focus on the courts, where the stakes are real (or at least higher). Four decades after the revolution, the time is ripe to review the revolution’s judicial output and contemplate the next step.

A systematic study of judicial decisions is necessary, instructive, and rewarding. It is necessary if only because, “right or wrong,” court decisions are the law—particularly in a field like conflicts, into which legislatures rarely venture. As Professor Weintraub, one of the living legends of American conflicts law, aptly stated, “More important than what the commentators are up to as they deforest the land with the mountains of conflicts articles, is the results that the courts are reaching.”\(^10\) This Article focuses on these results in one important category of conflicts cases—those involving cross-border torts and decided during and since the revolution under approaches other than the traditional *lex loci delicti* rule.\(^11\)

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11. For additional limitations to the scope of this Article, see infra at notes ___. The *lex loci delicti* rule continues to be followed in the following ten states, with varying degrees of commitment: Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming. For authorities and discussion, see SYMEONIDES, THE CHOICE-OF-
A study of judicial decisions is also instructive because there is a great deal of wisdom to be gleaned from the law reports. As this author can attest from reading all choice-of-law decisions over the last two decades, there is a qualitative difference between a selective reading and an all-inclusive reading of the cases. The former, especially when the reader is searching merely for cases that support a particular theory, can be misleading. The latter avoids such misimpressions and can provide a more stable grounding for academic theory. In the words of an astute observer of the American conflicts scene, “We have been so busy teaching the judges that we have not been learning from them.” This Article is an attempt to acquire, and hopefully transmit, that knowledge.

Finally, a comprehensive study of the cases is rewarding because it produces a more comprehensible and optimistic picture than a reading of the academic literature. For example, although at first glance the above complaint about unpredictability appears to be supported by the malleability of the choice-of-law approaches emerging from the revolution, a closer look at the results of judicial decisions leads to a more encouraging assessment. It reveals that, regardless of the approach they follow, and despite occasionally using verbose, platitudinous, or impressionistic language, the courts that have joined the revolution tend to reach fairly uniform results in several categories of tort conflicts. This author has documented this development in publications discussing other categories of tort conflicts.

This Article also provides a survey of how foreign conflicts systems resolve these conflicts. Unlike the traditional American system, these systems recognized early on the difficulties these conflicts present and, rather than locking themselves into inexorable rules, they opted for flexible solutions, some of which are openly result-oriented. One solution that has been gaining traction in recent years is to allow the plaintiff to choose between the laws of the state of conduct and the state of injury, or to authorize the court to choose whichever of the two laws favors the plaintiff. Even by American standards, this solution may appear “off the wall.” Yet, as this Article documents, American courts have reached precisely the same result. They have sometimes applied the law of the state of conduct and

LAW REVOLUTION 50-62; Symeon C. Symeonides, Choice of Law in the American Courts in 2007: Twenty-First Annual Survey, 56 AM. J. COMP. L.243, 244 (2008). Under this rule, courts invariably apply the law of the state of injury, regardless of the content of that law or any other factors. See infra ___.

12. For the last twenty years, this author has been conducting an annual survey of choice-of-law cases for the Section of Conflict of Laws of the Association of American Law Schools, a task which entails reading more than a thousand cases per year. The surveys have been published in volumes 37 through 57 of the American Journal of Comparative Law.


sometimes the law of the state of injury, but in most cases they have applied whichever law favored the plaintiff. The difference is that the American results have come only after prolonged and expensive litigation, to say nothing of reinventing the wheel.

The findings of this Article may provide ammunition to “tort reformers” and others who contend that American courts are too “liberal” and eager to favor plaintiffs at any cost. It is important to reiterate, however, that this Article is limited to one category of tort conflicts, and that previous studies of other categories of tort conflicts do not confirm the perception of judicial plaintiff-favoritism. In any event, the more interesting question—which the reader is urged to keep in mind while reading the discussion of cases in this Article—is whether the results reached in these cases can be justified on grounds other than their plaintiff-favoring effect, such as whether the results adequately serve the interests of the involved states or other pertinent choice-of-law considerations.

The Article is divided into six parts, including this introduction. Part II explains (1) how the traditional American choice-of-law system resolved cross-border torts, (2) how the changes brought by the revolution affect the resolution of tort conflicts in general, and (3) how courts following the revolution have resolved tort conflicts other than those discussed in this Article. Part III surveys the decisions of American courts in cross-border tort conflicts throughout the last four decades. Part IV summarizes the results of the cases and compares them with the results of the traditional methodology and one modern approach—Professor Brainerd Currie’s interest analysis. Part V surveys domestic and foreign choice-of-law rules for cross-border tort conflicts. Part VI examines whether the results of the cases can be compressed into new content-sensitive, result-selective choice-of-law rules which would be free of the vices of the old rules and would be easy for judges to apply. It answers the question in the affirmative and, to prove the point, it offers three options for such rules.

II. PRELIMINARIES

1. THE TRADITIONAL AMERICAN APPROACH TO CROSS-BORDER TORT CONFLICTS

For many generations, most students of American conflicts law have begun their study of the subject with an infamous case involving a cross-border tort—

15. For example, in product-liability conflicts—which are not included in this Article even though they involve cross-border torts—the cases that applied a pro-defendant law slightly outnumber the cases that applied a pro-plaintiff law. See Symeonides, Choice of Law for Products Liability, supra note ___, at 1314-16 (documenting that 51 percent of the cases covered by the study, which covers a fifteen-year period, applied a pro-defendant law). Similarly, in intrastate tort conflicts, namely, cases in which the conduct and the injury occurred in the same state but which involve a party or parties from another state, American courts apply the law of a state that has certain contacts, irrespective of whether that law favors the plaintiff or the defendant. See infra ______.

16. The selection of cases is comprehensive but not exhaustive. While every effort has been made to identify all relevant cases, there is no guarantee that the effort has been one hundred percent successful.
In this case, the negligent conduct of a train worker in Alabama caused injury to a fellow worker working on the same train shortly after it entered the neighboring state of Mississippi. The injured worker sued his employer in Alabama and argued strenuously for the application of Alabama law, which, unlike Mississippi law, permitted a tort action against the employer. The court opted for Mississippi law because that state was the place of injury, reasoning that “there can be no recovery in one state for injuries to the person sustained in another, unless the infliction of the injuries is actionable under the law of the state in which they were received.”

The court’s choice-of-law syllogism was as questionable then as it would be today: (1) the existence of a cause of action could only be “determined by the law which obtained at the time and place when and where the fact which is relied on to justify a recovery transpired”; (2) Because “negligence of duty unproductive of damming results will not authorize or support a recovery, . . . [t]he fact which created the right to sue, . . . [is] the injury”; and (3) Because the injury “transpired in the state of Mississippi[,] . . . it was in that state . . . necessarily that the cause of action, if any, arose.” Under Mississippi law, the plaintiff “had no cause of action . . . and hence . . . no rights which our courts can enforce.”

Four decades after Carroll, the drafters of the First Conflicts Restatement, showing the same single-mindedness as the Alabama court, adopted the same solution by subjecting all cross-border torts to the law of the place of injury. The Restatement provided that “the law of the place of wrong determines whether a person has sustained a legal injury,” and, if that law created a cause of action, “a cause of action will be recognized in other states.” Otherwise, “no recovery in tort can be had in any other state.” The “place of wrong” was defined as the state in which “the last event necessary to make an actor liable for an alleged tort takes place.” Then, in a futile attempt to provide absolute certainty, the Restatement provided numerous minute localization sub-rules defining the place of injury in various cross-border torts. For example, in personal injury cases, the place of the injury was the place in which “the harmful force takes effect upon the body.”

18. Id. at 805.
19. Id. at 806.
20. Id.
21. Id.
22. Id. at 807.
25. Id. at § 384.
26. Id. at § 377 (emphasis added).
whereas in cases of poisoning it was the place where “the deleterious substance takes effect.” This is the American version of the *lex loci delicti* rule, with its “last event” sub-rule, which was followed throughout the U. S. until the choice-of-law revolution began in the 1960s.

2. **The American Choice-of-Law Revolution**

The American choice-of-law revolution led to the gradual abandonment of the *lex loci delicti* rule in 42 out of 52 jurisdictions. In its place, these jurisdictions substituted one or more of the competing modern approaches, such as the Restatement (Second) of 1971, Brainerd Currie’s “governmental interest analysis,” or Professor Leflar’s “better law” approach. While these approaches differ from one another, they also share one basic feature that is antithetical to the single-mindedness of the *lex loci delicti* rule: they all rely on multiple contacts, factors, and policies. Indeed, the revolution attacked not only the *lex loci* rule as such, but also the very premises and goals of the established choice-of-law system. All rules were denounced in favor of “approaches,” issue-by-issue analysis, and dépeçage became the new terms *du jour*, material justice became an overt goal, unilateralism was resurrected, and the principle of territoriality lost significant ground to personality, especially in contract conflicts. From the perspective of methodology, general philosophy, and even terminology, the choice-of-law revolution has instigated significant and, in many respects, beneficial changes.

Three of these changes are pertinent to the subject of this Article. The first is that the choice of the applicable law is no longer based on a single contact, such as the place of the conduct or injury. Instead, the choice is based on multiple contacts, including the parties’ domiciles or other affiliations with a particular state, or the place of their pre-existing relationship, if any.

The second change was the acceptance of the notion that, prior to choosing

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27. *Id.* at § 377, Note.

28. For a succinct discussion of the traditional American choice-of-law system, see SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 63–73 (2008) [hereinafter SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW].


30. See *Restatement (Second) of Conflict of Laws* (1971) [hereinafter *Restatement (Second)*].


33. For a succinct discussion of these approaches and their differences, see SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 92-17. For their following in the various states, see SYMEONIDES, THE CHOICE-OF-LAW REVOLUTION 63-116.
between the laws of the contact states, the court should consider the content of these laws and their underlying policies, as well as other policies and considerations, such as the needs of the interstate and international systems. Thus, the choice of law moved from “jurisdiction-selection” to a content-oriented law selection—that is, from the selection of a state without regard to the content of its substantive law\textsuperscript{34} to the selection of a state’s law based in part on that law’s content.\textsuperscript{35}

The third change was the emergence of a distinction between torts rules whose primary purpose is to deter injurious conduct (hereinafter “conduct-regulating rules”) and those whose primary purpose is to allocate the economic and social losses resulting from the tort (hereinafter “loss-allocation” or “loss-distributing” rules). This distinction, first articulated in New York and later followed in other states, facilitates choice-of-law analysis by pointing the court in the right direction. It amounts to a presumption that conduct-regulating rules are territorially oriented, while loss-distributing rules are not necessarily so oriented. Consequently, territorial contacts (i.e., the places of conduct and injury) remain relevant in conduct-regulation conflicts, while both territorial and personal contacts (e.g., the parties’ domiciles) are relevant in loss-distribution conflicts.

While all three of these changes have been both necessary and beneficial, they have also dramatically increased the complexity of choice-of-law analysis. Fortunately, when one looks beyond methodology and language and focuses on substantive outcomes in tort conflicts, the picture becomes clearer. At least in certain categories of cases, courts have produced fairly uniform results. These categories of cases are depicted in Table 1 and described in the text below.

| Table 1. The Three Major Categories of Tort Conflicts\textsuperscript{36} |
|---|---|---|---|---|
| Common-domicile cases | # | P’s dom | Injury | Conduct | D’s Dom |
| 1 | A | b | b | A |
| 2 | A | b | X | A |
| 3 | a | B | B | a |
| 4 | a | B | X | a |
| Loss-distribution issues | 5 | A | A | A | b |
| 6 | a | a | a | b |
| 7 | a | B | B | B |
| Split-domicile | 8 | A | b | b | b |
| intrastate torts | 9 | x | A | A | B |
| Loss-distribution or conduct regulation issues | 10 | X | a | a | b |
| Cross-border | 11 | --- | A | b | --- |

\textsuperscript{34} The term “jurisdiction-selection” was first coined by Professor Cavers. See David F. Cavers, A Critique of the Choice-of-Law Problem, 47 HARV. L. REV. 173 (1933).

\textsuperscript{35} For a full discussion of these concepts, see Symeon C. Symeonides, American Conflicts Law at the Dawn of the 21st Century, 37 WILLAMETTE L. REV. 1, 46-60 (2000).

\textsuperscript{36} In the last four columns of the table, the use of capital letters indicates that the state represented by that column has a pro-plaintiff law. Lower-case letters indicate a pro-defendant law. The shaded cells represent the applicable law.
(1) **Common-domicile cases.** These cases involve torts in which both the tortfeasor and the victim are domiciled in one state and in which the injurious conduct and the resulting injury occur in another state, or states. (See cases 1-4, in Table 1.) Most of the cases (32 out of 42) in which an American court of last resort abandoned the *lex loci delicti* rule involved this pattern, and all but one of them applied the law of the parties’ common domicile, regardless of whether that law favored the victim (see cases 1-2) or the tortfeasor (see cases 3-4).37 However, in all of these cases, the conflict was confined to loss-distribution issues.38 In contrast, when the conflict is limited to conduct-regulation issues, courts do not apply the law of the parties’ common domicile; rather they apply the law of the state of conduct and injury in intrastate torts39 and the law of either the state of conduct or the state of injury in cross-border torts, as explained in Part III.40

(2) **Split-domicile intrastate torts.** These cases involve torts in which the parties are domiciled in different states but both the conduct and the injury occur in the same state. (See cases 5-10.) In most of these cases, the latter state is also the domicile of either the tortfeasor or the victim (see cases 5-8). When that is the case, courts tend to apply the law of that state, regardless of whether it favors the tortfeasor (cases 6, 8) or the victim (cases 5, 7), and regardless of whether the conflict involves conduct-regulation or loss-distribution issues.41 Courts also tend to apply the same law even in the less common cases in which the state of conduct and injury does not coincide with the domicile of either party (see cases 9-10), although exceptions are possible if the conflict involves only loss-distribution issues and that state’s contacts are transient or otherwise fortuitous.

(3) **Cross-border torts.** These are cases in which the injurious conduct occurs in one state and the resulting injury in another. (See cases 11-14.) This Article discusses cross-border torts, other than the following: (a) cross-border torts involving loss-distribution issues in which both parties are domiciled in the same third state (see cases 2 and 4) or in states whose laws produces the same

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37. For documentation and discussion of these cases, see Symeonides, The Choice-of-Law Revolution 145-59.

38. Also, most of those cases involved intrastate torts (like those portrayed in rows 1 and 3 of Table 1) in which the conduct and injury occurred in the same state other than the state of the parties’ common domicile. However, by parity of reasoning, the law of the parties’ common domicile would also apply in cross-border such as those portrayed in rows 2 and 4 of the table.

39. See id. at 213-20.

40. See infra Parts III-IV. In loss-distribution conflicts in which the parties are domiciled in different states that have the same law on the pertinent issue, courts tend to apply the law of the domicile of either party. See Symeonides, The Choice-of-Law Revolution 159-62.

41. See id. at 163-91 for loss-distribution conflicts, and 213-20 for conduct-regulation conflicts.
outcome;\(^{42}\) (b) cross-border torts in which the laws of the state of conduct and the state of injury produce the same outcome;\(^{43}\) (c) product-liability cases;\(^{44}\) and (d) class action cases.\(^{45}\)

A total of 105 cases fall within these parameters. Unfortunately, space limitations do not allow a full discussion of these cases here. In lieu of such a discussion, which interested readers can find in a longer version of this Article posted on SSRN,\(^{46}\) this version simply depicts these cases in several tables and then provides very abbreviated summaries.

**III. CROSS-BORDER TORT CONFLICTS AFTER THE REVOLUTION**

The cross-border tort conflicts that fall within the scope of this Article can be divided into two principal patterns (depicted in Table 2, below):

(1) Cases in which the state of conduct has a law that favors the plaintiff (pro-plaintiff law), while the state of injury has a law that favors the defendant (pro-defendant law) (Pattern 1); and

(2) Cases in which the state of conduct has a pro-defendant law, while the state of injury has a pro-plaintiff law (Pattern 2).\(^{47}\)

<table>
<thead>
<tr>
<th>Pattern #</th>
<th>Plaintiff’s Domicile</th>
<th>State of Injury</th>
<th>State of Conduct</th>
<th>Defendant’s Domicile</th>
<th>Currie’s Classification</th>
</tr>
</thead>
<tbody>
<tr>
<td>1a</td>
<td>Conduct regulation</td>
<td>---</td>
<td>a</td>
<td>B</td>
<td>False conflict</td>
</tr>
<tr>
<td>1b</td>
<td>Loss distribution</td>
<td>a</td>
<td>a</td>
<td>B</td>
<td>Unprovided-for</td>
</tr>
<tr>
<td>2a</td>
<td>Conduct regulation</td>
<td>---</td>
<td>A</td>
<td>b</td>
<td>True conflict</td>
</tr>
<tr>
<td>2b</td>
<td>Loss distribution</td>
<td>A</td>
<td>A</td>
<td>b</td>
<td>True conflict</td>
</tr>
</tbody>
</table>

42. The reason for excluding these cases is because, as noted above, they are governed either by the law of the parties’ common domicile or by the law of the domicile of one of the parties.

43. The reason for excluding these cases is because they are a species of false conflict in the sense that it makes no difference which of the two laws the court applies.

44. The reason for excluding product liability conflicts is because their resolution is often based on additional factors or contacts, such as the place of the product’s acquisition, which are not present in other cross-border torts. For a comprehensive discussion of product-liability conflicts cases from 1990 to 2004, see Symeon C. Symeonides, *Choice of Law for Products Liability: The 1990s and Beyond*, 78 Tul. L. Rev. 1247 (2004).

45. The reason for excluding class-action cases is because most of these cases discuss the choice-of-law issue only in a tentative and often incomplete fashion in the preliminary context of class certification.


47. If the two states have the same law on the particular issue, then there is no conflict between those two states, although there may well be a conflict with the law of a third state. These cases are not discussed here. Suffice it to say that, if the conflict involves only conduct-regulation issues, courts tend to apply the law of either the state of conduct or the state of injury, rather than the law of the third state. For authorities and discussion, see Symeonides, *The Choice-of-Law Revolution* 220-23.
Table 2 subdivides each pattern into conduct-regulation and loss-distribution conflicts because this distinction determines the classification of a particular conflict into the three categories of conflicts (shown in the last column) established by Professor Currie’s interest analysis, which remains the lingua franca of the choice-of-law revolution.

The four middle columns represent the states that have the pertinent contacts. In these columns, the use of a capital letter indicates that the state represented by that column has a pro-plaintiff law, and the use of a lower-case letter indicates a state with a pro-defendant law.

In loss-distribution conflicts, the table shows the parties’ domiciles using the most common scenario -- the one in which the defendant is domiciled in the state of conduct and the plaintiff in the state of injury. In rows 1a and 2a, which represent conduct-regulation conflicts of patterns 1 and 2, respectively, the columns representing the parties’ domiciles are intentionally left blank because, as a general proposition, a party’s domicile is not a decisive factor in conduct-regulation conflicts. That is not to say that domicile is a wholly irrelevant contact. For example, if the state of either the conduct or the injury is also the domicile of either party, this contact may provide additional support for applying that state’s conduct-regulating rule. However, it is also true that: (a) the state of the conduct or the injury has an interest in enforcing its conduct-regulating rules even if neither party is domiciled in that state; and (b) this interest overrides any contrary interest of any third state, such as a state in which both parties are domiciled.

1. Pattern 1: Conduct in State with Pro-Plaintiff Law and Injury in State with Pro-Defendant Law

In cases falling within Pattern 1, the conduct occurs in a state whose law favors the plaintiff and the injury occurs in another state whose law favors the defendant. Under the traditional lex loci delicti rule, all such cases would be decided under the pro-defendant law of the state of injury, unless the court would be willing and able to evade the rule by utilizing any of the escape devices courts have employed for this purpose. The choice-of-law revolution, which ended the reign of the lex loci as the exclusive and inexorable rule, freed courts to apply either the law of the state of injury or the law of the state of conduct (and, potentially, the law of a third state). As the cases surveyed here indicate, most courts that joined the revolution have opted for the law of the state of conduct in Pattern 1 cases, under a variety of rationales.

From the perspective of academic theory (though not necessarily from the courts’ perspective), Pattern 1 cases are subdivided into those in which the conflict is confined to conduct-regulation issues (Pattern 1a) and those in which the conflict is confined to loss-distribution issues (Pattern 1b). As explained below, Pattern 1a presents the false conflict paradigm because only one state has

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48. For this analysis, see B. CURRIE, SELECTED ESSAYS, supra note ___.
49. For the use of these “escape devices,” like characterization, ordre public, or renvoi under the traditional system, see SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 74-85.
an “interest” in applying its law, while Pattern 1b arguably presents the so-called “no interest” paradigm because neither state has an interest in applying its law. In practice, this difference has not had an appreciable bearing on the outcome of cases; courts have opted for the pro-plaintiff law of the state of conduct at approximately the same rate in both Pattern 1a and Pattern 1b.

A. Conduct-Regulation Conflicts: The False Conflict Paradigm (Pattern 1a)

Under the assumptions and terminology of interest analysis, if a Pattern 1 case involves only conduct-regulation issues--such as when the conduct state considers the particular conduct tortious and the injury state does not--then the case presents the false conflict paradigm regardless of where the parties are domiciled.\(^5\) On the one hand, the conduct state has an undeniable interest in applying its conduct-regulating rule in order to police and deter conduct occurring within its territory and violating its law, even if the injury occurs outside its borders. Indeed, the effectiveness of this rule is undermined if it is not applied to out-of-state injuries. On the other hand, the state of injury has no clear interest in applying its more lenient conduct-regulating rule because that rule is designed to protect conduct within, not outside, that state. In other words, the application of the stricter conduct-regulating rule of the conduct state promotes the policy of that state in policing conduct within its borders--without subordinating the (non-implicated) policies embodied in the less strict rule of the state of injury. Moreover, there is nothing unfair in subjecting a tortfeasor to the law of the state in which he acted. Having violated the standards of that state, the tortfeasor should bear the consequences of such violation and should not be allowed to invoke the lower standards of another state.

*D’Agostino v. Johnson & Johnson, Inc.*\(^5\) is one of many cases illustrating the proposition that a state’s interest in deterring prohibited conduct within its territory is not diminished when the conduct causes injury in another state whose law considers that conduct lawful. In *D’Agostino*, the wrongful conduct occurred in New Jersey and caused injury in Switzerland. Executives of a New Jersey-based corporation allegedly “orchestrated” the retaliatory firing of an employee of their wholly-owned Swiss subsidiary for refusing to bribe Swiss officials in charge of regulating the licensing of pharmaceuticals in Switzerland. If proven, this conduct would violate the Federal Corrupt Practices Act, which New Jersey cases had incorporated into New Jersey law. Under Swiss law, the alleged bribes would be considered “consulting fees” and would be lawful, as would the employee’s firing.

The New Jersey Supreme Court held that New Jersey law should govern the employee’s action against the executives. The court noted that, although Switzerland had an interest in regulating the employment relationship between a

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\(^5\)The term “false conflict” was first advanced by the chief architect of interest analysis, Professor Brainer Currie. False conflicts are those in which only one of the involved states has an interest in applying its own law. In contrast “true conflicts” are those in which both (or more) of the involved states have such an interest. See Currie, supra note __, at ____.

\(^5\)628 A.2d 305 (N.J. 1993).
Swiss company and a Swiss resident, Switzerland did “not have an interest in condoning corporate bribery orchestrated beyond its boundaries.” 52 In any event, New Jersey’s interests in deterring wrongful conduct in New Jersey “outweigh[ed] the Swiss interest in the at-will employment relationship that would not seek to deter such conduct through its civil law.” 53 The court emphasized that its decision was “not exporting New Jersey employment law so much as applying New Jersey domestic policy . . . to a domestic company,” 54 and “regulating the conduct of parent companies in New Jersey that engage in corrupt practices through subsidiary employees.” 55 The court concluded that the strength of New Jersey’s commitment to deterring commercial bribery, “which could have a negative impact on public health and safety in New Jersey,” 56 coupled with the “extensive New Jersey contacts,” 57 outweighed “[a]ny opposing interest involving extraterritoriality.”

This study has identified forty more conduct-regulation conflicts of the same pattern as D’Agostino. Table 3, below, depicts those cases. As the table indicates, thirty-four of the forty-one cases (83 percent) have applied the law of the pro-plaintiff law of the state of conduct rather than the pro-defendant law of the state of injury. Most of the thirty-four cases have followed a similar reasoning as the D’Agostino court.

**Table 3. Conduct-Regulation Conflicts Arising from Conduct in State with Pro-Plaintiff Law and Injury in State with Pro-Defendant Law (Pattern 1A)** 58

<table>
<thead>
<tr>
<th>#</th>
<th>Case name</th>
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52. *Id.* at 316.

53. *Id.* at 307.

54. *Id.* at 318.

55. *Id.* at 311.

56. *Id.* at 315.

57. *Id.* at 316.

58. This table and subsequent tables list the case name, the forum state, and the states that had the four basic contacts—namely, the plaintiff’s domicile and injury, and the defendant’s conduct and domicile. The shaded cells indicate the state whose law the court applied.
<table>
<thead>
<tr>
<th>Case</th>
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<tr>
<td>D’Agostino v. J.</td>
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<td>Rong Yao Zhou</td>
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<td>White v. Smith</td>
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<td>Dolan v. Sea Transfer</td>
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<td>Maffatone v. Woodson</td>
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<td>Aponte v. Baez</td>
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<td>Williams v. Jeffs</td>
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The first six cases listed after D’Agostino (cases 2 through 7) involved conflicting punitive-damages laws, which are *par excellence* conduct-regulating. In all six cases, the state of conduct (which was also the defendant’s domicile) imposed punitive damages but the state of injury did not. In terms of interest analysis, these cases present the false conflict paradigm. The first state has an
interest in applying its punitive-damages law in order to punish the tortfeasor who engaged in egregious conduct in that state, and to deter others similarly situated. In contrast, the state of injury does not have an interest in applying its non-punitive damages law because that law is designed to protect tortfeasors who are either domiciled in, or act in, that state, neither of which is the case here. Thus, the application of the law of the conduct state promotes the deterrence policies of that state without impairing the defendant-protecting policies of the state of injury. As Table 3 indicates, all six cases imposed punitive damages under the law of the state of conduct.59

The next seven cases (cases 8 through 14) involved “dram-shop acts,” which the court characterized as conduct-regulating. Dram-shop acts impose civil liability on the owner of a tavern (dram shop) or other similar establishment for injuries caused by an intoxicated patron to whom the owner furnished alcohol. In cases that fall under this pattern, the owner’s conduct—namely, the furnishing of alcohol to the patron—occurs in a state that has a dram-shop act (or similar rule) imposing liability on the owner, while the injury occurs in a state that does not impose such liability. This difference produces only a false conflict in which the conduct state has an interest in deterring and policing conduct that occurred within its territory and violated its law, while the state of injury does not have a countervailing interest in applying its non-liability rule to protect out-of-state tavern owners who violate the laws of their state. As Table 3 indicates, six of the seven cases applied the dram-shop act of the conduct state60 and one case applied the non-liability rule.

59. See In re Air Crash Disaster at Stapleton Int’l Airport, Denver, 720 F. Supp. 1445 (D. Colo. 1988) (imposing punitive damages under Texas law on airline whose airplane crashed in Colorado; Texas was the airline’s principal place of business and the place of the conduct most likely responsible for the crash; Colorado did not allow punitive damages in wrongful death actions); Jackson v. Travelers Ins. Co., 26 F. Supp. 2d 1153 (S.D. Iowa 1998) (imposing punitive damages under Iowa law in case involving bad faith insurance practices that took place in Iowa and caused injury in Nebraska, which prohibited punitive damages); Fanselow v. Rice, 213 F.Supp.2d 1077 (D. Neb. 2002) (imposing punitive damages under Minnesota law on a Minnesota employer of a truck driver who caused an accident in Nebraska, which prohibited punitive damages); Cunningham v. PFL Life Ins. Co., 42 F. Supp. 2d 872 (N.D. Iowa 1999) (imposing punitive damages under Iowa law on Iowa defendant who engaged in bad faith insurance practices in Iowa and caused injuries to insureds domiciled in several states); Ardoyno v. Kyzar, 426 F. Supp. 78 (E.D. La. 1976) (imposing punitive damages under Mississippi law in a slander action by a Louisiana plaintiff against a Mississippi defendant who made defamatory statements about the plaintiff in Mississippi and caused injury in both states). See also Bryant v. Silverman, 703 P.2d 1190 (Ariz. 1985) (imposing punitive damages under the law of Arizona, which was the defendant airline’s principal place of business, without resolving the factual question of whether the critical conduct had also occurred in Arizona or, as the defendant argued, in Colorado, where the defendant’s airplane crashed; Colorado did not allow punitive damages).

60. See Schmidt v. Driscoll Hotel, 82 N.W.2d 365 (Minn. 1957) (applying Minnesota’s dram shop act imposing liability on a Minnesota tavern owner whose drunk patron caused an accident in Wisconsin, injuring plaintiff, also a Minnesota resident; Wisconsin did not have a dram-shop act); Rong Yao Zhou v. Jennifer Mall Rest., Inc., 534 A.2d 1268 (D.C. App. 1987) (applying the District of Columbia’s dram shop act imposing liability on a D.C. tavern owner whose drunk patron caused an accident in Maryland; Maryland did not impose liability); Patton v. Carnrike, 510 F.Supp. 625 (N.D.N.Y. 1981) (applying New York law imposing liability on a New York alcohol vendor who sold alcohol to a Pennsylvania minor who drove back to Pennsylvania and caused an accident there; refusing to apply Pennsylvania’s parental supervision defense); Rutledge v.
of the state of injury--which, however, was also the state where part of the conduct occurred.  

Slightly more than half of the cases in this pattern (a total of 23, cases 15 through 37) involved car-owner liability statutes or similar common-law rules imposing vicarious civil liability on car owners (including car-rental companies) for injuries caused by a driver who used the car with the owner’s consent. In Pattern 1 cases, the conduct-state--namely, the state in which the owner entrusts the car to the driver--imposes such liability, while the state of the injury does not. Eighteen of the 23 cases applied the pro-plaintiff liability rule of the conduct state, and five cases applied the pro-defendant non-liability rule of the state of


61. See Johnson v. Yates, No. 94-6041, 1994 WL 596874 (10th Cir. Nov. 2, 1994) (decided under Oklahoma conflicts law). In Yates, the defendants, Oklahoma residents, were passengers in a pickup truck driven by another Oklahoma resident and purchased their first round of beer in Oklahoma and the second round in Texas. In the latter state, the pickup truck collided with a car occupied by three New Mexico residents, two of whom were killed. The victims’ families sued the passengers of the pickup truck in Oklahoma for negligence in furnishing beer to the driver. The defendants would have been liable under Oklahoma law, but not under Texas law. The court concluded that Texas had the most significant relationship, chiefly because the injury and much of the conduct had occurred in that state.

62. While most cases characterize these statutes as conduct-regulating, see, e.g., Svege v. Mercedes Benz Credit Corp., 182 F. Supp. 2d 226 (D. Conn. 2002), some cases characterize them as loss-distributing. These cases are discussed infra at note ___. A preempting federal statute enacted in 2005 released car rental companies from vicarious liability but did not do so for other car owners. See 49 U.S.C.§ 30106 (2005).

63. See Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968) (applying D.C. rule imposing civil liability on car owner who left his car unlocked and unattended in action arising from Maryland accident caused by the defendant’s apparently stolen car; Maryland law did not impose liability); Sexton v. Ryder Truck Rental, Inc., 320 N.W.2d 843 (Mich. 1982) (applying Michigan’s car-owner liability statute to case involving a truck leased in Michigan and arising from an accident in Virginia, which did not have such a statute.); Burney v. PV Holding Corp., 553 N.W.2d 657 (Mich. Ct. App. 1996), appeal denied, 572 N.W.2d 9 (Mich. 1997) (applying Michigan’s car-owner statute to case in which the driver rented the car in Michigan and caused an accident in Alabama, a state that did not have such a statute); Veasley v. CRST Int’l, Inc., 553 N.W.2d 896 (Iowa 1996) (applying Iowa’s car-owner statute to case arising from an accident in Arizona, which did not have such a statute); Garcia v. Plaza Oldsmobile Ltd., 421 F.3d 216 (3d Cir. 2005) (applying New York’s car-owner liability statute to case arising from an accident in Pennsylvania, which did not have such a statute); Aponte v. Baez, No. CV000802893, 2002 WL 241456 (Conn. Super. Ct. Jan. 30, 2002) (applying Connecticut’s car-owner liability statute to case arising out of a Pennsylvania accident that injured a Puerto Rico victim and involved a car rented in Connecticut; Pennsylvania did not impose liability). The following cases applied New York’s car-owner liability statute in actions arising from accidents occurring in states that did not impose liability on
injury.\textsuperscript{64}


67.\textit{See} Marra v. Bushee, 447 F.2d 1282 (2d Cir. 1971) (decided under Vermont conflicts law;
the conduct state, while one case applied the pro-defendant law of the state of injury.

In addition to the cases listed above, several class-action cases (which fall outside the scope of this Article) have held that the pro-plaintiff law of the state of conduct should govern the consumer fraud claims of plaintiffs injured and domiciled in other states or countries. This does not mean, however, that plaintiffs invariably succeed in obtaining class certification under the law of the conduct state. As one court recently noted, “[C]ertification of a nationwide class is rare, and application of the law of a single state to all members of such a class is even more rare.” In fact, many courts have denied class certification on the ground that the claims of each class plaintiff would be governed by the differing laws of the states in which each plaintiff was domiciled and had suffered the injury.

holding that if the defendant’s conduct had occurred in Vermont, the New York plaintiff would be entitled to an action for alienation of affection against the Vermont defendant under Vermont law, even though the injury occurred in New York, which did not allow this action). But see Williams v. Jeffs, 57 P.3d 232 (Utah Ct. App. 2002) (dismissing action for alienation of affection brought by Arizona plaintiff against Utah defendants despite Utah’s numerous contacts, including the occurrence of the critical conduct; Utah law, but not Arizona law, allowed the action).


69. See Citizens Ins. Co. of Am. v. Daccach, 217 S.W.3d 430 (Tex. 2007) (certifying multinational class action under the Texas Securities Act); In re Vivendi Universal, S.A., 381 F. Supp. 2d 158 (S.D.N.Y. 2003), reconsideration denied, No. 02 Civ. 5571(RJH), 2004 WL 2375830 (S.D.N.Y. Oct 22, 2004) (holding that the federal Securities and Exchange Act applied because the critical fraudulent conduct occurred in the United States when two top foreign executives of defendant company resided in, and operated the company from, the United States.).


71. In the following cases, the court has denied class certification after finding the law of the conduct state (which is noted in parentheses) inapplicable: In the Matter of Bridgestone/Firestone Inc., 288 F.3d 1012 (7th Cir. 2002), reh’g en banc denied (Tennessee and Michigan); Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675 (Tex. 2002), reh’g of cause overruled (May 08, 2003) (Texas); Barbara’s Sales, Inc. v. Intel Corp., 870 N.E.2d 910 (Ill. 2007) (California); Pratt v. Panasonic Consumer Elec. Co., 2006 WL 1933660 (N.J. Super. Ct. Law Div. July 12, 2006) (New
If a conflict falling within Pattern 1 involves only loss-distribution issues--such as when the state of conduct provides more generous compensatory damages than the state of injury--then the parties' domiciles become a relevant factor. In the most common Pattern 1 scenario: (a) the defendant is domiciled in, or has a similar affiliation with, the conduct state, which has a law that favors the plaintiff, and (b) the plaintiff is domiciled in, or has a similar affiliation with, the state of injury, which has a law that favors the defendant. This study has identified sixteen loss-distribution conflicts falling within Pattern 1b. Table 4, below, depicts those cases. As the table indicates, thirteen of the sixteen cases applied the pro-plaintiff law of the state of conduct (cases 1 through 13), while three cases applied the pro-defendant law of the state of injury.

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72. For example, when both parties are domiciled in the same state, then, as noted earlier, most courts classify that as a false conflict in which only the state of the common domicile has an interest in applying its law. See supra ____. Likewise, when the parties are domiciled in different states that have the same loss-distribution law, most courts adopt the same classification and apply the law of one of the domiciliary states, by analogy to the common-domicile cases. See supra ____.
Under the assumptions and terminology of Currie’s interest analysis, all of the cases listed above present the “no interest” (or “unprovided-for”) paradigm because neither state is supposed to have an interest in protecting the domiciliary of the other state. The state of conduct is not supposed to be interested in applying its pro-plaintiff law for the benefit of a plaintiff domiciled in the state of injury; conversely, the state of injury is not supposed to have an interest in applying its pro-defendant law for the benefit of a defendant domiciled in the state of conduct. Currie concluded that, in the absence of conflicting interests, the law of the forum qua forum should govern “no-interest” cases because that law is the default law and should govern in the absence of a good reason for its displacement.

Even if one agrees with Currie’s assumptions, the “no-interest” label is problematic because it forejudges the answer to the basic question of whether a state actually has an interest in applying its law to the particular case—a question that reasonable minds often answer differently. For this reason, it is better to employ the non-prescriptive term “inverse conflicts,” which simply indicates objectively that each state’s law favors the party affiliated with the other state. In any event, virtually none of the sixteen cases in Pattern 1b have adopted Currie’s assumptions about state interests.

For example, in none of the cases did the court conclude that both involved states were uninterested in applying their respective laws. Rather than accepting Currie’s “no-interest” label, most courts classified the case as a false conflict. The courts characterized the pro-plaintiff law of the state of conduct as partly conduct-regulating and concluded that (1) that state had an interest in applying its law to deter defendants from engaging in substandard conduct within its territory, and (2) the state of injury did not have a countervailing interest in applying its pro-defendant law. As one court put it, the application of the law of the state of conduct would “further the interests” of that state without “interfer[ing] with any of the articulated policies of the [state of injury],” whereas the application of the law of the latter state would “impinge upon [the] interests [of the state of conduct], without furthering any of the recognizable policies of [its own].”

Further, as Table 4 indicates, only seven of the sixteen cases applied forum law (cases 1 through 6, and case 16), while nine cases applied non-forum law. Moreover, in the cases that applied forum law, the courts did so on grounds other than those Currie advocated (namely, the role of forum law as the default law). In six of the seven cases (cases 1 through 6), the forum state was also the state of conduct, and the courts based their choice of law on that state’s affirmative interest.

73. See B. Currie, Selected Essays, 152-56.

74. Williams v. Rawlings Truck Line, Inc., 357 F.2d 581, 586 (D.C. 1965) (applying the pro-plaintiff law of the conduct state (New York) against a New York defendant in a case arising out of injury in D.C. The defendant sold his car in New York but did not follow the proper procedures for transferring title. The car was later involved in a D.C. accident, injuring plaintiff, a New Jersey domiciliary. Under the law of New York, but not of D.C. law, the defendant was estopped from denying his ownership, and thus liability.).
to police conduct within its borders.

Lastly, the courts did not adopt Currie’s assumption that a state has no interest in applying its law when it favors a domiciliary of another state at the expense of its own domiciliaries. Specifically:

(1) In all thirteen cases that applied the pro-plaintiff law of the state of conduct, that law disfavored a defendant domiciled in that state. In many of those cases, the court concluded that the state of conduct had an affirmative interest in applying its law to deter defendants from engaging in substandard conduct within its territory;

(2) In eight of the thirteen cases that applied the pro-plaintiff law of the state of conduct, the party who benefited was a plaintiff who was not a domiciliary of the forum state;

(3) In the five of the thirteen cases in which the application of the pro-plaintiff law of the state of conduct benefited a forum plaintiff, the court’s reasoning

75. See Williams, supra note ___; Schubert v. Target Stores, Inc., 201 S.W.3d 917 (Ark. 2005) (applying the pro-plaintiff law of the state of conduct (Arkansas), rather than the pro-defendant law of the state of injury (Louisiana) in a case involving an Oklahoma plaintiff and an Arkansas-based defendant); Downing v. Abercrombie & Fitch, 256 F.3d 994 (9th Cir. 2001) (action for misappropriation of a person’s picture and name for commercial purposes; applying the pro-plaintiff law of the state of conduct (California), rather than the pro-defendant law of the state of injury (Hawaii) in a case involving a Hawaii plaintiff and a California defendant); Workman v. Chinchinian, 807 F. Supp. 634 (E.D. Wash. 1992) (action for medical malpractice resulting from misdiagnosis in another state; applying the pro-plaintiff law of the state of conduct (Washington), rather than the pro-defendant law of the state of injury (Idaho) in a case involving an Idaho plaintiff and a Washington defendant); Hitchcock v. United States, 665 F.2d 354 (D.C. Cir. 1981) (Federal Tort Claims Act decided under D.C. conflicts law; action for erroneous medical advice given in D.C. and causing injury in Virginia; applying the pro-plaintiff law of the state of conduct (D.C.), rather than the pro-defendant law of the state of injury (Virginia), in a case involving a Virginia plaintiff and D.C. defendants); Gianni v. Fort Wayne Air Serv., Inc., 342 F.2d 621 (7th Cir. 1965) (decided under Indiana conflicts law; applying Indiana’s longer limitation statute to wrongful death actions by survivors of Connecticut victims of Massachusetts air crash, because alleged negligence in inspecting the aircraft by Indiana defendant had occurred in Indiana); Janssen v. Ryder Truck Rental, Inc., 667 N.Y.S.2d 369 (N.Y.A.D. 1998) (applying New York statute imposing liability on a car owner in a case arising from a New Jersey accident caused by a car rented in New York and involving parties domiciled in a state whose law was similar to New York’s; New Jersey law did not impose liability); Motor Club of Am. Ins. Co. v. Hanifi, 145 F.3d 170 (4th Cir. 1998) (decided under Maryland conflicts law; applying New York’s car-owner liability statute to a case arising from a Maryland accident injuring a New Jersey domiciliary and involving a car rented in New York by a New York company; Maryland law did not impose liability). See also Lopez v. United States, No. CV-03-1729 (CPS), 2005 WL 2076593 (E.D.N.Y. Aug. 26, 2005) (Federal Tort Claims Act action by a New York plaintiff against the federal government decided under Pennsylvania conflicts law; finding that critical conduct occurred in Pennsylvania and applying its pro-plaintiff law).

76. See Fanning v. Dianon Systems, Inc., Civil No. 05-cv-01899-LTB-CBS, 2006 WL 2385210 (D. Colo. Aug. 16, 2006) (applying Connecticut’s pro-plaintiff law to action for medical misdiagnosis brought against a Connecticut medical laboratory by a Colorado patient injured in Colorado); Ardoyno v. Kyzar, 426 F. Supp. 78 (E.D. La. 1976) (applying Mississippi law to action for interference with contract brought by Louisiana plaintiff against a Mississippi defendant whose conduct in Mississippi caused injury to plaintiff in both states; Mississippi, but not Louisiana, allowed such an action.); Cates v. Creamer, 431 F.3d 456 (5th Cir. 2005) (applying Florida law
for its choice-of-law decision did not match Currie’s reasoning. For example, in all five cases, the state with the pro-plaintiff law was also the defendant’s domicile. Yet, no court adopted Currie’s assumption that a state is uninterested in applying its law when it favors foreign plaintiffs at the expense of domestic defendants. In some cases, the court found an affirmative interest in deterring defendants from engaging in substandard conduct within its territory;\(^77\)

(4) In six of the thirteen cases (cases 1 through 6), the state of conduct was also the forum state, but the application of the pro-plaintiff law of that state favored a non-forum plaintiff at the expense of a forum defendant; and

(5) In the three cases that applied the pro-defendant law of the state of injury, that law disfavored a forum plaintiff (cases 14 through 16) and, in two of those cases (cases 14 and 16), it benefited a foreign defendant.\(^78\)

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77. Several (but by no means all) product-liability cases, which are outside the scope of this Article, have also reached the same conclusion. See, e.g., Gantes v. Kason Corp. 679 A.2d 106 (N.J. 1996) (applying New Jersey’s statute of limitation and allowing action brought by family of Georgia domiciliary who was killed in Georgia while using a product manufactured by New Jersey defendant in New Jersey; Georgia’s statute of repose barred the action); Mitchell v. Lone Star Ammunition, Inc., 913 F.2d 242 (5th Cir. 1990) (applying Texas law and allowing action brought by foreign plaintiffs against Texas manufacturer of product that was manufactured in Texas and caused injury in a state whose statute of repose barred the action); McLennan v. Am. Eurocopter Corp., Inc., 245 F.3d 403 (5th Cir. 2001), reh’g denied (Apr. 09, 2001) (decided under Texas conflicts law and applying Texas pro-plaintiff law to an action of a Canadian domiciliary injured in Canada by a product manufactured by a Texas manufacturer in Texas); DeGrasse v. Sensenich Corp., CIV. A. No. 88-1490, 1989 WL 23775 (E.D. Pa. Mar. 15, 1989) (applying Pennsylvania’s pro-plaintiff law to action brought by Arkansas plaintiff injured in Alabama against a Pennsylvania manufacturer); Lacey v. Cessna Aircraft Co., 932 F.2d 170 (3d Cir. 1991) (applying Pennsylvania’s strict liability law to a case involving a product that was manufactured in Pennsylvania and caused injury in British Columbia); Lewis-DeBoer v. Mooney Aircraft Corp., 728 F. Supp. 625, 645 (D. Colo. 1990), (concluding that Texas, as the place of the defendant’s conduct and principal place of business, “had a greater policy interest in applying its laws and providing deterrence than Colorado had in preventing a windfall to its citizens;” Colorado was the victim’s home state and place of injury).

2. PATTERN 2: CONDUCT IN STATE WITH PRO-DEFENDANT LAW AND INJURY IN STATE WITH PRO-PLAINTIFF LAW

A. Introduction: The True Conflict Paradigm

In Pattern 2 cases, the conduct occurs in a state which, with regard to the issue in conflict, has a law that favors the defendant, and the injury occurs in a state that, on the same issue, has a law that favors the plaintiff. The issue can be either:

(1) conduct regulation, such as when the state of conduct does not consider the conduct tortious, but the state of injury considers it tortious or imposes a more exacting or “higher” standard than the state of conduct; or

(2) loss distribution, such as when the state of conduct (usually the tortfeasor’s home state) immunizes the defendant from suit or otherwise disallows or limits the plaintiff’s recovery, while the state of injury (often the victim’s home state) provides for more generous or unlimited recovery.\(^79\)

Both of the above permutations present what is known in the conflicts literature as the “true conflict” paradigm—situations in which each state has an interest in applying its own law. Under Currie’s assumptions, both the state of conduct and the state of injury each has an interest in applying its law to Pattern 2 conflicts. In conduct-regulation conflicts, the conduct state has an interest in protecting conduct that occurs within its territory and is lawful there, while the state of injury has an interest in preventing injuries within its territory caused by conduct considered unlawful there.

In loss-distribution conflicts, the first state has an interest in protecting conduct that is legal within its territory, while the second state has an interest in ensuring reparation for injuries it considers tortious. Additionally, however, each state arguably has an interest in protecting the parties affiliated with it. The first state has an interest in protecting a tortfeasor acting (and usually domiciled) within its territory, while the second state has an interest in protecting victims injured (and often domiciled or hospitalized) within its territory.

Although both permutations fall within the true-conflict paradigm and present similar dilemmas, the text below separates conduct-regulation conflicts from loss-distribution conflicts because, in practice, they tend to appear separately.\(^80\)

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79. It is of course possible that a state may have a pro-defendant conduct-regulating law and a pro-plaintiff loss-distribution law, and vice versa. If so, the case will fall within Pattern 2 with regard to conduct regulation and Pattern 1 with regard to loss distribution issues. The application of the law of one state to the first and the law of the other state to the second category of issues may result in a potentially inappropriate dépeçage, although in practice, such cases have been rare. For the criteria of distinguishing between inappropriate and permissible dépeçage, see SYMEON SYMEONIDES, WENDY PERDUE & ARTHUR VON MEHREN, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 206 (2d ed. 2003).

80. The placement of a particular case within one category or the other is based on the court’s own assumptions, whether explicit or implicit. Even if, in a particular case, these assumptions are questionable, they do not affect the conclusions of this Article.
Professor Currie argued that the law of the forum \textit{qua} forum should govern all true conflicts like those of Pattern 2 because judges do not have the constitutional authority--nor the resources--to weigh conflicting state interests and potentially subordinate the interests of the forum state to those of another state.\footnote{Currie thought that such a weighing was a “political function of a very high order . . . that should not be committed to courts in a democracy.” B. \textsc{Currie}, \textit{Selected Essays} at 182. \textit{See also id.} at 278-79, 357 (where Currie speaks of the “embarrassment of [a court] having to nullify the interests of its own sovereign”); Brainerd Currie, \textit{The Disinterested Third State}, 28 \textit{Law \\& Contemporary Prosbs.} 754, 778 (1963).} As the data in this Article indicate, the majority of Pattern 2 cases (thirty-eight out of forty-eight cases, or 79 percent) have applied the law of the forum state. The courts in those cases, however, did not heed Currie’s proscriptions and did \textit{not} refrain from weighing state interests.

An even larger majority of Pattern 2 cases (forty-three out of forty-eight cases, or 89 percent) have applied the pro-plaintiff law of the state of injury. The fact that Pattern 2 conflicts are characterized as true conflicts--even by those who do not subscribe to interest analysis--indicates that reasonable minds can disagree on the proper choice of law. On balance, the application of the pro-plaintiff law of the state of injury is appropriate--provided that the circumstances are such that the tortfeasor should have foreseen the occurrence of the injury in that state and, thus, the possibility that its law may be applied. All cases that applied the law of the state of injury have met this requirement, which is discussed later.\footnote{\textit{See infra} text accompanying notes \underline{___}. \textit{But see} Louise Weinberg, \textit{Theory Wars in the Conflict of Laws}, 103 \textit{Mich. L. Rev.} 1631, 1654 (2005) (arguing that the foreseeability factor has been overstated: “Given the near universality of liability insurance among suable defendants, it is somewhat unreal to speak of ‘unfair surprise’ to tort defendants. They have insured against liability precisely because they anticipate it under some state’s laws. . . .[A] defendant’s insurer is the paradigmatic actuarial expert, and has every opportunity to structure the insured’s coverage accordingly. It has every opportunity to adjust the defendant’s premiums to take into account this and other risks.”).}

\textbf{B. Conduct-Regulation Conflicts (Pattern 2a)}

This study has identified thirty-one cases involving conduct-regulating conflicts falling within Pattern 2--namely, cases in which the conduct did not violate the (pro-defendant) standards of the state of conduct but did violate the (pro-plaintiff) standards of the state of injury. Table 5, below, depicts those cases. As the table indicates, twenty-seven of the thirty-one cases (or 87 percent) applied the pro-plaintiff law of the state of injury (see the shaded cells).

\begin{table}[h]
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\caption{Conduct-Regulation Conflicts Arising from Conduct in State with Pro-Defendant Law and Injury in State with Pro-Plaintiff Law (Pattern 2A)}
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<td>\textit{Kearney v. SSB}</td>
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\footnote{\textit{See infra} text accompanying notes \underline{___}. \textit{But see} Louise Weinberg, \textit{Theory Wars in the Conflict of Laws}, 103 \textit{Mich. L. Rev.} 1631, 1654 (2005) (arguing that the foreseeability factor has been overstated: “Given the near universality of liability insurance among suable defendants, it is somewhat unreal to speak of ‘unfair surprise’ to tort defendants. They have insured against liability precisely because they anticipate it under some state’s laws. . . .[A] defendant’s insurer is the paradigmatic actuarial expert, and has every opportunity to structure the insured’s coverage accordingly. It has every opportunity to adjust the defendant’s premiums to take into account this and other risks.”).}
The first two cases, *Hartford Fire Ins. Co. v. California*, 83 and *U. S. v. Nippon Paper Indus.*, 84 involved intentional acts—which, arguably, present a stronger case for applying the stricter law of the state of injury than negligence cases. Indeed, not many people would question the right of a state to punish conduct that is intended to produce—and does produce--detrimental effects within its territory, even when that conduct takes place outside the state. As Justice Holmes stated almost a century ago, “Acts done outside the jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm.” 85 To this end, federal courts have developed the so-called “effects doctrine”


84.109 F.3d 1 (1st Cir. 1997), cert. denied, 522 U.S. 1044 (U.S. 1998), reh’g denied, 522 U.S. 1143 (U.S. 1998) (upholding criminal prosecution under the Sherman Act of a Japanese defendant for conduct in Japan (price-fixing) that was intended to, and did, produce detrimental effects in the United States).

for acts committed abroad that produce intended injuries in the United States.

In *Hartford Fire*, one of several cases applying or reiterating this doctrine, the U.S. Supreme Court held that the Sherman Act applies to “foreign conduct that was meant to produce, and did in fact produce, some substantial effects in the United States.” *Hartford Fire* applied the Act to British insurance underwriters who, while in London, engaged in conduct designed to affect the California insurance market. The Court held that, because the defendants’ London conduct was meant to produce (and did, in fact, produce) substantial effects in the United States, the Sherman Act was applicable—even though, as the defendants claimed, their conduct was perfectly consistent with British law and Britain had “a strong policy to permit or encourage such conduct.” As long as the defendants did not claim that British law required them to act in a way that violated American law, or that their compliance with the laws of both countries was otherwise impossible, the defendants were perfectly capable of complying with the laws of both countries. Several lower-court cases have likewise applied the Sherman Act along with other federal statutes, such as the Securities and Exchange Act, to cases involving foreign conduct that produced detrimental effects in the United States.

The remaining twenty-nine cases in Table 5 involved negligent conduct, for which the argument for applying the higher standard of the state of injury may be less powerful psychologically. Nevertheless, twenty-five of the twenty-nine cases applied the law of the state of injury. Five of those cases involved cross-border communications: *Kearney v. Salomon Smith Barney, Inc.*, *Butler v. Adoption*.

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86. For other cases, see Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962) (“A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.”); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1986) (“The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce.”); F. Hoffman-La Roche Ltd. v. Empagran, 124 S. Ct. 2359, 2365-67 (2004) (“Our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is . . . reasonable . . . insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused.”).

87. 509 U.S. at 795-96.

88. *Id.* at 799 (citing Restatement (Third) of Foreign Relations Law § 415 cmt. j).

89. See U.S. v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); Timberlane Lumber Co. v. Bank of Am. N.T. & S.A., 549 F.2d 597 (9th Cir.1976); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 494 F. Supp. 1161 (E.D. Pa. 1980); Filetech S.A. v. France Telecom S.A., 157 F.3d 922 (2d Cir. 1998); see also Restatement (Third) of Foreign Relations Law § 402(1)(c) (1986) (“a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effects within its territory”).


91. 137 P.3d 914 (Cal. 2006), reh’g denied (Sept. 27, 2006) (applying California law and granting injunction enjoining Georgia defendants from recording their telephone conversations with their California clients; the recordings were legal under Georgia law, but illegal under California law).
In those cases, the communication originated in a state that did not consider the communication tortious and was received in a state that did consider it tortious. All five cases applied the law of the latter state.

The next nine cases (cases 8 through 16) were “dram-shop act” cases in which the defendant was the operator of a tavern or other establishment serving alcohol and the plaintiff was a person injured by one of the defendant’s intoxicated patrons. The conduct at issue—the defendant’s service of alcohol to an apparently intoxicated patron—occurred in a state that did not impose liability on tavern owners for such conduct, while the plaintiff’s injury occurred in a state that imposed such liability (through a dram-shop act, or a judicially created rule to the same effect). The result of this difference is a true conflict between the laws of the two states. Seven of the nine cases applied the law of the state of injury: Bernhard v. Harrah’s Club, Hoeller v. Riverside Resort Hotel, Young v. Players Lake Charles, LLC, Blamey v. Brown, Zygmuntowicz v. Hospitality Inv., Inc.

92.486 F. Supp. 2d 1022 (N.D. Cal. 2007) (holding that the operator of an Arizona website who refused to post an adoption ad sent by two California same-sex partners was subject to California’s Civil Rights Act).


94. 431 F.2d 584, 590 (9th Cir. 1970) (applying California law to action for intentional infliction of mental distress of California domiciliary caused by letters sent to him by Arizona domiciliary from Arizona).

95. 546 P.2d 719 (Cal. 1976) (applying California law imposing liability on Nevada tavern owner who served alcohol to an apparently intoxicated patron who then drove to California and caused an accident there, injuring a California domiciliary; Nevada law did not impose liability on the tavern owner).

96. 47 F. Supp. 2d 832 (S.D. Tex. 1999) (applying Texas law imposing liability on a Louisiana tavern owner who served alcohol to an apparently intoxicated patron, who then drove to Texas and caused an accident there, injuring a Texas domiciliary; Louisiana’s “anti-dram shop act” expressly relieved the tavern owner of liability).

97. 270 N.W.2d 884 (Minn. 1978), cert. denied, 444 U.S. 1070 (1980) (applying Minnesota law imposing liability on a Wisconsin liquor shop owner who sold alcohol to a Minnesota minor, who then drove to Minnesota and caused an accident there, injuring a Minnesota domiciliary; Nevada law did not impose liability on the tavern owner).
One case, *Dunaway v. Fellous*[^103] applied the “anti-dram-shop act” of the state of injury (which was also the forum state), which act specifically relieved tavern owners from liability and made the consumption--rather than the furnishing--of alcohol the proximate cause of injuries inflicted by drunk patrons. With much less justification, *Estates of Braun v. Cactus Pete’s, Inc.*[^104] also applied the non-liability rule of the state of injury.[^105]

The next nine cases (cases 17 through 25) involved car-owner liability statutes—namely, rules that impose vicarious liability on car owners, including car-rental companies, for injuries caused by drivers who use the car with the owner’s consent. If the car is leased or otherwise entrusted to someone in a state that does not impose such liability and the accident occurs in a state that does impose such liability, the resulting true conflict falls within Pattern 2. Of the nine cases in this pattern, seven applied the law of the state of injury rather than that of the state of the rental transaction or entrustment. Those cases are: *Brown v. National Car Rental System, Inc.*,[^106] *Sierra v. A Betterway Rent-a-Car, Inc.*,[^107] *Fu v. Fu*,[^108] *Piché v. Nugent*,[^109] *Zatuchny v. Doe*,[^110] *Eby v. Thompson*,[^111] and *Brunow v. Burnett*.[^112]

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[^101]: 13300 Brandon Corp.,[^101] and *City of Hastings v. River Falls Golf Club*.[^102] One case, *Dunaway v. Fellous*[^103] applied the “anti-dram-shop act” of the state of injury (which was also the forum state), which act specifically relieved tavern owners from liability and made the consumption--rather than the furnishing--of alcohol the proximate cause of injuries inflicted by drunk patrons. With much less justification, *Estates of Braun v. Cactus Pete’s, Inc.*[^104] also applied the non-liability rule of the state of injury.[^105]

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Two cases refused to apply the pro-plaintiff law of the state of injury. The first case, *Townsend v. Boclair*,\(^{113}\) instead applied the law of the parties’ common domicile, which was also the state of the rental transaction. In the second case, *Oyola v. Burgos*,\(^{114}\) the court applied the law of the home state of the driver and the victim (Rhode Island), which, like the state of the rental transaction (Massachusetts), did not impose liability on the car owner.

The next four cases in Table 5 (cases 26 through 29) involved punitive-damages conflicts. In all four cases, the state of injury imposed punitive damages but the state of conduct did not, thus presenting a true conflict because (a) the state of injury has an interest in deterring and punishing conduct and actors that cause injury within its territory, and (b) the state of conduct has an interest in regulating (and, in this case, shielding) conduct and actors within its borders from the heavy financial price of punitive damages. On balance, the application of the law of the state of injury (and the award of punitive damages under that law) is a perfectly sensible resolution to such conflicts, provided that it meets two conditions. First, it must meet the standard set forth by the U. S. Supreme Court in *BMW of North Am., Inc. v. Gore*.\(^{115}\) *Gore* held that, in assessing the amount of punitive damages, the court should consider only the conduct that caused detrimental effects in its own territory—not the conduct that caused such effects in other states. The second condition is the general requirement of avoiding unfair surprise. In cases of this pattern, the application of the law of the state of injury could result in unfair surprise to the defendant if it can be shown that one could not have reasonably foreseen the occurrence of the injury in that state (objective foreseeability). All four cases allowed punitive damages under the law of the state of injury,\(^{116}\) and all four

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\(^{113}\)No. 4003463, 2007 WL 126933 (Conn. Super. Ct. Jan. 5, 2007) (applying Maine law, which did not impose liability on a car owner who rented the car in Maine to a Maine driver, who drove to Connecticut and caused an accident there, injuring a Maine plaintiff; Connecticut law imposed liability on the car owner).

\(^{114}\)864 A.2d 624 (R.I. 2005) (applying Rhode Island law, which was the same as Massachusetts law and did not impose liability on a car owner who rented a car in Massachusetts to a Rhode Island driver whose daughter, in express prohibition of a clause in the rental contract, drove the car to New York and caused an accident there, injuring Rhode Island plaintiff; New York law imposed liability on the car owner).

\(^{115}\)517 U.S. 559 (1996) (holding that, although Alabama may consider evidence of the defendant’s non-Alabama conduct in assessing the reprehensibility of the defendant’s conduct, nevertheless, Alabama may not punish the defendant in fixing the amount of punitive damages for non-Alabama conduct that produced injuries outside of Alabama).

\(^{116}\)See *In re Air Crash Disaster at Washington D.C.*, 559 F. Supp. 333 (D.D.C. 1983) (holding that airline was liable for punitive damages in case arising from a District of Columbia crash of an airplane which airline did not properly de-ice before takeoff from an airport located on the Virginia side of the Virginia-D.C. border. Virginia (unlike D.C.) prohibited punitive damages;
satisfied the above conditions.117

C. Loss Distribution Conflicts (Pattern 2b)

Loss-distribution conflicts falling within Pattern 2a present similar tensions, as do conduct-regulation conflicts of Pattern 2a. Those tensions increase when, as is often the case, the defendant is domiciled in the state of conduct and the plaintiff is domiciled in the state of injury. In such cases, the state of conduct has the previously discussed interest in applying its pro-defendant law to protect conduct that is lawful there, as well as an additional interest in protecting the particular defendant and others similarly situated. Conversely, the state of injury has an equally strong interest in (a) applying its law to prevent injuries in its territory, and (b) compensating its domiciliary plaintiff and his or her family, and protecting others similarly situated.

Nevertheless, American courts generally have shown little hesitation in resolving Pattern 2b conflicts in the same way as Pattern 2a conflicts: by applying the pro-plaintiff law of the state of injury. Indeed, of the seventeen loss-distribution conflicts involving Pattern 2b, all but one case applied the law of the state of injury. Table 6 depicts those cases.

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Rice v. Nova Biomedical Corp., 38 F.3d 909 (7th Cir. 1994), *reh’g denied* (Jan. 05, 1995), *cert. denied*, 514 U.S. 1111 (1995) (applying Illinois law to a defamation action filed by Illinois plaintiff against Massachusetts defendant who defamed plaintiff by statements made in Massachusetts and then repeated in Illinois; Illinois, but not Massachusetts, imposed punitive damages); Cooper v. Am. Express Co., 593 F.2d 612 (5th Cir. 1979) (invasion of privacy action; awarding punitive damages under the law of the state of injury and victim’s domicile (Alabama), even though the law of the defendant’s domicile and place of conduct (Louisiana) prohibited such damages); Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293 (5th Cir. 1982) (imposing punitive damages on a Louisiana defendant for conduct in Louisiana that caused injuries to a Kentucky plaintiff in Mississippi and Kentucky; Louisiana did not allow punitive damages).

117. The last two cases in Table 5 involved environmental torts, and the court in both cases applied the pro-plaintiff law of the state of injury rather than the pro-defendant law of the state of conduct. See Pakootas v. Teck Cominco Metals, Ltd. 452 F.3d 1066 (9th Cir. 2006), *cert. denied*, 128 S.Ct. 858 (Jan. 7, 2008, U.S.) (holding that the federal Comprehensive Environmental Response, Compensation, and Liability Act applied to a lead-zinc smelting plant, located on the banks of the Columbia River in British Columbia, which generated hazardous waste that was discharged into the river and carried downstream, eventually settling into a lake in Washington); Nnadili v. Chevron U.S.A., Inc., 435 F. Supp. 2d 93 (D.D.C. 2006) (applying District of Columbia law to activities at the defendant’s gas station in Maryland that contaminated the plaintiffs’ lands in D.C.).
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<th>Jurisdiction 1</th>
<th>Jurisdiction 2</th>
<th>Jurisdiction 3</th>
<th>Jurisdiction 4</th>
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</thead>
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<tr>
<td>6</td>
<td>Raflo v. U.S.</td>
<td>DC+</td>
<td>VA</td>
<td>DC</td>
<td>VA</td>
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<tr>
<td>7</td>
<td>Troxel v. duPont</td>
<td>PA</td>
<td>PA</td>
<td>DE</td>
<td>DE</td>
</tr>
<tr>
<td>8</td>
<td>Carver v. Schafer</td>
<td>MO</td>
<td>MO</td>
<td>MO</td>
<td>ILL</td>
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<tr>
<td>9</td>
<td>Performance Motor.</td>
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<tr>
<td>11</td>
<td>Lilly v. Fisher</td>
<td>DE</td>
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<td>Monroe v. Numed</td>
<td>NY</td>
<td>FL</td>
<td>FL</td>
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<td>14</td>
<td>Brown v. Harper</td>
<td>NY</td>
<td>NY</td>
<td>NY</td>
<td>PA</td>
</tr>
<tr>
<td>15</td>
<td>Drinkall v. Used Car</td>
<td>IA</td>
<td>IA</td>
<td>IA</td>
<td>NE</td>
</tr>
<tr>
<td>16</td>
<td>Bombardier v. Richfield</td>
<td>NY</td>
<td>VT</td>
<td>VT</td>
<td>NY</td>
</tr>
<tr>
<td>17</td>
<td>Condit v. Dunne</td>
<td>NY</td>
<td>CA</td>
<td>CA</td>
<td>NY</td>
</tr>
</tbody>
</table>

The first two cases in Table 6 involved issues of sovereign immunity, while the rest of the cases involved cross-border medical malpractice, other professional malpractice, defamation, fraud or deceptive practices, and

118. See Franchise Tax Bd. of California v. Hyatt, 538 U.S. 488 (2003) (action by Nevada plaintiff against the State of California for conduct occurring in California and causing injury in Nevada; upholding Nevada’s refusal to recognize California’s sovereign immunity, noting that, as the place of injury and plaintiff’s domicile, Nevada had more than the requisite contacts to constitutionally favor its own interests over those of the conduct state); Ensminger v. Cincinnati Bell Wireless, LLC, 434 F. Supp. 2d 464 (E.D. Ky. 2006) (refusing to honor Ohio’s sovereign immunity in action filed against Ohio state agency by a Kentucky domiciliary who suffered injury in Kentucky caused by the negligent Ohio conduct of the Ohio agency).

119. See Kuehn v. Children’s Hospital, Los Angeles 119 F.3d 1296 (7th Cir. 1997) (decided under Wisconsin conflicts law; action filed by the parents of a Wisconsin child who died in Wisconsin as a result of a California hospital’s negligence in improperly shipping a package to Wisconsin containing the child’s bone marrow; applying Wisconsin law, under which the action survived the child’s death, rather than California law, under which the action did not survive); Laboratory Corp. of Am. v. Hood, 911 A.2d. 841 (Md. 2006) (action by a Maryland plaintiff against a North Carolina laboratory that misread a sample from an amniocentesis performed on the plaintiff in Maryland and sent the erroneous report to her Maryland obstetrician; the court applied Maryland law, which provided an action to plaintiff, rather than North Carolina law, which did not); Pietrantonio v. United States, 827 F. Supp. 458 (W.D. Mich. 1993) (action by a Michigan domiciliary against a Wisconsin doctor who failed to diagnose lung cancer from an X-ray taken in Wisconsin; the court applied Michigan law, which (unlike Wisconsin law) did not limit the amount of damages, reasoning that Michigan had an interest in protecting its domiciliaries and that the patient did not go to Wisconsin except by referral from his Michigan doctor); Raflo v. United States, 157 F. Supp. 2d 1 (D.D.C. 2001) (applying D.C. law, which (unlike Virginia law) did not limit the amount of damages in a medical malpractice action brought by a Virginia plaintiff charging that the defendant’s misdiagnosis in Virginia caused injury in D.C.)

120. See Performance Motorcars of Westchester, Inc. v. KPMG Peat Marwick 643 A.2d. 39 (N.J. Super. Ct. App. Div. 1994), cert. denied, 652 A.2d 172 (N.J. 1994) (applying New Jersey’s pro-plaintiff law to an action for cross-border accounting malpractice brought by a New Jersey-based corporation and arising out of an audit report prepared by defendant, a New York accounting firm, and sent to plaintiff in New Jersey; under New Jersey law (but not New York law), the defendant could maintain an action against the defendant); Bankers Trust Co. v. Lee Keeling & Assoc., Inc., 20 F.3d 1092 (10th Cir. 1994) (decided under New York conflict law; applying New York’s pro-plaintiff law to a case arising from injury in New York sustained by a New York plaintiff and caused by the conduct of an Oklahoma oil and gas consultant in Oklahoma); David B. Lilly Co., Inc. v. Fisher, 18 F.3d 1112 (3d Cir. 1994) (applying Delaware’s pro-plaintiff law to Delaware
other cross-border torts, as well as more complex disputes between joint tortfeasors.

The only case that did not apply the law of the state of injury was Troxel v. A.I. duPont Institute, an atypical medical malpractice case in which the foreseeability element was somewhat tenuous because the victim was not the treated patient, but rather the patient’s friend who stayed home in Pennsylvania. Following a referral from a Pennsylvania doctor, the patient was treated in a Delaware hospital and returned to Pennsylvania where, unaware that she was suffering from a contagious disease, communicated that disease to her pregnant friend and neighbor, the plaintiff, whose in utero child died as a result of the disease. The plaintiff sued the Delaware hospital in Pennsylvania for failure to inform its patient of the contagious nature of her disease and the resulting risk to others. The hospital would have been liable to plaintiff under the law of

plaintiff’s action for legal malpractice committed outside Delaware by out-of-state attorneys).

121 See, e.g., Condit v. Dunne, 317 F. Supp. 2d 344 (S.D.N.Y. 2004) (applying California’s pro-plaintiff law rather than New York’s pro-defendant law to a California congressman’s defamation action against a journalist for statements made in television and radio talk shows broadcast from New York to a national audience; the court found that, although New York had an interest in regulating the conduct of journalists in New York, California also had an interest in applying its law to protect its citizens from defamation and that was “the most significant interest.” Id. at 355).


124 See, e.g., Glunt v. ABC Paving Co., Inc, 668 N.Y.S.2d 846 (N.Y.A.D. 1998) (case arising out of a New York traffic accident involving an Ohio victim, his Ohio employer, and a New York defendant; applying New York law, which allowed the New York defendant to obtain indemnification from the Ohio defendant who would be immune from indemnification under Ohio law); Mascarella v. Brown, 813 F. Supp. 1015, (S.D.N.Y. 1993) (third-party action by a New York defendant against a New Jersey corporation seeking contribution and indemnification for medical malpractice committed in New York by the New York defendant; applying New York law and allowing contribution, which was not available under New Jersey law); Bader v. Purdom, 841 F.2d 38 (2d Cir. 1988) (action by a New York minor bitten by defendant’s dog in Ontario. Defendants brought a third-party action against the minor’s parents, claiming contribution and indemnification for their negligent supervision of the child. Such claim was permitted by Ontario law, but not by New York law. The court applied Ontario law).

Pennsylvania but not under Delaware law. The court recognized Pennsylvania’s interest in protecting its citizens, but concluded that this interest was “superseded by Delaware’s interest in regulating the delivery of health care services in Delaware” and in protecting defendants who acted in that state. The court said that “the qualitative contacts of Delaware were greater and more significant than those of Pennsylvania,” and that, when acting in Delaware, the defendant was “entitled to rely on the duties and protections provided by Delaware law.” The court also stated that any rule that would allow patients to carry with them the protective law of their domicile when they travel to another state for medical care “would be wholly unreasonable, for it would require hospitals and physicians to be aware of and be bound by the laws of all states from which patients came to them for treatment.”

This discussion of state interests is a reminder that Pattern 2 cases are veritable true conflicts, which in turn means that the two states’ interests are more or less equally strong and pertinent. One element that can tip the scales in either direction is the actor’s ability to reasonably foresee where the act will manifest its direct consequences. In Troxel, one could argue that the Delaware doctors should have foreseen that, by sending an uncured and uninformed contagious patient back to her home in Pennsylvania, the consequences of that negligence would be felt in Pennsylvania. The fact that the Troxel court did not accept this argument suggests that the court believed strongly that, from a systemic perspective, medical malpractice conflicts should be resolved invariably under the law of the place where the medical services are rendered, regardless of any other factors. Many cases, including Bledsoe v. Crowley, have adopted this very concept.

However, there is a difference between cases like Bledsoe, in which a patient chooses to receive treatment at an out-of-state hospital, and cases like Troxel, in which the victim has no relation with the hospital. In the latter group of cases, the court should look at each case from the perspective of the victim—an individual who has never left her home state and has been injured there—and ask whether she deserves to rely on the protective law of her own state. Stated another way, foreseeability has two sides—that of the tortfeasor and that of the victim. When, as in Bledsoe, both sides can foresee the injury occurring in the victim’s home state, the foreseeability criterion may be less critical in resolving the conflict. But when, as in Troxel, only the tortfeasor is in a position to foresee this eventuality and the

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126. 636 A.2d at 1181.
127.  Id. at 1182.
128.  Id. at 1181.
victim cannot foresee it, the scale tips against the tortfeasor, not the victim.\textsuperscript{131}

This was precisely the court’s reasoning in \textit{Carver v. Schafer}.\textsuperscript{132} \textit{Carver} was a dram-shop-act case, but because both involved states imposed liability on the tavern owner, the conflict centered on the amount of damages the plaintiff could recover. Illinois, the state where the tavern was located and the defendant was domiciled, limited the amount of damages recoverable, while Missouri, the state where the accident occurred and the victim was domiciled, provided for unlimited recovery. The court recognized that Missouri’s interest in fully compensating Missouri domiciliaries injured in Missouri directly clashed with Illinois’ contrary interest in limiting the financial exposure of Illinois tavern owners. The court resolved the conflict in favor of Missouri law by focusing on foreseeability. Noting that the defendant’s tavern was located near a major highway only ten miles from the Missouri-Illinois border, the court found it “unlikely that [defendant] would have been totally unaware that many of her patrons came from Missouri.” Thus, the court reasoned, “the fact that an accident occurred in Missouri as a result of the intoxicated condition of one of her patrons blunts any claim of [defendant] that a choice of Missouri law was an unpredictable consequence.”\textsuperscript{133} Then, focusing on the plaintiffs, the court concluded:

If one examines the question of predictability from [plaintiffs’] standpoint, any choice of law other than Missouri law would be a manifestly unfair surprise. . . . To tell [plaintiffs] that a Missouri resident who is killed by a second Missouri resident while the former is working within Missouri that Illinois law governs a resulting lawsuit would doubtless be met with shock and disbelief.\textsuperscript{134}

\textbf{IV. A LOOK AT THE FOREST}

\textbf{1. SUMMARY OF RESULTS}

Time now to summarize the results of the cases surveyed in Part III. Before doing so, it is important to reiterate that these cases have been decided by courts that have abandoned the \textit{lex loci delicti} rule in favor of several different choice-of-law approaches, such as the Restatement (Second), significant contacts, interest analysis, Leflar’s better-law approach, and several combinations of those approaches. Despite the multiplicity and variety of approaches, however, the cases produced remarkably consistent results. Table 7 summarizes the results of the 105 cases portrayed in the previous four tables.

\footnotesize

\textsuperscript{131}Cf. Peter Nygh, \textit{The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort}, 251 RECUEIL DES COURS 269, 296 (1995) (“The expectation of compensation is . . . reasonable and fundamental, as is the converse expectation that the liability be foreseeable.”).

\textsuperscript{132}647 S.W. 2d 570 (Mo. Ct. App. 1983).

\textsuperscript{133}Id. at 577-78.

\textsuperscript{134}Id. at 578.
<table>
<thead>
<tr>
<th></th>
<th>Injury</th>
<th>Conduct</th>
<th>Pro-P law</th>
<th>Pro-D law</th>
<th>Forum law</th>
<th>Non-Forum</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Pattern 1</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conduct-Regulation (41)</td>
<td>7</td>
<td>34</td>
<td>34</td>
<td>7</td>
<td>24</td>
<td>17</td>
</tr>
<tr>
<td>Loss-Distribution (16)</td>
<td>3</td>
<td>13</td>
<td>13</td>
<td>3</td>
<td>7</td>
<td>9</td>
</tr>
<tr>
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<td>47</td>
<td>47</td>
<td>10</td>
<td>31</td>
<td>26</td>
</tr>
<tr>
<td><strong>Pattern 2</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conduct-Regulation (31)</td>
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<td>4</td>
<td>27</td>
<td>4</td>
<td>25</td>
<td>6</td>
</tr>
<tr>
<td>Loss-Distribution (17)</td>
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<td>1</td>
<td>16</td>
<td>1</td>
<td>12</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total (48)</strong></td>
<td>43</td>
<td>5</td>
<td>43</td>
<td>5</td>
<td>37</td>
<td>11</td>
</tr>
<tr>
<td><strong>Grand-Total (105)</strong></td>
<td>53</td>
<td>52</td>
<td>90</td>
<td>15</td>
<td>68</td>
<td>37</td>
</tr>
<tr>
<td><strong>Percentages</strong></td>
<td>50%</td>
<td>50%</td>
<td>86%</td>
<td>14%</td>
<td>65%</td>
<td>35%</td>
</tr>
</tbody>
</table>

The three most revealing--and, perhaps, surprising--findings of this study of cases are:

1. The cases are almost evenly split (53 to 52) between applying the law of the place of conduct and the law of the place of injury;
2. The vast majority of the cases (90 out of 105 cases, or 86 percent) have applied whichever of the two laws favored the plaintiff; and
3. Almost two thirds of the cases (68 out of 105 cases, or 65 percent) have applied the law of the forum state.

**INSERT CHARTS 1-3**

![Chart 1. Conduct or Injury?](image1)

![Chart 2. Pro-P and Pro-D Law](image2)
If the 105 cases had been decided under the traditional *lex loci delicti* rule, then, barring the use of escape devices, such as characterization, *ordre public*, or *renvoi*, which are often used in states that follow that rule, the results would have been as follows:

(1) *All* (rather than half) of the 105 cases would have been decided under the law of the state of injury;

(2) Fifty-four (rather than 14) percent of the cases would have applied a law that favored the *defendant*—all 57 cases falling within Pattern 1; and

(3) Fifty-seven (rather than 65) percent of the cases would have applied the law of the forum.

These differences are discussed below.

2. **Comparison with the *Lex Loci Delicti* Rule and Currie’s Solutions**

   **A. Pattern 1a**

   A total of 41 conduct-regulation conflicts fell within Pattern 1a, the false conflict sub-pattern--cases in which the conduct occurred in a pro-plaintiff state and the injury occurred in a pro-defendant state.

   Under the *lex loci delicti* rule, all 41 cases would have applied the pro-defendant law of the state of injury, which was the forum state in 14 cases.

   Under Currie’s analysis, all 41 cases would have applied the pro-plaintiff law of the state of conduct because that state would be the only one with an interest in having its law applied. The state of conduct was also the forum state in 24 cases.

   In the actual cases, the courts applied the pro-plaintiff law of the state of conduct in 34 cases. That state was the forum in 24 cases.

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135. *See supra* note ____.
### Pattern 1a Cases (Conduct Regulation Conflicts)

<table>
<thead>
<tr>
<th></th>
<th>Conduct</th>
<th>Injury</th>
<th>Forum</th>
<th>Non-Forum</th>
<th>Pro-P</th>
<th>Pro-D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lex loci delicti</td>
<td>0</td>
<td>41</td>
<td>14</td>
<td>27</td>
<td>0</td>
<td>41</td>
</tr>
<tr>
<td>Currie</td>
<td>41</td>
<td>0</td>
<td>24</td>
<td>17</td>
<td>41</td>
<td>0</td>
</tr>
<tr>
<td>The cases</td>
<td>34</td>
<td>7</td>
<td>24</td>
<td>17</td>
<td>34</td>
<td>7</td>
</tr>
</tbody>
</table>

**B. Pattern 1b**

Sixteen loss-distribution conflicts fell within Pattern 1b, the inverse conflict sub-pattern in which the parties’ domiciles are added to the equation: the pro-plaintiff law of the state of conduct favors a victim domiciled in the state of injury, while the pro-defendant law of the state of injury favors a defendant domiciled in the state of conduct.

Under the *lex loci delicti* rule, all 16 cases would have been decided under the law of the state of injury, which favored the defendant in all cases and was the forum state in 6 cases.

Under Currie’s assumptions, all 16 cases would have been classified as “no-interest” cases because neither state would have an interest in protecting the domiciliary of the other state. All 16 cases would have been resolved under the *lex fori* in its role as the residual law. This would have produced a pro-plaintiff result in 6 cases and a pro-defendant result in 10 cases.

Contrary to Currie’s prescriptions, only 7 of the 16 cases applied the law of the forum. Moreover, in most of the 16 cases, the court based its choice-of-law decision on the chosen state’s affirmative interests or contacts, rather than on the state’s lack of interest or the role of forum law as the residual law. Thirteen of the 16 cases applied the pro-plaintiff law of the state of conduct, and three cases applied the pro-defendant law of the state of injury.

### Pattern 1b Cases (Loss-Distribution Conflicts)

<table>
<thead>
<tr>
<th></th>
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<th>Forum</th>
<th>Non-Forum</th>
<th>Pro-P</th>
<th>Pro-D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lex loci delicti</td>
<td>0</td>
<td>16</td>
<td>6</td>
<td>10</td>
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<tr>
<td>Currie</td>
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<td>0</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>The cases</td>
<td>13</td>
<td>3</td>
<td>7</td>
<td>9</td>
<td>13</td>
<td>3</td>
</tr>
</tbody>
</table>

**C. Pattern 2**

Forty-eight of the 105 cases fell within Pattern 2—the true conflict pattern, namely, cases in which the conduct occurred in a pro-defendant state and the injury occurred in a pro-plaintiff state.

Under the *lex loci* rule, and barring the use of escape devices, all 48 of these cases would have been resolved under the law of the state of injury, which had a pro-plaintiff law in all cases and was the forum state in 40 cases.

Under Professor Currie’s assumptions and analysis, all 48 cases would have been resolved under the law of the forum state because, in Currie’s view, courts lack the ability or authority to weigh conflicting state interests and thus potentially
subordinate the interests of the forum state to those of another state. In 40 of the 48 cases, the forum state was also the state of injury and had a pro-plaintiff law.\textsuperscript{136}

In the actual cases, the courts applied the pro-plaintiff law of the state of injury in 43 of the 48 cases. In all 43 cases, the plaintiff was also domiciled in that state. This was a supporting factor in conduct-regulation conflicts and an important factor in loss-distribution conflicts because it provided an additional basis for that state’s interest in protecting people injured within its territory. In 37 cases, the state of the applicable law was also the forum state. However, none of the cases in which the courts applied the forum law did so for the reasons advanced by Currie—namely, the court’s inability or lack of authority to weigh conflicting state interests. On the contrary, in many of these cases, the courts openly engaged in weighing the conflicting state interests.

<table>
<thead>
<tr>
<th>Pattern 2 Cases</th>
<th>Conduct</th>
<th>Injury</th>
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<th>Non-Forum</th>
<th>Pro-P</th>
<th>Pro-D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lex loci delicti</td>
<td>0</td>
<td>48</td>
<td>40</td>
<td>8</td>
<td>48</td>
<td>0</td>
</tr>
<tr>
<td>Currie</td>
<td>8</td>
<td>39</td>
<td>48</td>
<td>0</td>
<td>40</td>
<td>8</td>
</tr>
<tr>
<td>The cases</td>
<td>5</td>
<td>43</td>
<td>37</td>
<td>11</td>
<td>43</td>
<td>5</td>
</tr>
</tbody>
</table>

On the whole, courts in the actual cases applied a pro-plaintiff law more often than if they had been decided under either Currie’s analysis or the \textit{lex loci delicti} rule; further, courts applied the law of the forum less often than Currie but more often than courts following the \textit{lex loci delicti} rule. Specifically, the cases have applied:

1. a pro-plaintiff law in 90 cases, compared to the 87 cases under Currie’s analysis and 48 cases under the \textit{lex loci delicti} rule;

2. the law of the forum in 68 cases, compared to 88 under Currie and 60 under the \textit{lex loci delicti} rule; and

3. the law of the place of conduct in 52 cases, compared to 57 under Currie’s analysis and none under the \textit{lex loci delicti} rule.

\textbf{INSERT CHARTS 4-6 HERE}

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\textsuperscript{136}In one case (case \# 26, \textit{Oyola v. Burgos}), the forum’s only contact was that it was the domicile of the plaintiff.
3. The Contacts and Law of the Forum State

The high percentage of pro-plaintiff results, coupled with the relatively high percentage of cases applying forum law, suggests that plaintiffs are taking full advantage of the opportunities provided by current jurisdictional rules to sue in states with favorable laws. However, this may not occur as often as critics assume, and it does not necessarily amount to forum shopping. Of course, this depends on one’s definition of forum shopping. If one defines forum shopping in a way that would include all cases in which the plaintiff sues in a state with a favorable substantive law, then one may conclude that plaintiffs do engage in forum shopping—inasmuch as plaintiffs sued in states with a pro-plaintiff substantive law.
in 70 percent of the cases (73 of the 105).

However, a more precise definition of forum shopping should encompass only those cases in which a plaintiff unfairly exploits the jurisdictional rules to sue in a state that does not have relevant contacts beyond minimum jurisdictional nexus with the defendant (e.g., doing business). Under this definition, none of the 105 cases would qualify as forum-shopping cases because the forum in every case had legitimate and pertinent jurisdictional contacts. Specifically:

(1) In almost half of the cases (52 of 105 cases, or 49.5 percent), the plaintiffs sued in their home state, but that state was also the place of injury in 46 cases and the place of conduct in two cases. In 36 of those 52 cases, the forum state had a pro-plaintiff law, and that law must have played a role in the plaintiffs’ decision to sue there. However, in the remaining 16 cases, the forum state had a pro-defendant law. It seems that some plaintiffs prefer the convenience, or other advantages, of litigating in their home state, even if that state has an unfavorable substantive law, thus pinning their hopes on the forum’s conflicts law.

(2) In 39 of the 105 cases (37 percent), the plaintiffs sued in the defendant’s home state, which was also the state of conduct in 38 cases and the state of injury in one case. In 31 of the 39 cases, the forum had a pro-plaintiff law, and this undoubtedly influenced the plaintiffs’ decision to sue there. However, in the remaining eight cases, the forum had a pro-defendant law. The fact that the plaintiffs nevertheless sued there must find its explanation in other factors. Lack of jurisdiction in other states was a factor in only two cases.

(3) In 18 cases, the forum had only one of the four contacts portrayed in the tables. That contact was the plaintiff’s domicile in 4 cases, the place of injury in 13 cases, and the place of conduct in one case. Only in half of the 18 cases did the forum have a pro-plaintiff law.

137. In four cases, the forum was the plaintiff’s home state, without any of the other three contacts.
All in all, the plaintiffs sued in a state with a pro-plaintiff substantive law in 73 of the 105 cases (70 percent). This is not an excessive number and, if anything, it is less notable than the remaining 32 cases in which the plaintiffs sued in a state with a pro-defendant law.\(^{138}\)

By and large, the plaintiffs’ faith in the forum’s conflicts law does not appear misplaced. For example, of the 32 plaintiffs who sued in a state with a pro-defendant law, 27 plaintiffs succeeded in persuading the court to apply the pro-plaintiff law of another state. Clearly, the 73 plaintiffs who sued in a state with a pro-plaintiff law had an easier task. Sixty-three of these plaintiffs succeeded in convincing the court to apply the forum state’s own law. See chart 9. Percentage-wise, the number of cases applying a pro-plaintiff law was only slightly higher in cases decided in states that had a pro-plaintiff law than in cases decided in states that had a pro-defendant law (86 percent versus 84 percent).

\(^{138}\)Of these 32 cases, 15 were filed in the plaintiff’s home state and place of injury, seven in the defendant’s home state and place of conduct, seven in the state of injury, and three elsewhere.
Of the 68 cases (out of 105 cases, or 65 percent) that applied the law of the forum state: (a) 37 cases fell within Pattern 2, the true conflict pattern (which encompassed 43 cases); (b) 24 cases were conduct-regulation conflicts falling within Pattern 1a, the false conflict sub-group (which encompassed 41 cases); and (c) the remaining seven cases were loss-distribution conflicts falling within Pattern 1b, the inverse conflict group (which encompassed 16 cases).

INSERT CHART 10 HERE
4. THE CONTACTS AND LAW OF THE STATE OF THE APPLICABLE LAW

After looking at the contacts of the forum state, the next task is to summarize (1) the contacts of the state whose law the court applied and (2) the content of that law.

Eight of the 105 cases applied the law of a state that had three contacts; 85 cases applied the law of a state that had two contacts; and 12 cases applied the law of a state that had only one contact (the place of injury).

In 41 cases, the state of the applicable law was the plaintiff’s home state and place of injury. The state had a pro-plaintiff law in 36 of those cases.

In 51 cases, the state of the applicable law was the defendant’s home state and place of conduct and had a pro-plaintiff law in 46 cases.

In 12 cases, the state of the applicable law was the state of injury without any other contact. It had a pro-plaintiff law in seven of those cases.139

5. WHY PLAINTIFFS WIN?

Although 50 percent of the cases applied the law of the state of conduct and 50 percent applied the law of the state of injury, 86 percent of the cases applied whichever of the two laws favored the plaintiff. This finding will surely provide more ammunition to those who believe that American courts are “too liberal” and too eager to favor plaintiffs.

Yet, before coming to such a sweeping conclusion, one should bear in mind that, although this is a high percentage, it is confined to one category of tort

139. In one case, the state of the applicable law was the plaintiff’s home state and place of conduct. It had a pro-plaintiff law.
conflicts—those arising from certain (but not all) cross-border torts. As noted earlier, this study does not cover products liability conflicts, most of which involve cross-border torts. In products cases, courts tend to apply the law of a state that has a certain combination of contacts (such as the plaintiff’s domicile and injury, plus the place of the product’s acquisition), regardless of whether that law favors the plaintiff or the defendant. As a result, these cases are evenly split between those that apply a pro-plaintiff law and those that apply a pro-defendant law. Likewise, this study does not cover other tort conflicts in which the conduct and the injury occurred in the same state. Again, in these conflicts, courts tend to apply the law of a state that has a certain combination of contacts (e.g., conduct and injury, or domicile of both parties), regardless of whether that law favors the plaintiff or defendant. Thus, when one looks at tort conflicts as a whole, the percentage of cases that apply a pro-plaintiff law is much lower than 86 percent and may well be closer to 50 percent.

Nevertheless, it is fair to ask whether the 86 percent of cross-border cases that applied a pro-plaintiff law have unduly favored plaintiffs. Depending on one’s viewpoint, this question can be answered differently (at least for many cases). For what it is worth, this author’s answer is, on the whole, negative. This viewpoint is based on a thorough study of the cases and on the following points:

(1) The cases that applied a pro-plaintiff law belong to two categories: (a) those in which the court applied the law of the state of injury, and (b) those in which the court applied the law of the state of conduct. In the cases of the first category, the courts reached the same result as they would have reached had they followed the lex loci delicti rule. The difference is that the courts did so after determining that the defendants foresaw (or should have foreseen) the occurrence of the injury in that particular case. The fact that lack of foreseeability was not a permissible defense under the lex loci regime means that defendants have no good basis to complain about the abandonment of that regime in this category of cases. As for the second category of cases, foreseeability is not an issue because, in those cases, the courts applied the law of a state of conduct, that is, a state with which the defendants had voluntarily associated themselves and which, more often than not, was also the defendants’ home state. Under those circumstances, the application of that state’s law could hardly surprise the defendants.

(2) In the vast majority of cases that applied a pro-plaintiff law, the courts did

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141. See id. at 332-33 (showing that 52 percent of the cases applied a pro-plaintiff law and 48 percent applied a pro-defendant law).
142. See supra ___.
143. It may be worth noting that a comprehensive review of one of this author’s books has characterized this author as “conservative,” “traditionalist,” and as placing too high a premium on the notion that conflicts law should be neutral and evenhanded toward plaintiffs and defendants. See Weinberg, Theory Wars in the Conflict of Laws, supra note __ at 1632-33, 1646, 1649, 1661, 1664.
so not for the sake of the individual plaintiff, but rather in order to effectuate
the policies of a state in deterring wrongful conduct, preventing injuries, or
protecting tort victims as a class. Although plaintiffs as a class have been the
beneficiaries of these choice-of-law decisions, the individual plaintiffs were
not the reason for these choices.

(3) By definition, tort conflicts involve conflicting value judgments of at least
two states as to who should bear the social and economic losses caused by
injurious conduct that at least one state considers tortious. In the final analysis,
of the two actors involved in the conflict, the tortfeasor is the one who is in a
better position to prevent the loss. All other factors being equal, it is not
unfair to place this burden on the actor who was in a better position to prevent
the loss.

Finally, whether one agrees or disagrees with the above assessment, these are
the results of the cases. Perhaps these results should be different; perhaps not.
Perhaps judges should be more sympathetic toward actors whose conduct causes
injuries in other states; perhaps not. Such changes, even if desirable, cannot come
about as a result of academic commentary. If the results of the case law—be they
good or bad—cannot, or will not, be changed, is it possible to at least increase
the predictability of these results? Can we improve the system by making it more
efficient?

This author’s answer is a hopeful, perhaps even utopian, yes. One vehicle for
gaining efficiency is to adopt choice-of-law rules which, to the extent appropriate,
will: (1) codify the results of the cases; (2) avoid repeating the mistakes created by
the old rules (which were not based on judicial experience); and (3) incorporate
not only the best teachings of revolutionary thought, but also the lessons of both
the revolution and its aftermath. Before offering suggestions regarding the content
of these rules, it would be helpful to discuss some existing rules for cross-border
tort conflicts. This discussion begins with three sets of American rules—an
academic rule, a judicial rule, and a legislative one—and then turns to foreign
systems.

144. The scenario in which the victim also had the ability to prevent or minimize the loss is
addressed through the rules of contributory fault.

145. See Weinberg, supra note ___ at 1648 (“Symeonides acts on the principle that what courts do,
and their measure of agreement in what they do, are phenomena to be taken very seriously indeed.
Symeonides has the strong conviction that to glean truth from reality one has to handle a great deal
of reality, and to do so with utmost care.”).

146. See Symeon C. Symeonides, The First Conflicts Restatement Through the Eyes of Old: As
adoption of territoriality as the exclusive choice-of-law principle was not justified by the case law
of that time, and that, in drafting specific rules (such as the lex loci contractus rule), Beale ignored
contrary judicial precedents). In the ALI discussion of the Restatement in 1928, Beale candidly
admitted that the rule he proposed was “opposed to a majority of the cases.” See 6 AMERICAN LAW
INSTITUTE PROCEEDINGS 454, 458 (1927-28).
IV. CHOICE-OF-LAW RULES FOR CROSS-BORDER TORTS

1. AMERICAN RULES

   A. Professor Cavers’s Principles

   In his seminal 1965 book *The Choice of Law Process*, Professor David F. Cavers, one of the legendary figures of American conflicts law, proposed five “principles of preference” for tort conflicts and two principles for contract conflicts.\(^\text{147}\) His first principle for torts would cover cross-border conflicts falling within Pattern 1. The principle provides, in part, that “[w]here the liability laws of the state of injury set a higher standard of conduct or of financial protection against injury than do the laws of the state where the person who caused the injury has acted . . . the laws of the place of injury shall determine the standard . . . applicable to the case . . . .”\(^\text{148}\) Thus, this principle would resolve Pattern 1 conflicts in the same way as the majority of actual cases. Cavers offered the following rationale for this result:

   “Th[e] system of physical and financial protection [of the state of injury] would be impaired . . . if actions outside the state but having foreseeable effects within it were not also subject to its law. . . . [T]he fact that [the defendant] would be held to a lower standard of . . . damages back in the state where he had his home (or in the state where he acted) or, indeed, the fact that he enjoyed an immunity there, all would ordinarily seem matters of little consequence to the state of the injury. . . . If he has not entered the state but has caused harm within it by his act outside it, then, save perhaps where the physical or legal consequences of his action were not foreseeable, it is equally fair to hold him to the standards of the state into which he sent whatever harmful agent, animal, object or message caused the injury.”\(^\text{149}\)

   Cavers’s third principle of preference would cover cross-border conflicts falling within Pattern 2. It provides:

   Where the state in which a defendant acted has established special controls, including the sanction of civil liability, over conduct of the kind in which the defendant was engaged when he caused a foreseeable injury to the plaintiff in another state, the plaintiff, though having no relationship to defendant, should be accorded the benefit of the special standards of conduct and of financial

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\(^\text{147}\) See *David F. Cavers, The Choice of Law Process* 139-180 (1965).

\(^\text{148}\) *Id.* at 139. This principle is accompanied by an escape: “at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing their relationship.” *Id.*

\(^\text{149}\) *Id.* at 140, 141. Cavers also argued that the same rationale applies even if the victim is not domiciled in the state of injury but is instead domiciled in a state that has a lower standard of financial protection than the state of injury. *See id.* at 144 ("[T]he financial protection a state has prescribed, being a part of its provision for the general security, is in part a sanction for wrongfully causing harm. As a consequence its purposes include elements of deterrence and retribution even though it may be couched in essentially compensatory terms. When the laws of the state of injury are viewed in this light, the restrictive laws of the plaintiff's home state tend to fade into irrelevance.").
protection in the state of the defendant's conduct, even though the state of injury had imposed no such controls or sanctions.\textsuperscript{150}

Cavers illustrates the application of this principle by discussing a dram shop act case similar to the ones discussed above, as well as a case in which the defendant engages in blasting operations in a state that imposes strict liability for such operations, and these operations cause injury in a state that follows a negligence rule. Cavers concludes that, in both cases, it is appropriate to apply the law of the place of conduct in order to effectuate the deterrent and regulatory purposes of that law. When that law is violated by substandard conduct occurring within that state, Cavers said, such conduct “is just as bad when the victim is an outsider as an insider,”\textsuperscript{151} regardless of whether the injury materializes within or outside that state.\textsuperscript{152}

\textbf{B. The Neumeier Rules}

In the 1972 case \textit{Neumeier v. Kuehner},\textsuperscript{153} the New York Court of Appeals enunciated a set of choice-of-law rules to deal with the then-common and problematic guest-statute conflicts. In the 1985 case \textit{Schultz v. Boy Scouts of Am., Inc.},\textsuperscript{154} the court expanded the scope of these rules to encompass other loss-distribution conflicts; however, the court did not extend the rules to conduct-regulation conflicts, which continue to be resolved under interest analysis. The second \textit{Neumeier} rule, which is divided into Rule 2a and 2b for discussion purposes, provides as follows:

[Rule 2a]. When the driver’s conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim’s domicile. [Rule 2b]. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defence.\textsuperscript{155}

On its surface, this rule seems to cover cross-border torts falling within Pattern 1. The problem is that the two parts of the rule conflict with each other. For example, when a defendant acts in his home state, whose law protects him, and causes injury to the victim in her home state, whose law protects her, Rule 2a calls for the application of the law of the former state, whereas Rule 2b calls for the application the law of the latter state. This conflict is due to the fact that these rules have been devised for traffic accident cases, which are intrastate by definition.

\begin{itemize}
  \item \textsuperscript{150}Id. at 159.
  \item \textsuperscript{151}Id. at 160.
  \item \textsuperscript{152}See also id. at 160-66.
  \item \textsuperscript{153}286 N.E.2d 454 (N.Y. 1972).
  \item \textsuperscript{154}480 N.E.2d 679 (N.Y. 1985).
  \item \textsuperscript{155}Neumeier, 286 N.E.2d at 457-458.
\end{itemize}
Thus, when Rule 2a speaks of the “driver’s conduct,” it presupposes that any injury resulting from that conduct will also occur in the same state. Likewise, when Rule 2b speaks of a “guest [being] injured in the state of his own domicile,” it assumes that the injury is the result of the host-driver’s conduct and that both the conduct and the injury have occurred in the same state. By extending the scope of the Neumeier rules beyond guest-statute conflicts, the Schultz court made the rules applicable to cross-border torts but did not give careful thought to the old question of “localizing” the tort. Where one places the locus of the tort determines which of the Neumeier rules (or part thereof) is applicable and ultimately determines the outcome of the case.

In the absence of clear guidance from New York’s highest court, lower courts continue to speak of the “locus of the tort” and, uncritically relying on dicta contained in Schultz, place the “locus” in the state “where the last event necessary to make the actor liable occurred,” namely, the state of injury. This means that, in Pattern 1 cases, the place of conduct becomes irrelevant. More importantly, it means that Rule 2b trumps Rule 2a, thus resulting in the application of the pro-recovery law of the victim’s home state and place of injury. For reasons explained above, this result is proper, except for the lack of a foreseeability proviso. Fortunately, Rule 2b contains an escape of sorts—“in the absence of special circumstances”—which allows courts to consider the foreseeability factor.

Rule 2 does not apply in the converse situation, namely, cases falling within Pattern 2, in which the conduct occurs in a state with a pro-plaintiff law and the injury occurs in a state with a pro-defendant law. Consequently, these cases will fall within the scope of the third Neumeier rule, the default rule, which provides for the application of the law of the state in which “the accident” occurred. Although the quoted term is somewhat ambiguous when applied to cross-border torts, courts have assumed that it refers to the place of injury. Fortunately, this rule also contains a more explicit, if vague, escape for cases in which the non-application of the law of the place of injury “will advance the relevant substantive law purposes without impairing the smooth workings of the multi-state system or producing great uncertainty for litigants.”

156. *Schultz*, 480 N.E.2d at 683.

157. See *Bankers Trust Co. v. Lee Keeling & Assoc., Inc.*, 20 F.3d 1092 (10th Cir. 1994); *Kramer v. Showa Denko K.K.*, 929 F. Supp. 733 (S.D.N.Y. 1996); see also *Hamilton v. Accu-Tek*, 47 F. Supp. 2d 330, 337 (E.D.N.Y. 1999) (“In cases where the defendant’s tortious conduct and the plaintiff’s injury occur in different states ‘the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred.’”) (quoting *Schultz*).


159. See cases cited at note ___, supra.

160. *Neumeier*, 286 N.E.2d at 458. For a case applying the escape, see *Stevens v. Shields*, 499 N.Y.S.2d 351 (N.Y. Sup. Ct.1986) (applying Florida’s pro-plaintiff vicarious liability law to a New Yorker’s action against a Florida defendant arising from a New York accident; finding that Florida had a significant interest in applying its law to its domiciliaries, and that this would not impair New York’s interest in protecting its residents from liability because a New York defendant was not involved in the case). For a case refusing to apply the escape, see *Buglioli v. Enter. Rent-
In summary, then, under the Neumeier rules, both Pattern 1 and Pattern 2 cases will be decided under the law of the state of injury, regardless of whether or not that law favors the plaintiff or the defendant (unless the opposing party persuades the court to apply the escapes).

C. The Louisiana Codification

The Louisiana codification of 1991 distinguishes between conduct-regulation and loss-distribution conflicts and provides different rules for each category. The codification further subdivides the first category into generic conduct-regulation conflicts and those involving punitive damages. For conduct-regulation conflicts, the codification provides a rule which, like the vast majority of cases discussed above, calls for the application of the law of either the state of conduct or the state of injury, whichever provides for a higher standard of conduct. Article 3543 provides as follows:

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

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

For punitive damages, the codification provides a more conservative rule, which is built around three contacts—conduct, injury, and the tortfeasor’s...
domicile. The rule provides that punitive damages may be awarded when any two of these contacts are located in a state or states that impose punitive damages for the particular conduct. In 1994, the American Law Institute adopted the same solution for its Complex Litigation Project.

For loss-distribution conflicts arising from cross-border torts, the Louisiana codification also takes a cautious position by dealing only with conflicts that would fall within Pattern 1 but not Pattern 2. Article 3544(2)(b) of the codification provides that, when the parties are domiciled in different states with different laws and the conduct and injury occur in different states, the law of the state of injury governs, “provided that (i) the injured person was domiciled in that state, (ii) the person who caused the injury should have foreseen its occurrence in that state, and (iii) the law of that state provided for a higher standard of financial protection for the injured person than did the law of the state in which the injurious conduct occurred.”

Clause (i) in the quoted text makes this rule narrower than some of the cases discussed above because it limits the rule to those of Pattern 1 cases in which the victim is domiciled in the state of injury. Clause (iii) makes the rule inapplicable in the converse situation, namely, Pattern 2 cases in which the victim is injured (and domiciled) in a state that has a pro-defendant law. These cases are relegated to the codification’s default rule, Article 3542, which provides for a flexible approach aiming to apply “the law of the state whose policies would be most seriously impaired if its law were not applied to [the particular] issue.”

D. Oregon’s Pending Codification

Finally, the last word on this subject in the United States is a bill drafted by this author and currently pending before Oregon’s Legislative Assembly. Section 8(c) of the bill provides in pertinent part that, in cross-border torts (other than products liability), the law of the state of conduct governs. However, this provision also allows the application of the law of the state of injury, if:

(A) The activities of the person whose conduct caused the injury were such as to make foreseeable the occurrence of injury in that state; and

(B) The injured person formally requests the application of that state’s law by a pleading or amended pleading. The request shall be deemed to encompass all

163. See LA. CIV. CODE, art. 3546. For discussion of the rationale of this article by its drafter, see Symeonides, Exegesis, supra note ___ at 735-749. The Puerto Rico Draft Code does not contain a separate article for punitive damages. This means that punitive damages conflicts are governed by Article 40 of the Draft Code, which applies to other conduct-regulating conflicts and which allows punitive damages more easily, i.e., whenever they are allowed under the law of either the state of conduct or the state of injury (in the latter case, subject to a foreseeability defense).


165. LA. CIV. CODE ANN. art. 3544(2)(b).

166. LA. CIV. CODE ANN. art. 3542(1).
claims and issues against that defendant.\textsuperscript{167}

This provision is subject to an exception if a party demonstrates that the application to a disputed issue of the law of another state is “substantially more appropriate under the principles of section 9” (which articulates the bill’s residual choice-of-law approach), in which case the law of the other state applies to that issue.

2. A LOOK ABROAD: FOREIGN SOLUTIONS TO CROSS-BORDER TORT CONFLICTS

In contrast to the traditional American system, other private international law (PIL) systems recognized early on the inherent difficulties of cross-border tort conflicts; consequently, these systems have been far less categorical in choosing between the places of conduct and injury. Although these systems also follow the principle of territoriality and the \textit{lex loci delicti} rule, they differ from the American system (and among themselves) in localizing the \textit{delict}. For example, the Austrian\textsuperscript{168} and Polish\textsuperscript{169} PIL codifications opt for the place of conduct, the Dutch codification opts for the place of injury,\textsuperscript{170} and the Czech,\textsuperscript{171} Greek,\textsuperscript{172} and Spanish\textsuperscript{173} codifications leave the choice between the two places unanswered, while the Japanese,\textsuperscript{174} Swiss,\textsuperscript{175} and Quebec\textsuperscript{176} codifications opt for the law of the

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\textsuperscript{169} See Act of 12 Nov. 1965 on Private International Law (Pol.), art. 33(1) [hereinafter POLISH PIL ACT].


\textsuperscript{171} See Act 97 of 4 December 1963 Concerning Private International Law and the Rules of Procedure Relating Thereto, art. 15 (law of former Czechoslovakia, now in force in the Czech Republic and Slovakia).

\textsuperscript{172} See GREEK CIV. CODE, art.26.

\textsuperscript{173} See Preliminary Title of the Civil Code as amended on 9 July 1974, art. 9.

\textsuperscript{174} See Law No. 10 of 1898, as amended on 21 June 2006 (Act on the General Rules of Application of Laws), English translation by Ken Anderson in 8 YBK. PRIV. INT’L L. 427 (2006), art. 17 (applying law of state of injury, unless occurrence there was unforeseeable, in which case the law of state of conduct governs).

\textsuperscript{175} See Federal Law of 18 Dec.1987, art. 133(2) (Switz.), translated in Jean-Claude Cornu, Stéphane Hankins & Symeon Symeonides, Swiss Federal Statute on Private International Law of December 18, 1987, 37 AM. J. COMP. L. 193, 228 (1989) [hereinafter SWISS PIL ACT] (applying law of place of conduct, but if injury occurred in another state, applying that state’s law if the tortfeasor should have foreseen the occurrence of the injury in that state). \textit{But see} arts.135, 138-39, \textit{infra} note \textsuperscript{12} (giving plaintiffs a choice in certain cases).

\textsuperscript{176} See QUEBEC CIV. CODE, art. 3126 as revised in 1991 (applying law of state of conduct, unless the injury occurred in another state and the actor should have foreseen its occurrence there). \textit{But see} \textit{id.} art. 3129, which requires the application of Quebec law for injuries sustained outside Quebec as a result of exposure to raw materials originating in Quebec. \textit{See also} \textit{id.} art. 3128 \textit{infra} at
\end{footnotesize}
place of conduct in some specified cases and the law of the place of injury in other cases.

In recent years, an intriguing solution has been gaining ground: allowing the tort victim to choose between the laws of the two places, or authorizing the court to choose the law most favorable to the victim. As early as 1966, the Portuguese codification gave this choice to the court. Article 45 subjected torts to the law of the place of conduct, but also provided that “[i]f the law of the state of injury holds the actor liable but the law of the state where he acts does not, the law of the former state shall apply, provided the actor could foresee the occurrence of damage in that country as a consequence of his act or omission.”

The German codification gave this choice directly to the tort victim. Article 40(1) of the codification provides in part:

Claims arising from tort are governed by the law of the state in which the person liable to provide compensation acted. The injured person may demand, however, that the law of the state where the result took effect be applied instead.

Likewise, Article 62 of the Italian codification provides in reverse that torts are governed by the law of the state of injury, but “the person suffering damage may request the application of the law of the State in which the event causing the injury took place.” Several other countries have adopted this same principle, either for all cross-border torts or for only certain categories. The first group includes countries as diverse as China, Estonia, Hungary, Korea, Serbia, Slovenia

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177. CÓDIGO CIVIL PORTUGUÊS as amended in 1966 [hereinafter PORTUGUESE CIV. CODE], art. 45(2). This provision is subject to an exception for some cases in which the parties have the same nationality or habitual residence. An identical provision is contained in Art. 2097 of the Peruvian Civil Code of 1984. See English translation by Alejandro Garro in 24 I.L.M. 997, 1011 (1985).


180. In a judgment rendered on January 28, 1988, China’s highest court held that a court may apply either the law of the state of conduct or the state of injury. See Xu Donggen, Chronique de jurisprudence chinoise, J. DR. INT’L 191 (1994). A Model Law of PIL drafted by the Chinese Society of PIL (2000) provides in article 112 that the victim has the right to choose between the laws of the places of conduct or injury. Article 125 allows the victim of defamation to choose from among the laws of the victim’s domicile, habitual residence, or injury, or the place of dissemination of the defamatory material or the place of the injury. See English translation by Han Depie in 3 YBK. PRIV. INT’L LAW 359 (2001).
Other countries have adopted this idea only for certain torts. For example, Belgium allows such a choice only in cases involving defamation and in direct actions against insurers;\textsuperscript{188} Turkey adds products liability;\textsuperscript{189} the Rome II Regulation does so only in environmental torts, direct actions against insurers, and certain cases involving anti-competitive restrictions;\textsuperscript{190} Switzerland does so in cases involving


\textsuperscript{182}See Hungarian Decree No. 13 of 1979, 33 MK, art.33(2), translated in Francis A. Gabor, A Socialist Approach to Codification of Private International Law in Hungary: Comments and Translation, 55 TUL. L. REV. 63 (1980) [hereinafter HUNGARIAN PIL ACT] (providing for the application of the law of the state of conduct, unless the law of the state of injury is “preferable” to the victim).


\textsuperscript{184}See Law of 15 July 1982 Concerning Conflicts with Foreign Laws (in force in the former Yugoslavia), art. 28(1). See also Act No. 402 of 30 March 1978, art. 1102(4) (applicable to internal inter-republic conflicts and providing that damages for torts are governed by “that law which is most favourable for the injured party.”).

\textsuperscript{185}See Private International Law and Procedure Act 56/99 (13.07.1999), art.30(1).


\textsuperscript{187}See Act No. 36.511of 6 August 1998 on Private International Law, eff. 6 February 1999, English transl. in 1 YBK. OF PRIV. L. 341 (1999) [hereinafter VENEZULEAN PIL ACT], art. 32, (providing for the application of the law of the state of injury, unless the victim requests the application of the law of the state of conduct). The idea of allowing the tort victim to choose between the laws of the place of conduct or the place of injury has also been adopted in draft legislation pending in Mexico (2006 Draft) and Uruguay (2007). See Cecilia Fresnedo de Aguirre & Diego Fernandez Arroyo, A Quick Latin American Look at the Rome II Regulation, 9 YBK. PRIV. INT’L L. 193, 197-98 (2007).

\textsuperscript{188}See CODE DE DROIT INTERNATIONAL PRIVÉ (Belg.) (Loi du 16 juillet 2004), Moniteur Belge, July 27, 2004 [hereinafter BELGIAN PIL CODE], art. 99(2)(1) (applicable to defamation; allowing plaintiff to choose between the laws of the state of conduct and, subject to a foreseeability proviso, the state of injury); art.106 (applicable to direct actions against the tortfeasor’s insurer; providing that the action will be allowed if it is allowed by either the law governing the tort or the law governing the insurance contract).

\textsuperscript{189}See CODE OF PRIVATE INTERNATIONAL LAW AND CIVIL PROCEDURE (Law No. 5718 of 27 November 27, 2007), English translation by Ayşe Odman Boztosun in 9 YBK. PRIV. INT’L L. 583 (2007) [hereinafter TURKISH PIL CODE], art. 35 (applicable to defamation; allowing plaintiff to choose between the laws of the defendant’s habitual residence or place of business and, subject to a foreseeability proviso, the states of the victim’s domicile or injury); art. 34(4) (applicable to direct actions against the tortfeasor’s insurer; providing that the action will be allowed if it is allowed by either the law governing the tort or the law governing the insurance contract); art. 36 (applicable to products liability; allowing plaintiff to choose between the laws of the defendant’s habitual residence or place of business and the law of the state of the product’s acquisition).

\textsuperscript{190}See REGULATION (EC) NO 864/2007 ON THE LAW APPLICABLE TO NON-CONTRACTUAL

Tunisia,\textsuperscript{186} and Venezuela.\textsuperscript{187}
emissions, injury to rights of personality, and products liability; and Romania does likewise in cases of defamation, unfair competition, and products liability.

In products liability conflicts, the Italian, Quebec, Swiss, and Turkish codifications allow the plaintiff to choose from among the laws of either (a) the tortfeasor’s place of business or habitual residence, or (b) subject to a proviso, the place in which the product was acquired. The Russian Civil Code adds the plaintiff’s domicile to these choices. The Tunisian codification adds the state of injury to the plaintiff’s choices. The Romanian codification allows plaintiffs to choose between their home state and the place of the product’s acquisition, while the Hague Convention on the Law Applicable to Products Liability allows plaintiff to choose between the laws of the tortfeasor’s principal place of business and the law of the place of injury, provided that certain contingencies are met. Similar rules have been proposed in the United States.

OBLIGATIONS (“Rome II”), 2007 O.J. (L 199) 40, art. 7 (environmental torts; applying the law of the state of injury, unless the plaintiff opts for the law of the place of conduct); art. 6(3)(b) (allowing the plaintiff to choose between the otherwise applicable law and the law of the forum in certain cases involving anti-competitive restrictions); Art.18 (authorizing a direct action against the insurer if such action is allowed by either the law applicable to the tort or the law applicable to the insurance contract).

See SWISS PIL ACT, art. 138 (applicable to emissions; allowing victim to choose between the laws of the state of conduct and the state of injury); art. 139 (injury to rights of personality; giving victims a choice from among the laws of the tortfeasor’s habitual residence or place of business, and—subject to a foreseeability defense—the victim’s habitual residence or the place of the injury; art. 135 (allowing victims to choose between the laws of the state of the defendant’s principal place of business and, subject to a defense, the state of the product’s acquisition).

See Law No. 105 of 22 September 1992 on the Settlement of Private International Law Relations, eff. 26 October 1993 [hereinafter ROMANIAN PIL ACT], art. 112 (applicable to defamation; allowing victim to choose between the laws of the defendant’s domicile or residence and—subject to a foreseeability proviso—the plaintiff’s domicile or residence, or the state of injury); arts. 117-118 (applicable to unfair competition; applying the law of the state of injury but also allowing the victim to choose another law in certain cases); art. 114 (applicable to products liability; allowing plaintiff to choose between the laws of plaintiff’s domicile and the place of the product’s acquisition).

See ITALIAN PIL ACT, art. 63; QUEBEC CIV. CODE, art. 3128; SWISS PIL ACT, art. 135(1); TURKISH PIL CODE, art. 36.

See CIVIL CODE OF THE RUSSIAN FEDERATION (Law No. 147-Fz of 26 November 2001), art. 1221 (English translation by S. Lebedev in 4 YBK. PRIV. INT’L L. 349).

See TUNISIAN PIL CODE, art. 72.

See ROMANIAN PIL ACT, art 114.

See arts. 6 and 4-5 of the HAGUE CONVENTION ON THE LAW APPLICABLE TO PRODUCTS LIABILITY (1973). For the text of the convention and a list of the eleven countries in which it is in force, see http://www.hcch.net/index_en.php?act=conventions.status&cid=84.

See David Cavers, The Proper Law of Producer’s Liability, 26 INT’L & COMP. L.Q. 703, 728-29 (1977) (letting the plaintiff choose from among the laws of: (a) the place of manufacture; (b) the place of the plaintiff’s habitual residence if that place coincides with either the place of injury or the place of the product’s acquisition; or (c) the place of acquisition, if that place is also the place of injury); Russell Weintraub, Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation, 1989 U. ILL. L. REV. 129, 148 (1989) (giving both the victim and the tortfeasor a choice under certain circumstances); Symeon Symeonides, The Need for a Third Conflicts Restatement (And a Proposal
Some of the above codifications condition the application of the law of the state of injury to an express foreseeability proviso. One example is the Portuguese Civil Code provision quoted earlier.\textsuperscript{199} However, some codifications fail to include an express foreseeability proviso. For example, the German, Hungarian, and Tunisian codifications provide for the application of the law of the state of conduct, but allow the application of the law of the state of injury at the victim’s request—without conditioning such application on foreseeability.\textsuperscript{200} The German codification also provides an escape clause which may enable courts to avoid unfair results.\textsuperscript{201} The Italian and Venezuelan codifications and the Rome II regulation do the reverse by applying the law of the injury state unless the victim requests the application of the law of the state of conduct.\textsuperscript{202} Finally, less problematic are the provisions of the Dutch, Quebec, Russian, and Swiss codifications, which include a foreseeability proviso but do not condition the application of the law of the state of injury on whether that law is favorable to the victim or the tortfeasor.\textsuperscript{203} Clearly, the foreseeability proviso is needed only when that law is unfavorable to the tortfeasor.

Continental lawyers usually defend these rules on the basis of the principle of \textit{favor laesi},\textsuperscript{204} that is, the principle of favoring the injured party. In turn, this principle is at times perceived as a “cousin of the better law approach,”\textsuperscript{205} a peculiarly American approach advocated by Professor Robert Leflar.\textsuperscript{206} This does not mean, however, that these rules have been influenced by Leflar or by any other American approach. Nor is there any reason to assume that, in deciding these cases one by one, American courts have been aware of, much less influenced by, the foreign rules discussed above. Nevertheless, the very fact that these courts independently have arrived at the same solutions as so many elected representatives and legislative technocrats around the globe suggests that these solutions may not be as “off the wall” as some critics would argue.

\begin{footnotesize}
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\item \textsuperscript{199}See Portuguese Civ. Code Art. 45(2), \textit{supra} note ___ at text.
\item \textsuperscript{200}See EGBGB, Arts. 40(1), 44; Hungarian PIL Act, §§32-33; Tunisian PIL Code, Art. 70(2).
\item \textsuperscript{201}See EGBGB, Art. 41.
\item \textsuperscript{202}See Italian PIL Act, art. 62.1; Venezuelan PIL Act, art. 32 (2); Rome II, art. 7 (applicable to environmental torts only).
\item \textsuperscript{203}See Dutch PIL Act, art. 3(2); Quebec Civ. Code, art. 3126(1); Russian Civil Code, art. 1219(1); Swiss PIL Act, arts. 13(2), 137, 135, 139, 142(2).
\item \textsuperscript{204}For a discussion of this principle in comparative conflicts law, see Symeonides, \textit{Progress or Regress?} 57-59. See also Peter Nygh, \textit{The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort}, 251 Recueil des Cours 269, 292-293 (1995); Frank Vischer, \textit{General Course on Private International Law}, 232 Recueil des Cours 9, 119 (1992).
\item \textsuperscript{206}See supra note ____.
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\end{footnotesize}
VI. PROPOSALS IN LIEU OF CONCLUSIONS

A. Introduction

Most of the foreign rules described above (at least those that allow victims to choose the law governing cross-border torts, or that authorize the court to choose the law most favorable to victims) would produce the same result as the 86 percent of the American cases in which courts applied a pro-plaintiff law. The difference is that each American court confronting such a case must engage in a multifaceted and laborious choice-of-law analysis and comparison of many relevant factors and policies, all without much certainty regarding the final outcome. In contrast, the foreign courts can arrive at the legislatively and democratically prescribed outcome without any choice-of-law analysis, precisely because the choice has already been made in advance by the legislature.

Can the American revolution produce similar rules for American courts? As the Louisiana codification indicates, the answer is clearly affirmative. The civil law heritage of that state may explain why codification was a viable option there, but it does not mean that the resulting product is peculiarly civilian. The codification has used civilian drafting technique and drew elements from many European approaches, but, more than anything, it drew from the general American conflicts experience. Moreover, the codification experiment is now being repeated in Oregon, a typical common-law state. Thus, the answer to the question of “rules versus no rules” depends on willingness rather than ability.

The reason for the American unwillingness to opt for rules is the tumultuous experience courts endured with Beale’s ill-conceived rules and Currie’s excessive aphorism that “[w]e would be better off without choice-of-law rules. Now it is time to ask whether this assertion remains true (assuming it ever was true). For almost half a century now, we have been without choice-of-law rules. During this period, American courts have struggled with the various approaches generated by the revolution. After a few false starts, and despite using different choice-of-law approaches or merging approaches that their proponents consider incompatible, the courts have reached remarkably consistent results in several categories of tort conflicts. This Article has demonstrated this consistency in what is perhaps the most difficult category of tort conflicts: cross-border torts. This is a good time to capture and solidify this consistency. This author has previously argued that it is possible to compress this experience into a new breed of smart, evolutionary choice-of-law rules that will restore a proper equilibrium between certainty and flexibility, as well as preserve the substantive and methodological accomplishments of the revolution.


This author has also proposed such rules for other categories of tort conflicts. Is such a rule possible for cross-border torts? This author contends that it is. Below are some options.

**B. Three Proposals**

1. **Option 1**

   One option is to take the cautious approach of the Louisiana codification. As noted earlier, this codification provides three rules for three categories of cases, namely: (1) a conservative rule for punitive-damages conflicts, which requires the concurrence of two contacts before allowing punitive damages; (2) a liberal rule for other conduct-regulating conflicts, which, like the majority of the above cases, applies the law of either the state of conduct or the state of injury, whichever law prescribes a higher standard of conduct; and (3) an elliptical rule covering only certain loss-distribution conflicts in which the victim is injured and domiciled in a state whose law favors the victim more than the state of conduct. A variation of this option is provided by the Puerto Rico Draft Code, which subjects punitive-damage conflicts to the same rule as other conduct-regulating conflicts.

   The Louisiana option will produce fewer pro-plaintiff results than the American cases in two categories: punitive-damage conflicts and loss-distribution conflicts. Having drafted that codification, this author does not feel the need to apologize for it. Suffice it to say that the codification is in line with the conservative leanings of that state, where, for example, the law prohibits punitive damages for most torts.

2. **Option 2**

   A middle-of-the-road option would be to adopt a single rule for all three of the above categories of conflicts, which would provide as follows:

   When the tortfeasor and the victim are domiciled in different states, the law of the state of conduct governs all claims against the tortfeasor.

   However, if the injury occurs in another state whose law prescribes a higher standard of conduct for the tortfeasor or provides for a higher standard of financial protection for the victim, then that state’s law governs, provided that the tortfeasor’s actual or intended course of conduct were such as to make foreseeable the occurrence of the injury in that state.

   This rule would not apply to products liability conflicts, and, like the Louisiana

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210. See id. at 207-08, 235, 259-61, 346 (proposing specific rules for intrastate tort conflicts and product liability conflicts).

211. See supra text accompanying notes _____, The above rules are inapplicable to most product liability conflicts, for which the Louisiana codification provides a separate rule. See L.A. CIV. CODE art. 3545. All of these rules are subject to an escape clause. See L.A. CIV. CODE, art. 3547.

212. See supra notes _____.

213. For a favorable assessment, see Patrick J. Borchers, Louisiana’s Conflicts Codification: Some Empirical Observations Regarding Decisional Predictability, 60 L.A. L. REV. 1061, 1068 (2000) (finding that the Louisiana codification “has improved . . . the predictability of decisions in conflicts cases.”).
rule, it should be accompanied with a carefully drafted escape clause that would allow a court to deviate from the prescribed result in appropriate cases.\footnote{214} If a rule like this were in place, then the 86 percent of cases that applied the pro-plaintiff law of either the state of conduct or the state of injury would have been decided in exactly the same way. Of course, one could argue that these cases were wrongly decided, and thus a rule that reproduces these results simply replicates a flawed system. Although, as explained earlier, this author does not subscribe to this view, this is a matter on which reasonable minds can differ. Nevertheless, from a pragmatic systemic perspective, there is much to be said in favor of a rule that provides predictability, reduces litigation expenses, and lightens the courts’ choice-of-law burdens, \textit{without} changing the substantive results of the case law. If a rule like the one proposed above were in place, the cases discussed in part III would have been decided in the same way, but the decisions would have come early and easily, sparing courts and litigants the cost and uncertainty of litigating the choice-of-law question. Indeed, one could argue that a rule like this would have facilitated early settlements in most of these cases, without resort to litigation. If parties know the applicable law beforehand, this will likely put them in a better position to make an intelligent decision regarding whether or not to litigate. Even if litigation cannot be avoided, such a rule would conserve judicial resources by relieving courts from the burdens and risks of a laborious--and often inconsistent--judicial determination and evaluation of state policies and interests.

This rule, of course, \textit{could} have also changed the result in the remaining 14 percent of cases from a pro-defendant to a pro-plaintiff law, thus potentially raising the percentage of pro-plaintiff results from 86 to 100 percent. However, the use of the escape clause could prevent this change in some cases or change the result in other cases, thus keeping the overall balance more or less the same. Admittedly, though, this would not provide consolation for those defendants who would have fared better under the current case law. Consequently, the proposed rule should be defended on its merits. To that end, all the arguments offered earlier in defense of the pro-plaintiff bent of the current case law\footnote{215} are reiterated here. In addition, the proposed rule can be defended pattern-by-pattern along the lines suggested below.

In Pattern 2 cases (the true conflict pattern), the proposed rule will lead to the application of the law of the state of injury rather than the pro-defendant law of the state of conduct. As explained earlier, both states in these cases have a legitimate claim to apply their law. On balance, however, the application of the law of the state of injury is appropriate in these situations, especially because it is conditioned on objective foreseeability. It is worth noting that the \textit{lex loci delicti} rule, which has reigned for more than a century, did not include this condition, nor do most of the European rules discussed above. Because of the foreseeability proviso, one can

\footnote{214} For the function, uses, utility, and style of escape clauses, see Symeon C. Symeonides, \textit{Exception Clauses in American Conflicts Law}\textsuperscript{\textcopyright} 42 AM. J. COMP. L. 813 (Supp. 1994). For a critique of escape clauses commonly employed in Europe, such as in the Rome II Regulations, see Symeon C. Symeonides, \textit{Rome II and Tort Conflicts: A Missed Opportunity}, 56 AM. J. COMP. L. 173, 192-204 (2008).

\footnote{215} \textit{See supra} text accompanying notes \_\_\_.

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defend the application of the law of the state of injury not only on the basis of that state’s interest or on the basis of the favor laesi principle, but on the basis of basic principles of accountability. One who predictably causes harm in a state whose law considers that harm tortious should be held accountable under that law.\(^\text{216}\) As Cavers noted, under these circumstances “it is . . . [only] fair to hold [the tortfeasor] to the standards of the state into which he sent whatever harmful agent, animal, object or message caused the injury.”\(^\text{217}\)

The proposed rule can also be easily defended in conduct-regulation conflicts falling within Pattern 1a, cases in which the tortfeasor violates the conduct-regulation standards of the state of conduct but not those of the state of injury. For reasons explained earlier, these cases are clearly false conflicts in which only the state of conduct has an interest in applying its law. This rule will resolve these conflicts--as have most of the cases--by applying the law of the only interested state. This result is not unfair to the defendant. One who violates the laws of the state of conduct should not be allowed to avoid the consequences of that violation merely because the injury occurred on the other side of the border.

The loss-distribution conflicts falling within Pattern 1b are a bit more difficult, but only if one accepts Currie’s assumptions that a state is interested only in protecting its domiciliaries and not out-of-staters similarly situated. On the other hand, if one does not subscribe to these assumptions, then there is little reason to question the application of the law of the state of conduct in these cases. As the discussion in Part III indicates, the majority of cases involving these conflicts have rejected these assumptions and have applied the law of the state of conduct.

Finally, Professor Louise Weinberg, who has characterized this author’s previous work as too conservative and not sufficiently sympathetic to plaintiffs, offers bolder and more eloquent arguments:

Systematic choices of plaintiff-favoring law are better public policy than systematic choices of defendant-favoring law. When defendants engage in risky activities in reliance upon lax standards in their home states, shared public policies (favoring safety and fair dealing) would seem better served not by indulging such defendants in their race to the regulatory bottom, but rather by permitting plaintiffs injured by those activities to seek enforcement of higher legal standards. It is also sound public policy, universally recognized in American tort law, that innocent plaintiffs not bear the risk of their own injuries.”\(^\text{218}\)

\(^{216}\) See Weinberg, supra note ___ at 1654 (“The argument is sometimes made that the defendant is unfairly surprised and cannot adequately structure its enterprise if it is to be stripped of its defenses under an interested state's laws. Yet a defendant's insurer is the paradigmatic actuarial expert, and has every opportunity to structure the insured's coverage accordingly. It has every opportunity to adjust the defendant's premiums to take into account this and other risks. Given the near universality of liability insurance among suable defendants, it is somewhat unreal to speak of ‘unfair surprise’ to tort defendants. They have insured against liability precisely because they anticipate it under some state's laws.”).

\(^{217}\) D. Cavers, The Choice of Law Process, supra note ___ at 141.

\(^{218}\) Weinberg, supra note ___ at 1654. In criticizing this author’s defense of neutrality and
3. Option 3

A third option is to follow the European rules discussed above and leave the choice of law to the victim, but—as in the Oregon Draft— to also condition the choice of the pro-plaintiff law of the state of injury on (a) objective foreseeability and (b) an appropriately phrased escape clause. That rule would provide as follows:

When the tortfeasor and the victim are domiciled in different states, the law of the state of conduct governs all claims against the tortfeasor, unless:

(a) the injury occurred in another state and the victim requests the application of the law of that state; and

(b) the tortfeasor’s actual or intended course of conduct were such as to make foreseeable the occurrence of the injury in that state.

The victim’s request must be submitted to the court in writing on or before [a specified early time in the proceedings] and must encompass all claims and issues against the defendant.

The idea of allowing one party to choose the applicable law, especially after the dispute arises, is new in the United States. It is politically provocative and sounds unilaterally suspicious. Since the beginning of conflicts law history, the choice of the law governing multistate cases has been made either: (1) by the lawgiver in advance through pre-formulated choice-of-law rules, (2) by the judge in deciding the particular case, or (3) through a combination of these two methods. In all cases, the goal was to arrive at an unbiased choice made by impartial public actors. The will of private parties has entered the picture relatively recently. Over the last two centuries, most legal systems have begun resurrecting--and gradually employing--the ancient principle of party autonomy, which allows parties to a multistate dispute to select the law that will govern the dispute. By now, this principle is “perhaps the most widely accepted private international rule of our time.”

However, this principle has traditionally been limited to the law of contracts and has only contemplated a pre-dispute choice agreed to by both parties. If the parties to

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219. Obviously, allowing both parties to agree on the applicable law after the dispute arises is far less problematic. For example, in the United States, when neither party argues for the application of non-forum law, most courts will decide the case under forum law, even if the forum’s choice-of-law rules would normally point to non-forum law. See SYMEON SYMEONIDES, WENDY PERDUE & ARTHUR VON MEHREN, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 107-111 (2d ed. 2003).

a contract agreed in advance that a particular law would govern their future contractual dispute, then a court would honor the agreement as long as the agreement was otherwise valid and the contract did not exceed certain public-policy limits. In recent years, many systems have extended this principle to certain status-like contracts, such as those regulating the property relations of spouses (matrimonial regime) and, lately, testate successions law, where the testator is now allowed (within certain limits) to designate the law that will govern his or her succession. In the latter case, the choice of law is made by a single party—the testator—who, besides being in a different position than either party in adversarial litigation, makes the choice before the dispute arises. In contrast, proposed option 3 gives a post-dispute choice to one party who is already an actual or potential litigant. For this reason, one would be justified in assuming that such a rule is too generous to that party and, thus, unfair to the other party. However, closer examination reveals a more complex picture.

To begin, the notion of a post-dispute choice by one party may be novel, but it is not qualitatively different than requiring the court to choose a law that favors a certain party. After all, both approaches produce the same result, namely, the choice of a pro-plaintiff law. If anything, a rule that directly allows the party to choose which law governs has certain practical advantages, which will be explained later.

Second, result-oriented choice-of-law rules—albeit more subtle ones—have been around for centuries. Typically, these rules contain a list of alternative references to the laws of several states connected with the case (“alternative-reference” rules) and authorize the court to select a law that produces the preferred substantive result, such as favoring the status of marriage, legitimacy, filiation, or adoption. By favoring a particular status, these rules also favor, directly or indirectly, the party or parties whose interests depend on the particular status.

Third, in recent years, many systems have extended the notion of expressly favoring certain litigants to parties other than tort victims, such as maintenance obligees, consumers, employees, or other parties whom the legal order considers weak or whose interests are considered worthy of protection. These systems authorize the choice of the most favorable law from among the laws of several states having contacts with the case. For example, the German codification allows a choice from among the laws of (1) the obligee’s habitual residence, (2) the common nationality of the obligor and the obligee, or (3) the law of the forum. Similar rules in the 1973 Hague Convention on the Law Applicable to Maintenance

221. For the ability of contracting parties to choose the law that will govern future non-contractual disputes arising from a contract, see Scolès, Hay, Borchers, & Symeonides, §§ 17.40, nn. 20-30, 18.1 n.18; Symeonides, American Private International Law 212-14.


223. See Symeonides, Result-Selectivism, supra note ___ at ___.

Obligations, the 1989 Inter-American Convention on Support Obligations, and several national or sub-national codifications, allow similar and sometimes broader choices. The Belgian PIL Code extends the concept of post-dispute choice by one party to the owner of stolen cultural property or other movable property. Finally, many systems protect consumers and employees from the adverse consequences of their own potentially coerced or uninformed assents to choice-of-law clauses. These systems provide that a choice-of-law clause may not deprive the consumer or employee of the protection afforded by the mandatory rules of the country whose law would govern the consumer or employment contract in the absence of such a clause. Thus, a choice-of-law clause can expand but cannot contract the protection available to consumers or employees. Again, the materially desirable result of protecting members of a protected class is given preference over considerations of “conflicts justice.”

This list of result-oriented rules is a reminder, if one were needed, that conflicts law often adopts rules that are directly designed to reach a specific substantive result that the system considers preferable. The common denominator among the above rules is that they are all designed to level the conflicts field between presumptively strong parties and presumptively weak parties, such as tort victims or maintenance

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225. See arts. 4-6 of the Convention (choice between the lex fori and the law of the obligee’s habitual residence, or the common national law of the obligor and the obligee). For the text of the convention, see http://www.hcch.net/index_en.php?act=conventions.text&cid=86. See also arts. 1-3 of the 1956 Hague Convention on the Law Applicable to Maintenance Obligations Towards Children (choice between the lex fori and the law of the child’s habitual residence). For the text of the convention and a list of the thirteen countries in which it is in force, see http://www.hcch.net/index_en.php?act=conventions.status&cid=37.

226. See art. 6 INTER-AMERICAN CONVENTION ON SUPPORT OBLIGATIONS, done in Montevideo on July 15, 1989, 29 I.L.M. 73 (1990) (choice from among the laws of the habitual residence or domicile of either obligor or obligee).

227. See BELGIAN PIL CODE, art. 74 (choice from three different laws); FRENCH CIV. CODE, arts. 311-18 (giving the choice directly to the child); QUEBEC CIV. CODE, art. 3094 (choice between the law of the domicile of the obligee or the obligor); TUNISIAN PIL CODE, art. 51 (allowing the court to choose from among four potentially different laws the one most favourable to the obligee; the four laws are those of the obligee’s nationality or domicile or the obligor’s nationality or domicile); see also HUNGARIAN PIL ACT, art. 46 (providing that, with regard to the status, family relationships, and maintenance rights of children living in Hungary, Hungarian law applies whenever it is more favourable to the child than the otherwise applicable law).

228. See BELGIAN PIL CODE, arts. 90, 92 (giving owner a conditional choice between the state of origin and the state in which the property is found at the time of the claim. For a comparable provision applicable to movable things claimed by usucapion or acquisitive prescription, see ROMANIAN PIL ACT, art. 146.

229. The best known examples are articles 5 and 6 of the Rome Convention, which are reproduced without material changes in the new Rome I Regulation, but similar provisions are found in the laws of many countries, including Austria, Germany, Japan, South Korea, Quebec, Romania, Russia, Switzerland, and Turkey. For citations, see Symeonides, Result Selectivism, supra note __, at __.

obligees. Initially, the leveling tool was entrusted only to the courts. In recent years, it has been given directly to the presumptively weak parties themselves.

Is there a difference between giving this tool to the tort victim rather than to the court? Substantively, the answer is no. From the defendant’s perspective, it makes no difference because the outcome would be the same. The same is true from the plaintiff’s perspective. The only difference, then, is from the court’s perspective. When the choice is given to the court, the court has to determine and explain why one state’s law is more favorable than the other state’s law. Surprisingly, perhaps, this is not always easy, and an erroneous determination would be a ground for appeal. On the other hand, if the choice is given to the plaintiff, this would obviate the need for a judicial answer to the question of whether a given law indeed favors the victim. This is particularly helpful, not only in cases in which that answer is unclear, but also in cases in which one state’s law favors the plaintiff on some issues and the defendant on other issues. The rule avoids the possibility of an inappropriate dépeçage or “picking and choosing.” The plaintiff will have to carefully weigh all the pros and cons of exercising or not exercising the right to choose, and if the plaintiff exercises that right, the choice must be for “all claims and issues against the defendant.” If the choice proves ill-advised, it will not be appealable, and the plaintiff will only have himself or herself to blame.

In conclusion, therefore, one can say that, if given a chance, the idea of giving the choice to one party will prove to be a smart, efficient, and cost-saving tool that will help conserve judicial resources. One hopes that its political baggage and novelty will not prevent it from being considered on its merits. In any event, this author hopes that readers will find value in this Article, even if they disagree with this particular proposal.