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## Barkanic: The New York Choice-of-Law Method and Recovery for Air Crashes Abroad

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# **BARKANIC: THE NEW YORK CHOICE-OF-LAW METHOD AND RECOVERY FOR AIR CRASHES ABROAD**

YVES VAN COUTER\*

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I fly a good deal and my wife has instructions that if I go down, she is to get in touch with a particular New York attorney who is skilled in discovery, working juries, *and* conflict of laws.<sup>1</sup>

## I. INTRODUCTION

MASSIVE INDUSTRIALIZATION and rapid advances in communication technologies and transportation methods mean that today's transactions frequently transcend state and national borders.<sup>2</sup> People move. Accidents occur. Recovery questions are submitted to court and jury. The increasing crossborder mobility implies that more often several states might have an interest in a conflict of laws. The location of the accident might be fortuitous, especially in air transportation. The application of the traditional *lex loci delicti* might be felt as a choice-of-law "anomaly."<sup>3</sup>

<sup>1</sup> Andreas F. Lowenfeld, *Mass Torts and the Conflict of Laws: The Airline Disaster*, 1 U. ILL. L. REV. 157, 158 (1989).

<sup>2</sup> See *Feldman v. Acapulco Princess Hotel*, 520 N.Y.S.2d 477, 480 (N.Y. Sup. Ct. 1987).

<sup>3</sup> Until the early 1960s, the traditional *lex loci delicti* rule prevailed both in *Restatement (First) of Conflict of Laws* and among virtually every federal and state jurisdiction.

In *Kilberg v. Northeast Airlines*<sup>4</sup> the New York Court of Appeals was the first court in the United States to find it "unjust" and "anomalous" to subject the traveling New York plane passenger to the varying laws of other states through and over which he moved.<sup>5</sup>

*Kilberg* was followed by a substantial line of other air crash cases, which consistently challenged the traditional *lex loci delicti* rule and which seemingly resolved the recovery choice-of-law issue in favor of the law of the victim's or the survivors' domicile or place of residence.<sup>6</sup> Three decades after *Kilberg*, the Court of Appeals for the Second Circuit remarkably concluded in *Barkanic* that "*Kilberg* and its progeny are no longer good law."<sup>7</sup> *Barkanic* involved a Chinese airliner crash that killed two American businessmen, citizens of the District of Columbia and New Hampshire, respectively.<sup>8</sup> Both victims had bought their tickets for the China Airlines accident flight from Nanjing to Beijing from a Washington, D.C. travel agent.<sup>9</sup> Probably with *Kilberg* and

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The rule called for the application of the law of the place of the injury, regardless of the parties' domiciles or other states' interest in having their law applied. See Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 776-77 (1983).

<sup>4</sup> *Kilberg v. Northeast Airlines*, 172 N.E.2d 526 (N.Y. 1961).

<sup>5</sup> *Id.* at 527.

<sup>6</sup> See Allan I. Mendelsohn, *A Conflict of Laws Approach to the Warsaw Convention*, 33 J. AIR L. & COM. 624, 627 (1967).

<sup>7</sup> *Barkanic v. General Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 961 (2d Cir. 1991) [hereinafter *Barkanic II*].

<sup>8</sup> See *Barkanic v. General Admin. of Civil Aviation of the People's Republic of China*, 822 F.2d 11 (2d Cir. 1987), *cert. denied*, 484 U.S. 964 (1987) [hereinafter *Barkanic I*]. Mr. Barkanic was employed by Beijing-Washington Inc., an export management company that promotes the export of machinery from the United States to China. Mr. Fox, employed by Hollis Engineering Inc., accompanied Mr. Barkanic for the purpose of giving technical seminars in different cities within China. See Appellee's Brief at 4, *Barkanic II* (No. 90-7641) [hereinafter Appellee's Brief].

<sup>9</sup> *Barkanic I*, 822 F.2d at 12-13. These tickets were written as separate transactions (i.e., on different tickets from the purely international tickets). The respective fares were calculated separately and the tickets bore the legend "RQY," which in airline ticketing practice means that the domestic transaction must be confirmed by China Airlines in China. The tickets issued in the United States were indeed changed as to flight number and departure time and were eventually surrendered in their definitive form upon boarding the accident flight at Nanjing. Furthermore, both tickets were written as separate itineraries from the international itineraries which allowed the victims to travel from the United States to Shanghai, the point of entry in China,

its progeny in mind, the families of the American victims brought wrongful death actions against China Airlines in New York, seeking to recover \$3 million (U.S.).<sup>10</sup> However, rejecting *Kilberg* and its progeny, the court applied Chinese law limiting recovery to \$20,000 (U.S) per foreign passenger.<sup>11</sup>

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and to return to the United States from Beijing and Shanghai, the respective points of exit from China. Finally, Mr. Fox purchased his Nanjing-Beijing ticket from the Washington, D.C. travel agent, while purchasing all his other tickets from a New Hampshire travel agent. The purely international itineraries can be spelled out as follows: Mr. Barkanic flew on Pan Am from Washington, D.C. to New York and on to Hong Kong on January 12, 1985; on January 14, 1985, he flew from Hong Kong to Shanghai on China Airlines; he was scheduled to fly on February 18, 1985, from Shanghai back to Tokyo on China Airlines and back to Washington, D.C. on Pan Am. Mr. Fox flew on January 6, 1985, from Boston to Taipei on Northwest Airlines and to Hong Kong from Taipei on China Airlines; on January 14, he flew from Hong Kong to Shanghai on China Airlines. He was scheduled to fly from Beijing to Tokyo on Japan Airlines on January 12, 1985, and from Tokyo back to Boston on Northwest between January 27 and January 29, 1985. See Appellants' Brief at 31-32, *Barkanic I* (No. 86-7985) [hereinafter Appellants' Brief].

<sup>10</sup> See Appellee's Brief at 3.

<sup>11</sup> See *Barkanic II*, 923 F.2d at 961-64. Under the purchase circumstances and contract terms as described *supra* note 9, the accident flight does not appear to have constituted "international transportation" to or from the United States within the meaning of Article 1 of the Warsaw Convention/Montreal Agreement. Article 1 defines "international transportation" as "any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty . . . of another power . . . . Transportation to be performed by several successive air carriers shall be deemed . . . to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or series of contracts is to be performed entirely within a territory subject to the sovereignty . . . of the same High Contracting Party." Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, art. 1, 49 Stat. 3000 (1934), 876 U.N.T.S. 11, *reprinted in* 49 U.S.C. app. § 1502 (1982) [hereinafter Warsaw Convention], and the Agreement Re Liability Limitations, 44 C.A.B. 819 (May 13, 1966) (Docket 17325, Agreement CAB 18900, Order E-23680), 31 Fed. Reg. 7302 [hereinafter Montreal Agreement]. As noted above, Barkanic's Nanjing-Beijing trip was certainly not written as a "domestic segment" of a Warsaw Convention trip. The contract terms (separate fare calculation and no reference to the other tickets) and purchase circumstances (required confirmation in China and different travel agencies in Mr. Fox's case) indicate that at least China Airlines regarded the accident flight as a purely domestic flight and not as a domestic segment of an international flight plan. Cf. *Hernandez v. Aeronaes de Mexico, S.A.*, 583 F. Supp. 331, 333 (N.D. Cal. 1984) (California residents

This paper examines whether the Court of Appeals for the Second Circuit correctly interpreted and applied the New York choice-of-law method in *Barkanic* and whether the New York Court of Appeals would reach the *Barkanic* result if New York domiciliaries or residents were involved.<sup>12</sup>

Section I generally explores the evolution of the New York choice-of-law approach since *Kilberg* in an attempt to reveal the New York choice-of-law method as applied to the air crash recovery issue.

Section II examines how the Court of Appeals for the Second Circuit resolved the conflict of laws in *Barkanic*. This section further explains how to situate the *Barkanic* choice-of-law mechanic in the New York choice-of-law evolution.

Section III reveals how *Barkanic*, to a certain extent, misinterprets the current New York choice-of-law method. Subsequently, this section explores the *Barkanic* fact pattern

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had purchased all their tickets through a California travel agency: from San Jose (Cal.) to San Diego (Cal.) on Pacific Southwest Airlines; from San Diego to Tijuana (Mex.) on Pacific Southwest Airlines; roundtrip from Tijuana to Monterey (Mex.) on Aeronaves; and from Tijuana back to San Jose. The *Hernandez* court refused to consider the domestic Mexican accident flight as a Warsaw Convention trip because "the respective tickets . . . contained no reference to one another," and therefore, both parties did not regard the transportation as a single operation as required under the Warsaw Convention). *Id.* An interesting question is whether the plaintiffs in *Barkanic* could have turned the seemingly domestic accident flight into Warsaw/Montreal "international transportation" by showing that China Airlines systematically required travel agents "to write all such domestic segments" as separate transactions and separate itineraries even though they were to be flown in the course of an otherwise international voyage, thus purposefully avoiding the higher Warsaw/Montreal \$75,000 (U.S.) damage limitation. The plaintiffs indeed submitted a discovery request to the court in order to enable them to amend their complaint and assert a \$75,000 (U.S.) claim under the Warsaw/Montreal Agreement. See Appellants' Brief at 29-30. It is believed, but cannot be confirmed, that the *Barkanic* plaintiffs eventually waived their rights to claim that the accident flight was a Warsaw/Montreal flight in return for some settlement, the amount of which is under seal. Telephone conversation with Daniel F. Hayes, Esq., Counsel for the plaintiffs (June 3, 1994).

<sup>12</sup> Federal courts sitting in diversity cases must follow the choice-of-law rules of the state in which they sit. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1937)). See also *AroChem Int'l, Inc. v. Buirkle*, 968 F.2d 266, 269 (2d Cir. 1992). Therefore, the Second Circuit Court of Appeals used the New York state choice-of-law rules to determine which law governed the *Barkanic* and *Fox* wrongful death actions.

under the current New York choice-of-law method in an attempt to predict how the New York Court of Appeals would resolve a *Barkan*-type case involving New York domiciliaries.

This analysis ultimately leads to the conclusion, in Section IV, that whatever choice-of-law method is used, a court will not be able to accommodate the conflicting policies in a *Barkan*-type case without impairment of essential state interests and that, therefore, the supplemental compensation plan provided for in the Third Montreal Protocol offers a very attractive alternative.

## II. THE NEW YORK CHOICE-OF-LAW METHOD SINCE *KILBERG*

### A. *KILBERG & PEARSON*: THE "CONFLICTS REVOLUTION" ANNOUNCED

Under the original *Restatement of Conflict of Laws*, the law of the place of the accident determines "whether a person has sustained a legal injury."<sup>13</sup> In the early 1960s, two air crash cases made some serious inroads into this doctrine.<sup>14</sup>

In *Kilberg v. Northeast Airlines*<sup>15</sup> a New York domiciliary was killed when his flight, originating in New York, crashed in Massachusetts. His representative sued the airline for wrongful death in New York state court. The deceased had bought his ticket in New York and had boarded the ill-fated flight in New York. Massachusetts, the place of incorporation of the defendant and the place of the accident, had a wrongful death statute limiting recovery to \$15,000. New York had a full recovery rule. The New York Court of Appeals stated that the law governing a wrongful death action

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<sup>13</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (1934).

<sup>14</sup> The "vested rights" doctrine was based on the premise that foreign law could never operate outside the territory of the foreign sovereign and that the forum's use of foreign law had to be explained in terms of the creation and enforcement of vested rights. See WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 168 (2d ed. 1993).

<sup>15</sup> 172 N.E.2d 526 (N.Y. 1961).

was that of the place of the wrong.<sup>16</sup> The court refused, however, to apply the traditional *lex loci delicti* to the recovery issue.<sup>17</sup> Instead, the court granted full recovery under New York law by invoking a public policy exception<sup>18</sup> and recharacterizing the recovery issue as "procedural" instead of "substantive."<sup>19</sup> First admitting that a significant number of states still had a cap on damages in wrongful death actions,<sup>20</sup> the court lost credibility when it subsequently held that the damage limitation was "unfair and anachronistic"<sup>21</sup> or "absurd and unjust"<sup>22</sup> per se.<sup>23</sup> What the court found so anachronistic, absurd, and unfair was obviously not the for-

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<sup>16</sup> *Id.* at 527 ("[I]t is law long settled that wrongful death actions being unknown to the common law, derive from statutes only and that the statute which governs such an action is that of the place of the wrong.") (citing *Whitford v. Panama R.R. Co.*, 23 N.Y. 465 (1861); *Baldwin v. Powell*, 61 N.E.2d 412 (N.Y. 1945)).

<sup>17</sup> At the time *Kilberg* was decided, the generally accepted First Restatement specified that the law of the place of the wrong (*lex loci delicti*) controlled the measure of damages. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 412 (1934).

<sup>18</sup> See *Kilberg*, 172 N.E.2d at 528. The court considered the New York public policy against limiting damages recoverable in wrongful death actions as "strong, clear and old," and refused to apply the Massachusetts cap on damages because the "damage ceiling (at least as to our own domiciliaries) is so completely contrary to our public policy . . . ." *Id.* In support of this holding, the court cited *Conklin v. Canadian-Colonial Airways*, 194 N.E. 692 (N.Y. 1935), which held that a stipulation in the airplane ticket bought in New York by the decedent, limiting defendant's liability for negligently causing his death, which occurred in New Jersey, was not enforceable in New York because it was contrary to New York public policy, although valid in New Jersey.

<sup>19</sup> *Kilberg*, 172 N.E.2d at 529. The court considered it open to the court "to treat the measure of damages in this case as being a procedural or remedial question controlled by our State policies." *Id.* It is worth noting, however, that to the extent that *Kilberg* was based on the theory that the measure or extent of damages was a procedural or remedial matter to be governed by the law of the forum, the decision was disapproved the very next year in *Davenport v. Webb*, 183 N.E.2d 902 (N.Y. 1962).

<sup>20</sup> *Kilberg*, 172 N.E.2d at 528 (noting that the number of states limiting death case damages had become smaller over the years but that there were still 14 of them at that time). Today, general limitations on amounts recoverable for pecuniary losses have been repealed by all states. Maximum limitations remain, however, in the wrongful death statutes of several jurisdictions for specific elements of damages and in special situations (*e.g.*, when the decedent left no spouse, child, or dependent parent or for non-pecuniary damages). 3 MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS § 20.16, 20-43 (1991).

<sup>21</sup> *Kilberg*, 172 N.E.2d at 527-28 (reasoning that the New York courts "should if possible provide protection for [their] own State's people against unfair and anachronistic treatment . . .").

<sup>22</sup> *Id.* at 528.



oreign law in itself, but the harshness of New York's own choice-of-law rule which required the application of a foreign law in a case where New York was felt to have the predominant interest in the result.<sup>24</sup>

The second case, *Pearson v. Northeast Airlines*,<sup>25</sup> which arose out of the same air crash as *Kilberg*, was decided in federal court shortly after *Kilberg*. The Court of Appeals for the Second Circuit, compelled by *Klaxon*<sup>26</sup> to use New York's choice-of-law rules, reached the *Kilberg* result. The court required plaintiff to sue on the Massachusetts wrongful death statute but again refused on public policy grounds to enforce its damage provisions.<sup>27</sup> The federal court concluded that New York — the domicile of both the decedent and his widow, the place where the deceased had purchased his airplane ticket, the state over which most of the regularly scheduled flight occurred, and the state where the defendant corporation conducted a large part of its business — was "legitimately interested" in having its law applied to the recovery issue.<sup>28</sup>

The *Kilberg* and *Pearson* courts enumerated several New York contacts and seemed to consider New York's interests in the recovery issue. They gave no general guidance, however, as to how and when New York's strong policy opposing recovery limits should apply, setting aside the

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<sup>23</sup> It is also worth noting that about four decades before *Kilberg*, Justice Cardozo wrote for the New York Court of Appeals that "there [was] nothing in the Massachusetts [wrongful death] statute that outrage[d] the public policy of New York." *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918).

<sup>24</sup> See RICHMAN & REYNOLDS, *supra* note 14, at 176; *cf.* *Cooney v. Osgood Machinery, Inc.*, 612 N.E.2d 277, 285 (N.Y. 1993) (noting that "in earlier times the public policy rationale really substituted as a choice of law mechanism when the prevailing rigid choice of law rules permitted no flexibility"); *see also* *Kilberg v. Northeast Airlines*, 172 N.E.2d 526, 531 (N.Y. 1961) (Fuld, J., concurring). It is worth noting that Judge Fuld was impressed by the theoretical soundness of the "more significant contact" approach, an approach not surprisingly further developed and applied by Judge Fuld in his *Babcock* opinion. *See infra* Part II. B.

<sup>25</sup> 309 F.2d 553 (2d Cir. 1962) (en banc), *cert. denied*, 372 U.S. 912 (1963).

<sup>26</sup> *See supra* note 12 and accompanying text.

<sup>27</sup> *See Pearson*, 309 F.2d at 556-57 (allowing recovery of damages modeled on the New York wrongful death statute, "although the Massachusetts statute still served as the foundation for plaintiff's cause of action . . ."); *cf.* *Kilberg*, 172 N.E.2d at 528.

<sup>28</sup> *Pearson*, 309 F.2d at 557.

traditional *lex loci delicti* rule. What contacts with New York were required to trigger this policy? Was the fact that the deceased and the plaintiff were New York domiciliaries necessary or sufficient? Was some contact with the defendant required? Did the defendant have to do business in New York? If so, how much business was required? What if the ticket had been bought outside New York and/or the plane had been boarded in another state? Was it irrelevant that the defendant was incorporated in the state where the crash occurred?

The *Kilberg* and *Pearson* courts gave no criteria for a guided analysis of any different fact pattern.<sup>29</sup> Indeed, they “merely grant[ed] courts a crude tool to do rough justice — but not necessarily justice under law.”<sup>30</sup> Nevertheless, *Kilberg* and *Pearson* had “[set the stage] for the judicial conflicts revolution.”<sup>31</sup>

## B. *BABCOCK*: THE “CONFLICTS REVOLUTION”

The New York Court of Appeals reiterated its “*Kilberg-Pearson*” rationale in *Babcock v. Jackson*,<sup>32</sup> an automobile accident case involving a guest statute.<sup>33</sup> *Babcock* promoted the

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<sup>29</sup> See *Feldman v. Acapulco Princess Hotel*, 520 N.Y.S.2d 477, 480 (noting that the early public policy exception “lacked a clear analytical base”); cf. ANDREAS F. LOWENFELD, *AVIATION LAW, CASES AND MATERIALS*, 7-113 (2d ed. 1981) (noting that “[i]t was not clear whether the [*Kilberg*] rationale was based on a balancing of interests between New York and Massachusetts, on a ‘narrow provincialism’ in favor of the law of the forum, on a desire to protect [New York] plaintiffs . . . , or on a changed emphasis on public policy . . .”).

<sup>30</sup> RICHMAN & REYNOLDS, *supra* note 14, at 160.

<sup>31</sup> Friedrich K. Juenger, *Babcock v. Jackson Revisited: Judge Fuld’s Contribution to American Conflicts Law*, 56 ALB. L. REV. 727, 733 (1993).

<sup>32</sup> 191 N.E.2d 279, 285 (N.Y. 1963). *Babcock* involved injuries sustained by a New York guest as the result of the negligence of a New York host in driving his car, garaged, licensed, and insured in New York. The accident occurred in Ontario during a weekend journey which began and was to end in New York. Ontario’s guest statute barred recovery. New York law allowed full recovery. The court applied the law of New York, having “the dominant contacts and the superior claim for application of its law.” *Id.*

<sup>33</sup> Guest statutes were passed in the 1920s and 1930s to eliminate the liability of motor vehicle drivers to their passengers except in cases of gross or willful negligence. Such statutes were much criticized, and several states declined to apply the guest statute of the *lex loci delicti*, invoking their public policy. See *Barkanic II*, 923 F.2d at 962 n.4 (referring to *Melk v. Sarahson*, 229 A.2d 625 (N.J. 1967); *Clark v.*

"center of gravity" or "grouping of contacts" doctrine as "the appropriate approach for accommodating the competing interests in tort cases with multi-State contacts."<sup>34</sup> The idea was that "[j]ustice, fairness and 'the best practical result' may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties[,] has the greatest concern with the specific issue raised in the litigation."<sup>35</sup> Judge Fuld saw the merits of such a rule in that "it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context and thereby allows the forum to apply the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation.'"<sup>36</sup>

All founders of the competing choice-of-law methodologies<sup>37</sup> found the legitimacy for their respective "modern approaches" to conflict-of-laws in the *Babcock* "contacts-interests-fairness" test.<sup>38</sup> Professor Cavers saw triumph in the court's rejection of the "vested rights" doctrine and the

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Clark, 222 A.2d 205 (N.H. 1966)); see also Lowenfeld, *supra* note 1, at 174 n.83 (noting that, as of June 1, 1985, all but one of the 50 states had repealed their traditional guest statutes).

<sup>34</sup> *Babcock*, 191 N.E.2d at 283. Judge Fuld expanded to a tort case the approach that he had developed and applied before in *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954) (a contract case in which Judge Fuld adopted the "center of gravity" or "grouping of contacts" doctrine). Judge Fuld had already promoted this doctrine in his concurring opinion in *Kilberg*. See *Kilberg*, 172 N.E.2d at 531 (Fuld, J., concurring).

<sup>35</sup> *Babcock*, 191 N.E.2d at 283 (quoting *Auten*, 124 N.E.2d at 102).

<sup>36</sup> *Id.*

<sup>37</sup> The modern choice-of-law jurisprudence, currently followed in 36 states, generally rejects the "vested rights" doctrine. The "vested rights" doctrine, still followed by 15 states, underlies the *Restatement (First) of Conflict of Laws* § 377 (1934), which states that the applicable law in tort cases is the law of the place of the last event necessary to complete the tort. Professor Borchers divides the "modern approach" into three main schools: the "Currie" approach (governmental interest analysis), the "Reese" or "*Second Restatement*" approach (most significant relationship) and the "Leflar" or "better law" approach (choice-influencing considerations). See Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992).

<sup>38</sup> See Symposium, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963) (with contributions by David F. Cavers, Elliott E. Cheatham, Brainerd Currie, Albert A. Ehrenzweig, Robert A. Leflar, and Willis L.M. Reese).

"jurisdiction-selecting" choice-of-law rules.<sup>39</sup> The reference to "interests" and "policies" must have sounded like "interest analysis" music in Professor Currie's ears.<sup>40</sup> The proponent of the "choice influencing considerations" or "better law" methodology, Professor Leflar, particularly liked the court's concern about "fairness" and its search for the just and "best practical result."<sup>41</sup> The citations to the eighth tentative draft of the *Restatement (Second) of Conflict of Laws*, with the adoption of the "most significant relationship" terminology, were particularly welcomed by Professor Reese and the proponents of the *Second Restatement*.<sup>42</sup> Three decades after *Babcock*, several scholars still found the "unbridled eclecticism" the most remarkable feature of this case.<sup>43</sup>

Of particular importance, however, was the distinction made by *Babcock* between conduct-regulating and loss-allocating rules of tort law.<sup>44</sup> The conduct regulating "rules of the road"<sup>45</sup> were still considered as most appropriately governed by the *lex loci delicti*.<sup>46</sup> The "conflicts revolution" was therefore limited to the field of the loss-allocating rules, where *Babcock's* "contacts-interests-fairness" test had to

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<sup>39</sup> See David F. Cavers, Comment, 63 COLUM. L. REV. 1219 (1963).

<sup>40</sup> See Brainerd Currie, Comment, 63 COLUM. L. REV. 1233 (1963).

<sup>41</sup> See Robert A. Leflar, Comment, 63 COLUM. L. REV. 1247 (1963).

<sup>42</sup> See Willis L.M. Reese, Comment, 63 COLUM. L. REV. 1251, 1253 (1963).

<sup>43</sup> See Symposium on Conflict of Laws: *Celebrating the 30th Anniversary of Babcock v. Jackson*, 56 ALB. L. REV. 693 (1993); see e.g., the contributions by Professors Friedrich K. Juenger, Patrick J. Borchers, and Harold L. Korn.

<sup>44</sup> *Babcock*, 191 N.E.2d at 284-85.

<sup>45</sup> Compare the "rules of the air" in the Chicago Convention, providing that every plane wherever it may be shall comply with the rules and the regulations of the state over which territory it is flying or within which territory it is maneuvering. Convention on Int'l Civil Aviation, Dec. 7, 1944, art. 12, 61 Stat. 1180, 1183, 15 U.N.T.S. 295, 304.

<sup>46</sup> In order to avoid tortious injury on its territory, the accident state is indeed the one most concerned with regulation of activity within its borders. Furthermore, these rules are generally considered by people while acting (e.g., speed limits). See Harold L. Korn, *Big Cases and Little Cases: Babcock in Perspective*, 56 ALB. L. REV. 933, 934 (1993); cf. *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679, 684-85 (N.Y. 1985) (holding that "when the conflicting rules involve the appropriate standards of conduct, rules of the road, for example, the law of the place of the tort 'will usually have a predominant, if not exclusive concern' because of locus jurisdiction's interest in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future . . .") (citations omitted).

guide the New York courts towards the most appropriate law.<sup>47</sup>

### C. THE *BABCOCK* APPROACH EXPANDED TO THE AIR CRASH RECOVERY ISSUE

Shortly after *Babcock*, the New York state and federal courts broke the *Babcock* rationale free from the guest statute suit and applied it to wrongful death and survival actions, several of which arose out of air crashes.

In *Long v. Pan American World Airways*<sup>48</sup> the crash occurred when a Pan Am airplane, en route from San Juan, Puerto Rico, to Philadelphia, Pennsylvania, crashed in Maryland. The suit was brought in New York, Pan Am's state of incorporation. Pennsylvania and Maryland employed differing damage measures, and a substantial recovery was obtainable only under the laws of Pennsylvania.<sup>49</sup>

After acknowledging that "[t]here was no suggestion in *Babcock* that its approach and principle were inapplicable to actions for wrongful death," Judge Fuld concluded that Pennsylvania had "the greatest concern with the matter in issue and 'the strongest interest' in its resolution."<sup>50</sup> The

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<sup>47</sup> Loss-allocating rules deal with the redress of injuries caused by the tortious conduct. Typical examples are the rules which determine the available relief, the kind of compensable injuries, and the measure of recoverable damages. See Korn, *supra* note 46, at 934; cf. Reich v. Purcell, 432 P.2d 727 (Cal. 1967) (acknowledging that "[l]imitations of damages . . . have little or nothing to do with conduct. They are concerned not with how people should behave but with how survivors should be compensated."). *Id.* at 730-31. See also Mascarella v. Brown, 813 F. Supp. 1015, 1021 (S.D.N.Y. 1993) (stating that "the rule [which] concerns the available remedies in a wrongful death action . . . is unquestionably a 'loss allocation' rule").

<sup>48</sup> 213 N.E.2d 796 (N.Y. 1965).

<sup>49</sup> *Id.* at 797 n.2. Maryland law generally only awarded for the deceased's conscious pain and suffering and a maximum of \$1,000 of his funeral expenses. Pennsylvania, on the other hand, permitted an additional recovery for the present worth of a decedent's likely earnings during his expected lifetime, diminished by the probable cost of his own maintenance.

<sup>50</sup> *Id.* at 798. The court referred to a number of cases in which the question had previously been considered and which had clearly indicated that the law to be applied was the law, not necessarily of the place where the fatal accident occurred, but rather of the place having the most significant relationship with, and the greatest interest in, the issue presented. Among the cases referred to were four air crash cases: Griffith v. United Air Lines, 203 A.2d 796 (Pa. 1964); Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*,

decedents were Pennsylvania domiciliaries who had purchased their tickets in Philadelphia for round-trip flights from that city to San Juan. The plaintiffs were Pennsylvania domiciliaries. The estate was administered in Pennsylvania, and the airline was doing business in that state. In contrast, Maryland's sole relationship with the occurrence was the purely "adventitious circumstance" that the air crash occurred there.<sup>51</sup>

Simultaneously, a New York federal court applied the *Babcock* approach in *Ciprari v. Servicos Aeros Cruzeiro*.<sup>52</sup> The court applied Brazilian law, limiting recovery to seventy dollars for a New York passenger severely injured in the course of an airplane trip from Rio de Janeiro to Sao Paulo. Inasmuch as the victim bought his ticket in Brazil as a fare-paying passenger on a Brazilian airline to a destination in Brazil and was injured in Brazil, Brazil was considered to have the greatest interest in the recovery issue.<sup>53</sup>

In *Gore v. Northeast Airlines*<sup>54</sup> the wrongful death action arose out of the same Northeast Airlines crash as in *Kilberg*. This time, however, the court did not rely on the public policy exception but examined the action "in the light of the *Babcock-Long* criteria."<sup>55</sup> The court applied New York law where the victim was a New York domiciliary, even though the victim's widow and children left New York and became domiciled elsewhere after the accident.<sup>56</sup>

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383 U.S. 943 (1966); *Gianni v. Fort Wayne Air Serv.*, 342 F.2d 621 (7th Cir. 1965); and *Mertens v. Flying Tiger Line*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965). *Long*, 213 N.E.2d at 799.

<sup>51</sup> It is worth noting that, although Pan Am was incorporated in New York, Judge Fuld considered New York a "neutral" and "disinterested" forum. The defendant's incorporation in New York was considered "insufficient to warrant either application of [New York] substantive law or interposition of [New York's] public policy." *Long*, 213 N.E.2d at 799 (referring to *Kilberg*).

<sup>52</sup> 245 F. Supp. 819 (S.D.N.Y. 1965), *aff'd*, 359 F.2d 855 (2d Cir. 1966).

<sup>53</sup> *Id.* at 825.

<sup>54</sup> 373 F.2d 717 (2d Cir. 1967).

<sup>55</sup> *Id.* at 724.

<sup>56</sup> *Id.* The reader will notice that *Gore* and *Kilberg* ultimately reached the same result under different choice-of-law methods. *Kilberg* applied the *lex loci delicti* rule with the public policy exception while *Gore* applied the *Babcock* approach.

In *Miller v. Miller*<sup>57</sup> the action arose out of a car accident. The Court refused to apply the accident state's "absurd and unjust" \$20,000 damage limitation on wrongful death recovery. The Court thought it "fair" to grant unlimited recovery under New York law because the defendant had not "patterned his conduct upon the law of the jurisdiction in which he was acting"<sup>58</sup> and because that jurisdiction "would have no concern with the nature of the recovery awarded against defendants who [were] no longer residents of that State and who [were], therefore, no longer proper objects of its legislative concern."<sup>59</sup>

In *Thomas v. United Airlines*<sup>60</sup> the court refused to apply the Illinois \$30,000 (U.S.) damage limitation. The court considered it "well settled . . . that the fortuitous occurrence of an accident [was] not, of itself, a sufficient basis for applying the wrongful death statute of a particular state."<sup>61</sup> Further, the court referred to the Illinois choice-of-law approach that considered "the predominant interests to be served on the issue of damages are those of the states containing the people or estates which will receive the recover-

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<sup>57</sup> 237 N.E.2d 877 (N.Y. 1968). *Miller* was a wrongful death action resulting from a car accident in Maine that occurred in the course of a short business trip in Maine. The defendant driver and the deceased were brothers. At the time of the accident, the defendant was domiciled in Maine; the deceased was a New York domiciliary. Shortly after the accident, the defendant moved to New York.

<sup>58</sup> *Id.* at 881 (citation omitted) (noting that the Maine statute "is obviously not the kind of statute . . . upon which a person would rely in governing his conduct"). The court apparently considered the damage limitation provision in the wrongful death statute purely as a loss-allocating rule. The defendant did not rely on this provision while driving his car. According to the court, neither could the defendant have relied on it while purchasing insurance, because at the time of the accident one could buy only a standard liability policy covering both wrongful death (limited recovery) and personal injuries (full recovery).

<sup>59</sup> *Id.* at 882. The court also took into consideration the change in Maine's law—the damage limitation provision was abolished after the accident but before the court decided the case.

<sup>60</sup> 249 N.E.2d 755 (N.Y. 1969). Plaintiffs were the representatives of four passengers who were killed when a United Airlines Boeing 727 jet crashed into Lake Michigan, Illinois. The jet was on a scheduled flight from New York to Chicago.

<sup>61</sup> *Id.* at 759 (referring to *Kilberg* and *Long*).

able damages, if any, for their injuries or their decedent's death."<sup>62</sup>

All these cases reveal an interesting trend. Where the New York courts expanded the application of the *Babcock* approach to the wrongful death recovery issue in air crash cases, the choice remarkably resolved itself mostly in favor of the law of the decedent's or beneficiaries' domicile or place of residence.<sup>63</sup>

#### D. THE "NEUMEIER RULES" OR "THE CONTRAREVOLUTION"

*Babcock*, unlike *Kilberg* and *Pearson*, gave guidance. A "fair" choice-of-law had to be made based on a flexible "contacts-interests-fairness" trilogy test. What *Babcock* offered was not a "rule,"<sup>64</sup> but an "approach."<sup>65</sup> It seemed to be a confusing approach, however.<sup>66</sup> The confusion was demonstrated in a decade of highly inconsistent decisions in guest statute cases.<sup>67</sup> Chief Judge Fuld decided to attack

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<sup>62</sup> *Id.* at 759-60 (quoting *Manos v. Trans World Airlines, D.C.*, 295 F. Supp. 1170, 1173 (N.D. Ill. 1969)). In the large majority of cases, the deceased's state of domicile will also be the state containing the people or estates receiving the recoverable damages. But see *Barkanic I*, where a dependent survivor and plaintiff in the case, Mr. Barkanic's mother, was domiciled in a different state. See *infra* text accompanying notes 153, 162.

<sup>63</sup> Only *Ciprari* forms an exception; but it can easily be distinguished from the other cases inasmuch as the victim bought his ticket in the state of the accident, and the ill-fated flight was a purely domestic one that was not part of an interstate or international flight plan. For later cases confirming this trend, see *infra* notes 140-41.

<sup>64</sup> Professor Willis L.M. Reese, the reporter for the RESTATEMENT (SECOND) defines a "rule" as a "formula which once applied will lead the court to a conclusion." Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 315 (1972).

<sup>65</sup> *Id.* (describing an "approach" as an expression of factors to be considered, such as the factors listed in Section 6 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS or Leflar's choice-influencing considerations).

<sup>66</sup> See Peter Hay & Robert B. Ellis, *Bridging the Gap Between Rules and Approaches in Tort Choice of Law in the United States: A Survey of Current Case Law*, 27 INT'L LAW. 369, 371 (1993) (remarking that *Babcock* was factually a simple case providing an inadequate rule for cases of greater complexity).

<sup>67</sup> Only two years after *Babcock*, the New York Court of Appeals reached the opposite result in a similar fact situation although claiming to follow its approach in *Babcock*. See *Dym v. Gordon*, 209 N.E.2d 792 (N.Y.1965). *Dym* involved a two-car, instead of a one-car, accident and, unlike in *Babcock*, the plaintiff-defendant relationship was formed in the accident state. The court tried to determine the location of



this lack of judicial consistency by returning to a "rules"-oriented choice-of-law method, the "*Neumeier* rules."

In *Neumeier v. Kuehner*<sup>68</sup> Chief Judge Fuld crafted his "*Neumeier* rules" to tackle the uncertainty and unpredictability<sup>69</sup> in the guest statute context.<sup>70</sup> Using the inductive method, he formulated a framework of rules based on the previously acquired "*Babcock* approach" experience in dealing with this type of case:<sup>71</sup>

- (1) When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest;<sup>72</sup>
- (2) 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

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the most significant relationship. Barely one year later, the court got back on the real *Babcock* track when it refused to apply the law of the place of the accident in a case very similar to *Dym*. See *Macey v. Rozbicki*, 221 N.E.2d 380 (N.Y. 1966). The only factual difference from *Dym* was that the plaintiff-defendant relationship was formed in the state of their common domicile. This time the court tried to determine the applicable law by a counting of the contacts with the interested states. A few years later, *Dym* was overruled by *Tooker v. Lopez*, 249 N.E.2d 394 (N.Y. 1969) (applying a government interest analysis, the court held that a common New York domicile was controlling in guest statute cases).

<sup>68</sup> 286 N.E.2d 454 (N.Y. 1972).

<sup>69</sup> Predictability is generally considered "an important goal of the judicial process." RICHMAN & REYNOLDS, *supra* note 14, at 235-36 ("Lack of predictability imposes social costs by increasing the risk incurred in planning consensual transactions and in conducting and compromising litigation . . . [it] also increases the opportunity for (and perception of) arbitrary judicial decision-making.").

<sup>70</sup> In *Neumeier*, a domiciliary of Ontario, Canada, was killed when the car in which he was a 'guest,' owned and driven by a New Yorker, collided with a train in Ontario. The action was brought by the Ontario passenger's estate. The issue was whether the Ontario guest statute applied and permitted the New York defendant to rely on it as a defense.

<sup>71</sup> *Neumeier*, 286 N.E.2d at 456-58 (noting that there is "no reason why choice-of-law rules, more narrow than those previously devised, should not be successfully developed, in order to assure a greater degree of predictability and uniformity, on the basis of our present knowledge and experience"). Referring to his concurring opinion in *Tooker*, Chief Judge Fuld acknowledged that "the time [had] come . . . to endeavor to minimize what some [had] characterized as an *ad hoc* case-by-case approach by laying down guidelines . . . for the solution of guest-host conflicts problems." *Id.* (citation omitted).

<sup>72</sup> The first rule covers the "common domicile" cases and thus deals with false conflicts under interest analysis (only one state has an interest in having its law applied to the issue presented).

that liability would be imposed upon him under the tort law of the state of the victim's domicile. 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 defense;<sup>73</sup>

(3) In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.<sup>74</sup>

Chief Judge Fuld's "rules"-oriented method can easily be reduced to what Professor Korn sees as "a common domicile exception to the *lex loci delicti*."<sup>75</sup> From the very moment they were handed down, the second and third *Neumeier* rules have been targets of heavy criticism.<sup>76</sup> Judi-

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<sup>73</sup> The second rule deals with "split domicile" cases where the law of the respective domiciles respectively favors plaintiff and defendant. This rule deals with "true conflicts" under interest analysis — both states have an interest in having their law applied to the issue presented. Note that in *Barkanik II* the first sentence of this rule is controlling. This first sentence is meant to protect party expectations. It gives defendants the opportunity to plan their conduct in their home states relying on a certain and predictable liability for their tortious actions. See *Feldman v. Acapulco Princess Hotel*, 520 N.Y.S.2d, 477, 486 (N.Y. Sup. Ct. 1987).

<sup>74</sup> The third rule covers all "split domicile" cases that are not covered by the second rule. It is worth noting that this rule contains an escape clause that apparently requires a case-by-case interest analysis.

<sup>75</sup> Korn, *supra* note 46, at 935 (quoting Patrick J. Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883, 909 n.201 (1993)); cf. *Barkanik II*, 923 F.2d at 962 ("Essentially, the *Neumeier* rules directed courts to apply the law of the place of the accident unless the plaintiff and defendant were domiciliaries of the same state.").

<sup>76</sup> See generally Symposium, *Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 93 (1973); Patrick J. Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883, 908-911 (1993); Korn, *supra* note 3, at 886-903; RICHMAN & REYNOLDS, *supra* note 14, at 238; David E. Seidelson, *Interest Analysis: The Quest for Perfection and the Frailties of Man*, 19 DUQ. L. REV. 207, 214-20 (1981); Gary J. Simson, *The Neumeier - Schultz Rules: How Logical A "Next Stage in the Evolution of the Law" After Babcock?*, 56 ALB. L. REV. 913 (1993). Some courts who considered adopting the *Neumeier* rules in their jurisdictions had trouble with the escape clause built into the third rule and considered it as a wild card, heavily frustrating the certainty and predictability goal. See, e.g., *Labree v. Major*, 306 A.2d 808, 814-15 (R.I. 1973). Other courts were soon confronted with fact situations not provided for by the *Neumeier* rules. See, e.g., *Pahmer v. Hertz*

cial practice would prove that the rules were insufficiently tailored to the complexity of the choice-of-law cases with their unforeseeable number of different fact/issue patterns.<sup>77</sup>

For over a decade, the New York Court of Appeals would leave the lower New York state courts and the federal courts of the Second Circuit in total confusion as to the scope of the *Neumeier* rules.<sup>78</sup> In *Rosenthal v. Warren*<sup>79</sup> the Court of Appeals for the Second Circuit interpreted the *Neumeier* rules as being limited to the question of foreign guest statutes and refused to apply them to damage limitations in wrongful death actions.<sup>80</sup>

When the U.S. District Court for the District of Massachusetts had to interpret the New York choice-of-law rules in the multidistrict air crash litigation arising out of the *Air Crash Disaster at Boston*,<sup>81</sup> it did not even consider the

Corp., 296 N.E.2d 243 (N.Y. 1973) (Plaintiff and defendant were both New Yorkers, but the car was registered in California, a guest statute state.).

<sup>77</sup> Cf. *supra* note 67 (discussing the confusing post-*Babcock* period characterized by highly inconsistent decisions). See also Hay & Ellis, *supra* note 66, at 371 (remarking that *Babcock* was factually a simple case providing an inadequate rule for more complex cases).

<sup>78</sup> This confusion was illustratively expressed by District Judge Tenney who felt "called upon to wade into New York's choice-of-law quagmire." See *O'Rourke v. Eastern Air Lines*, 730 F.2d 842, 847 (2d Cir. 1984); cf. Hay & Ellis, *supra* note 66, at 375-76 nn.31-34 (remarking that "New York courts did not apply the *Neumeier* rules consistently"). "Several courts simply ignored them. Instead they applied interest analysis, a center of gravity or grouping of contacts approach . . . , or a more significant contacts approach." *Id.* (citations omitted); for cases illustrating each approach, see *id.* at 375-76 nn.31-33.

<sup>79</sup> 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973). Plaintiff's decedent, a New York domiciliary, had traveled to Boston for an operation by a famous surgeon. The patient did not survive the operation, and plaintiff brought a medical malpractice action. The court granted unlimited recovery under New York law and refused to apply the Massachusetts statutory limit on wrongful death actions. *Id.* at 440-46.

<sup>80</sup> *Id.* at 442 ("In no way, however, did the [New York] court [in *Neumeier*] retreat from the position it had staked out in *Kilberg* and *Miller*, refusing to apply other states' wrongful death limitations in the case of the death of a New York domiciliary.") (footnote omitted). It is worth noting that under the second *Neumeier* rule, Massachusetts law, providing for limited recovery, would have applied.

<sup>81</sup> *In re Air Crash Disaster at Boston, Mass.* on July 31, 1973, 399 F. Supp. 1106 (D. Mass. 1975). The New York cases were transferred to the U.S. District Court of Massachusetts by the Multidistrict Litigation Panel under 28 U.S.C. § 1407 and pursuant to 28 U.S.C.A. § 1401(a). The plaintiffs sought damages in excess of \$200,000 (U.S.), the Massachusetts limit on wrongful death damages. *Id.*

*Neumeier* rules, holding that "under New York's choice-of-law rules, the law applicable to the theory and amount of damages recoverable for wrongful death [was] that of the domiciles of the decedents and their beneficiaries."<sup>82</sup> *Gordon v. Eastern Airlines*<sup>83</sup> and *Junco v. Eastern Airlines*<sup>84</sup> seemed to confirm this view.<sup>85</sup>

In *Cousins v. Instrument Flyers, Inc.*<sup>86</sup> the New York Court of Appeals added to the confusion stating in dictum, "It is true that *lex loci delicti* remains the general rule in tort cases to be displaced only in extraordinary circumstances. But it has been acknowledged that in airplane crash cases, the place of the wrong . . . is most often fortuitous."<sup>87</sup> Did this statement mean that the *lex loci delicti* applied generally to all tort conflict problems, including loss allocation outside the guest statute context?<sup>88</sup> What was to be understood as

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<sup>82</sup> *Id.* at 1122 (citing *Thomas v. United Airlines*, 249 N.E.2d 755, 759-60 (N.Y.), *cert. denied*, 396 U.S. 991 (1969); *Long v. Pan American World Airways*, 213 N.E.2d 796 (N.Y. 1965); *Kilberg v. Northeast Airlines*, 172 N.E.2d 526 (N.Y. 1961)).

<sup>83</sup> 391 F. Supp. 31, 33-34 (S.D.N.Y. 1975).

<sup>84</sup> 399 F. Supp. 666, 667 (S.D.N.Y. 1975).

<sup>85</sup> Both cases arose from the same air crash. The ill-fated flight originated in New York, where all tickets were bought. The crash occurred in Florida, where the airline had its principal place of business. The Florida wrongful death statute—unlike its New York counterpart—provided for damages for grief, mental anguish, and loss of companionship. The court found Florida's contacts "adventitious" and "insignificant" and applied New York law, i.e., the law of the domicile. *Gordon*, 391 F. Supp. at 33. Note that under the third *Neumeier* rule, the normally applicable law would have been the *lex loci delicti*, i.e., Florida law.

<sup>86</sup> 376 N.E.2d 914 (N.Y. 1978) (per curiam). *Cousins* was a products liability case arising out of an air crash in Pennsylvania. The plane had been rented by a New Yorker from a New Jersey corporation whose president resided in New York. The plane had been manufactured in Florida by a Pennsylvania corporation. Under New York law, contributory negligence barred recovery while under New Jersey and Pennsylvania law, it did not. The court applied New York law because it was the forum law and because significant events occurred in the forum. *Id.* at 915.

<sup>87</sup> *Cousins*, 376 N.E.2d at 915.

<sup>88</sup> See *Himes v. Stalker*, 416 N.Y.S.2d 986 (N.Y. Sup. Ct. 1979). The court expressed uncertainty as to whether the *Neumeier* rules applied to tort conflicts other than those involving guest statutes and eventually concluded that they did, stating that "*lex loci delicti* should apply generally to tort conflict problems, other than guest statute situations." *Id.* at 993.

"extraordinary circumstances" displacing the *lex loci delicti*?<sup>89</sup> Did airplane crashes fall within this exception?<sup>90</sup>

In *O'Rourke v. Eastern Airlines*<sup>91</sup> the Court of Appeals for the Second Circuit summarized an extensive analysis of New York's choice-of-law system in a concise footnote that expressly referred to *Neumeier*.<sup>92</sup> The court found that "[u]nder the system of interest analysis that New York ha[d] evidently adopted,<sup>93</sup> the law of the place of the wrong normally applie[d] unless another state ha[d] a significant interest in the application of its own law."<sup>94</sup> Because New York's substantive law was not "an anachronistic law . . . drastically limit[ing] or eliminat[ing] the damage award,"<sup>95</sup> and because New York's law providing full and adequate compensation did not give "an unjust or anomalous result," the court saw no reason to displace the *lex loci delicti*.<sup>96</sup>

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<sup>89</sup> *Id.* at 992 (acknowledging that "[w]hat the Court of Appeals will determine to be 'extraordinary circumstances' is not clear").

<sup>90</sup> See *O'Rourke v. Eastern Airlines*, 730 F.2d 842 (2d Cir. 1984) (expressing uncertainty whether "all or even most airplane crash cases are within this exception"); cf. *Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp.*, 820 F. Supp. 503, 510 (C.D. Cal. 1992). Confronted with a contribution action arising out of an airplane accident at Dallas International Airport due to a brake failure, the court applied the interest analysis escape clause provided in the third *Neumeier* rule. Where MDC, the manufacturer of the aircraft, was domiciled in Maryland and Missouri, and where Goodyear, the company responsible for the brake/wheel assemblies, had its domicile in Ohio, the court, referring to *Cousins*, decided to displace the *lex loci delicti* because "American Airlines conducts numerous domestic and international flights, and the fact that the accident occurred in Texas [was] merely fortuitous." *Id.* Instead, the court decided to apply the law of California, the state where the business relationship between MDC and Goodyear had been centered for about twenty years and where the subcontracts between both parties had been executed and performed, which subcontracts contained choice-of-law provisions providing for the application of California law. *Id.*

<sup>91</sup> 730 F.2d 842 (2d Cir. 1984). *O'Rourke* involved an air crash in New York, killing, among others, a Greek citizen who was on his way home to Greece. New York's wrongful death statute, unlike that of Greece, did not provide for recovery in wrongful death actions for loss of consortium. The federal court applied what was for plaintiff the less favorable New York law. *Id.* at 851.

<sup>92</sup> *Id.* at 850 n.13.

<sup>93</sup> *Id.* at 849 (referring to New York's sophisticated "interest analysis" approach and citing *Rosenthal*, *Miller*, and *Tooker*).

<sup>94</sup> *Id.* at 850 n.13.

<sup>95</sup> *Id.* at 850 (referring to *Kilberg*).

<sup>96</sup> *Id.* (referring to *Babcock*).

In sum, the foregoing cases reveal the confusion among the lower New York state courts and the New York federal courts as to the exact scope of the "*Neumeier* contrarevolution." More than a decade after *Neumeier*, the key question remained whether the *Neumeier* rules applied to the wrongful death action recovery issue.

E. *SCHULTZ*, THE ULTIMATE EXPANSION OF THE  
"NEUMEIER CONTRAREVOLUTION" TO THE  
WRONGFUL DEATH RECOVERY ISSUE

In *Schultz v. Boy Scouts of America, Inc.*<sup>97</sup> the New York Court of Appeals ultimately reaffirmed the validity and applicability of the *Neumeier* rules and expanded their coverage to all post-event tort loss distribution issues.<sup>98</sup> Moreover, the court explicitly characterized a rule limiting damages in wrongful death actions as a typical loss allocating rule, covered by *Neumeier*.<sup>99</sup> Finally, the court added an important fourth rule in the form of a public policy exception.<sup>100</sup> The court noted that it would refuse to apply foreign law as contrary to New York public policy if the party invoking the exception proved that enforcing the foreign law "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal" expressed in the state's constitution, statutes and judicial decisions.<sup>101</sup> Fur-

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<sup>97</sup> 480 N.E.2d 679 (N.Y. 1985). New Jersey domiciliaries brought suit against two charitable organizations (one domiciled in New Jersey, the other in Ohio) for negligently assigning an employee to a boy scout camp in New York. The employee sexually abused their children, and, as a result, one of the children committed suicide. The question was whether New Jersey's charitable immunity doctrine barred recovery. The court held that it did. *Id.* at 689.

<sup>98</sup> *Id.* at 686 (stating that there is no "logical basis for distinguishing guest statutes from other loss distributing rules . . .").

<sup>99</sup> *Id.* at 685. The reader will recall that *Barkanic* precisely involved a conflict between a rule limiting recovery and a rule providing for unlimited recovery.

<sup>100</sup> *Id.* at 687-89; see also *infra* notes 245-57 and accompanying text (the public policy exception applied to a *Barkanic*-type hypothetical).

<sup>101</sup> *Id.* at 688 (quoting *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918)) (noting that the party invoking the exception has "a heavy burden for public policy is not measured by individual notions of expediency and fairness or by a showing that the foreign law is unreasonable or unwise").

thermore, that party must establish "that there are enough important contacts between the parties, the occurrence and the New York forum to implicate [New York's] public policy and thus preclude enforcement of the foreign law."<sup>102</sup>

After *Schultz*, some New York state and federal courts eagerly attempted a mechanical application of the seemingly manageable "*Neumeier-Schultz*" rules to tort cases involving conflicting loss allocation laws.<sup>103</sup> Others were rather reluctant to adopt the rules and reached their decision under an interest analysis approach.<sup>104</sup> A good example is *Scharfman v. National Jewish Hospital and Research Center*.<sup>105</sup> The Appellate Division of the New York Supreme Court found under an interest analysis that the plaintiff's New York domicile and the defendant's screening of potential patients in a New York office gave New York a significant interest in protecting its resident-patient by allowing the patient's recovery under New York law.<sup>106</sup> It is worth noting that the court would have reached the opposite result if it had applied the second *Neumeier-Schultz* rule.<sup>107</sup>

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<sup>102</sup> *Shultz*, 480 N.E.2d at 688. While rejecting the public policy exception in *Schultz*, the court explicitly referred to *Kilberg* as a case where "the contacts between the New York forum, the parties and the transaction involved were substantial enough to threaten [New York's] public policy." *Id.*

<sup>103</sup> See Hay & Ellis, *supra* note 66, at 377 n.40.

<sup>104</sup> *Id.* at 377 nn.41-45.

<sup>105</sup> 506 N.Y.S.2d 90 (N.Y. App. Div. 1986). The plaintiff was a child domiciled in New York who suffered permanent brain damage allegedly as a result of his treatment with experimental drugs at the National Jewish Hospital and Research Center located in Denver, Colorado.

<sup>106</sup> *Id.* at 91. Under Colorado law, the "Captain of the Ship doctrine," that a hospital cannot be held liable for a physician's negligence, even if that physician is employed by the hospital, would have barred recovery. Note that the New York court considered the Colorado law "unfair and anachronistic." *Id.* at 92.

<sup>107</sup> See also *Huang v. Lee*, 734 F. Supp. 71, 75 (E.D.N.Y. 1990). Plaintiff's child died of carbon monoxide intoxication while staying as an overnight guest in a house in New Jersey. The court applied the less generous New York law in determining the measure of damages in a wrongful death action brought by plaintiff against the New Jersey owners of the house. *Id.* at 73. Applying an interest analysis, the court thought the New York recovery standard appropriate to a New York resident and acknowledged that it was "not New York's policy to *enhance* the recovery of its residents by the application of a more favorable foreign rule." *Id.* (quoting *Gordon v. Eastern Airlines*, 391 F. Supp. 31, 34 (S.D.N.Y. 1975)). Note how the third *Neumeier* rule would normally have pointed to New Jersey law.

Still other courts applied the *Neumeier-Schultz* rules combined with an interest analysis check.<sup>108</sup> *Feldman v. Acapulco Princess Hotel*<sup>109</sup> is an excellent example of this third approach. In this case, the court found it instructive to check the outcome it had reached under the second *Neumeier-Schultz* rule by a subsequent examination of the allocation of governmental interests.<sup>110</sup> The court considered this double check appropriate because the applicable rule had never been previously applied on the given fact pattern.<sup>111</sup> After having balanced the respective interests involved, the court concluded that "the application of Mexican damages law, mandated by application of the second [*Neumeier*] rule, [was] entirely appropriate in [*Feldman*]." <sup>112</sup>

In sum, the *Schultz* decision gave guidance as to the exact scope of the *Neumeier* rules, making them applicable to all post-event tort loss distribution issues. Once again, however, the guidance seemed to leave room for confusion. The lower New York state courts and the New York federal courts clearly read different choice-of-law methods in the *Schultz* decision. Some adhered to the mechanical application of the *Neumeier-Schultz* rules; others reached their decision under a pure interest analysis; and a third group applied a "rules/interest analysis" combination.

Moreover, the post-*Schultz* New York case law established remarkable discrepancies in results. Some courts mysteri-

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<sup>108</sup> The New York Court of Appeals seemed to approve and adopt this third approach in a recent case. See *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277 (N.Y. 1993); see also *infra* notes 235-37.

<sup>109</sup> 520 N.Y.S.2d 477 (N.Y. Sup. Ct. 1987). The claim in *Feldman* arose from a swimming pool accident in a Mexican hotel. The New York plaintiff sued the Mexican owner of the hotel. New York law provided for unlimited recovery, while Mexican law limited damages to "moral damages" and did not allow damages for pain and suffering. The New York Supreme Court applied Mexican law under the second *Neumeier* rule. *Id.* at 478.

<sup>110</sup> See also *Morgan Guar. Trust Co. v. Garrett Corp.*, 625 F. Supp. 752, 759 (S.D.N.Y. 1986). The court in *Morgan* interpreted the *Schultz* combined "rules-interest analysis" approach, stating that the *Schultz* court "did not simply apply the first *Neumeier* rule, but rather engaged in a full *Babcock* interest analysis." *Id.* The *Morgan* court then applied the *lex loci delicti* under the third *Neumeier* rule and subsequently checked the result of this application under an interest analysis. *Id.*

<sup>111</sup> See *Feldman*, 520 N.Y.S.2d at 485.

<sup>112</sup> *Id.* at 487.



ously managed to apply the rules incorrectly,<sup>113</sup> while others applied an interest analysis approach and achieved results apparently inconsistent with the *Neumeier-Schultz* rules.<sup>114</sup> These discrepancies show that the rules were probably a premature attempt to combine certainty, predictability, and correct and fair interest-balanced results in a field characterized by a factual diversity as complex as choice-of-law cases involving conflicting loss-allocating laws.<sup>115</sup>

It is against this confusing New York choice-of-law background that *Barkanic II*, the first air crash case since the *Neumeier-Schultz* contrarevolution, was decided.<sup>116</sup> Confronted with the remarkable New York choice-of-law "rules/approach" dichotomy, the Court of Appeals for the Second Circuit had to make its own choice between the pure *Neumeier-Schultz* "rules"-oriented choice-of-law method, the pure "interest analysis" approach, or the *Feldman* combination. The highest New York federal court would establish its preference for the pure "rules"-oriented method.<sup>117</sup>

### III. BARKANIC, THE NEUMEIER-SCHULTZ MECHANIC MECHANICALLY APPLIED

In mid-January 1985, Peter Barkanic and Donald Fox, American businessmen and citizens of the District of Columbia and New Hampshire, respectively, arrived in China

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<sup>113</sup> See Hay & Ellis, *supra* note 66, at 377-78 n.40.

<sup>114</sup> See, e.g., *Huang*, 734 F. Supp. 71; *Morgan Guar. Trust Co.*, 625 F. Supp. 752; *Scharfman*, 506 N.Y.S.2d 90. For more inconsistent cases, see Hay & Ellis, *supra* note 66, at 378-79 n.45.

<sup>115</sup> See *Feldman*, 520 N.Y.S.2d at 485 (admitting that the *Neumeier* rules were an "early attempt at making sense of chaos," but nevertheless considering the rules, in the light of fifteen years of further litigation, as "the best guide to a fair, reasonable, consistent and constitutional determination of choice-of-law in tort cases").

<sup>116</sup> 923 F.2d 957 (2d Cir. 1991). See *supra* note 7.

<sup>117</sup> Recently, the New York Court of Appeals, relying heavily on the *Schultz* decision, considered the "rules/interest analysis" combination the appropriate choice-of-law method in a case covered by the second *Neumeier* rule, thus suggesting that *Barkanic* misinterpreted the New York choice-of-law method as established by *Schultz*. See *Cooney*, 612 N.E.2d at 277; see also *infra* Part IV.A. But see *Mascarella v. Brown*, 813 F. Supp. 1015 (S.D.N.Y. 1993) (recent case referring to and following *Barkanic*'s mechanical application of the second *Neumeier* rule). See also *infra* note 134 and accompanying text.

for the purpose of giving technical seminars in different Chinese cities.<sup>118</sup> Before leaving the United States, both men had purchased several separate tickets for their transportation to and from the United States and for their travel exclusively within China.<sup>119</sup>

The tickets for the entirely domestic China Airlines flight between Nanjing and Beijing were both purchased from a Washington, D.C. agent for Pan American World Airways.<sup>120</sup> On January 18, these tickets, although issued in the United States, were changed as to flight number and departure time<sup>121</sup> by the Nanjing office of the General Administration of Civil Aviation of the People's Republic of China (CAAC).<sup>122</sup> The very same day, the ill-fated Flight 5109 crashed while attempting to land in poor weather at Jinan, China, killing Barkanic and Fox.

Representatives of their respective estates brought wrongful death actions against CAAC in New York. The New York contacts with the parties and the occurrence were rather scarce. New York had been a stopping place in the Pan Am flight bringing Mr. Barkanic from Washington, D.C. to Hong Kong a few days before the fatal crash.<sup>123</sup> Under the 1980 Civil Aeronautics Board permit, CAAC regularly

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<sup>118</sup> See *supra* note 8.

<sup>119</sup> See *supra* note 9 (explaining how the tickets were written as separate transactions and spelling out the respective itineraries).

<sup>120</sup> *Barkanic I*, 822 F.2d at 12. The Civil Aviation Administration of the People's Republic of China [hereinafter CAAC] and Pan American World Airways had an interline traffic agreement and a general sales agency agreement whereby Pan Am was to act as general sales agent for CAAC in the United States and CAAC was to act as general sales agent for Pan Am in the People's Republic of China.

<sup>121</sup> Under the CAAC-Pan Am interline sales agreement, tickets issued for domestic flights in China bore the legend "RQY," which in airline ticketing practice means that the domestic transaction had to be confirmed by CAAC in China. *Barkanic I*, 822 F.2d at 13.

<sup>122</sup> Until 1988, the CAAC, an agency of the Chinese government, exclusively provided domestic and international air services to passengers traveling to or from airports within China. Since the 1988 deregulations, however, at least 35 different airline companies have sprung up, resulting in an increased lack of sufficiently trained pilots or basic facilities to handle the growth of the Chinese air transportation market. Lena H. Sun, *Chinese Airliner Crashes, Killing All 160 Aboard: Country's Worst Aviation Disaster Comes Amid Severe Criticism of Safety Record*, WASH. POST, June 7, 1994, at A12.

<sup>123</sup> See *supra* note 9.

scheduled flight operations into and out of New York, made its schedules available to the traveling public, and maintained its own employees and offices at two New York locations that were listed in public telephone directories.<sup>124</sup> *Kilberg* and its progeny, however, were certainly plaintiff-attractive.

The United States District Court for the Eastern District of New York dismissed the case for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 (FSIA).<sup>125</sup> The U.S. Court of Appeals for the Second Circuit reversed that decision, based on the finding of a significant nexus between CAAC's commercial activities in the United States and the accident that occurred in China.<sup>126</sup> On remand, the district court applied Chinese choice-of-law rules, which required the application of Chinese law and accordingly limited China Airlines' liability to \$20,000 (U.S.).<sup>127</sup>

On appeal, the Court of Appeals for the Second Circuit affirmed the district court's decision. The court decided, however, to apply the choice-of-law provisions of New York state instead of the Chinese choice-of-law rules.<sup>128</sup> The

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<sup>124</sup> *Barkanic I*, 822 F.2d at 12.

<sup>125</sup> 29 U.S.C. §§ 1602-1611 (1988). The FSIA transferred responsibility for foreign sovereign immunity decisions from the State Department to the Judiciary. The Act provides for a statutory system governing substantive issues of foreign state immunity, as well as procedural issues. See generally GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS, COMMENTARY AND MATERIALS* 449 (2d ed. 1992).

<sup>126</sup> *Barkanic I*, 822 F.2d at 13-14. The court based its reversal on 28 U.S.C. § 1605(a)(2) (1988) ("A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state . . .").

<sup>127</sup> The district court justified the application of the Chinese damage limitation on the theory that the FSIA directs courts to apply the choice-of-law rules of the place where the "act or omission" occurred, and that, under the facts of this case, Chinese choice-of-law rules required the application of Chinese law. *Barkanic II*, 923 F.2d at 959.

<sup>128</sup> *Id.* at 959-61 (holding that the FSIA implicitly requires courts to apply the choice-of-law provisions of the forum state with respect to all issues governed by state substantive law). The choice-of-law issue under the FSIA goes beyond the scope of this note. For an excellent comment on *Barkanic* and choice-of-law under the FSIA, see David E. Seidelson, *The Foreign Sovereign Immunities Act: Whose Conflicts Law? Whose Local Law? Barkanic v. General Administration of Civil Aviation of the People's Re-*

court determined that after *Schultz*, "New York courts would . . . apply the *Neumeier* rules to all post-accident loss distribution rules, including rules that limit damages in wrongful death cases."<sup>129</sup> The court believed that the only factors the New York high court "consider[ed] relevant with respect to loss distribution issues [were] those factors incorporated in the three *Neumeier* rules."<sup>130</sup> The court further noted that, unlike the third rule, the relevant portions of the second *Neumeier* rule were phrased in non-discretionary terms, which unambiguously called for application of the *lex loci delicti*.<sup>131</sup> Therefore, because CAAC's conduct occurred within its "domicile" and the law of that domicile served to limit CAAC's liability, the court applied the \$20,000 damage limitation under Chinese law.

Confronted with the remarkable New York choice-of-law "rules/approach" dichotomy, the highest federal court sitting in New York thus made its own choice among the pure *Neumeier-Schultz* "rules"-oriented choice-of-law method, the pure "interest analysis" approach, and the *Feldman* combination.<sup>132</sup> While referring to *Feldman*, the Court of Appeals for the Second Circuit apparently did not feel it appropriate or necessary to follow *Feldman*'s combined "rules/interest" approach or "double check" choice-of-law analysis.<sup>133</sup> Instead, the court chose the first method and limited itself to a purely mechanical application of the second *Neumeier*-

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*public of China*, 58 BROOK. L. REV. 427 (1992). See generally Desmond T. Barry, *Solving Choice of Law Problems in Foreign Sovereign Immunities Act Cases*, 55 DEF. COUNS. J. 255 (1988); Sandra Engle, *Choosing Law for Attributing Liability Under the Foreign Sovereign Immunities Act: A Proposal for Uniformity*, 15 FORDHAM INT'L L.J. 1060 (1992); Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901 (1969); Joel M. Overton, *Will the Real FSIA Choice-of-Law Rule Please Stand Up?*, 49 WASH. & LEE L. REV. 1591 (1992). For an interesting recent case that followed the *Barkanic* reasoning that state rather than federal choice-of-law rules should apply to federal actions based on the FSIA, see *Pittston Co. v. Allianz Ins. Co.*, 795 F. Supp. 678, 682 (D. N.J. 1992).

<sup>129</sup> *Barkanic II*, 923 F.2d at 963 (citing *Feldman*, 520 N.Y.S.2d at 483).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 962 n.5.

<sup>132</sup> For a full description of the confusing New York choice-of-law "rules/approach" dichotomy after the *Schultz* decision, see *supra* Part II.E.

<sup>133</sup> See *Feldman*, 520 N.Y.S.2d at 485; see also *supra* notes 109-12 and accompanying text.

*Schultz* rule. Accordingly, the Second Circuit applied the Chinese damage limitation.<sup>134</sup>

#### IV. *BARKANIC*, A JUSTIFIED APPLICATION OF CHINESE LAW UNDER THE CURRENT NEW YORK CHOICE-OF-LAW METHOD?

##### A. THE NEW YORK CHOICE-OF-LAW METHOD MISINTERPRETED

To justify its application of Chinese law, *Barkanic* relied heavily on *Schultz* and the extension under *Schultz* of the controlling second *Neumeier* rule to all post-accident loss distribution issues, including rules limiting damages in wrongful death actions.<sup>135</sup> The court believed that, under the current New York choice-of-law method, the only relevant factors to consider in a case involving conflicting loss distribution rules were the factors incorporated in the three *Neumeier* rules.<sup>136</sup> Was the Second Circuit's belief justified? Would the New York Court of Appeals, confronted with a *Barkanic*-type case, really apply the second *Neumeier-Schultz* rule in the same mechanical way?<sup>137</sup> It would probably not.

It is worth noting that the *Schultz* fact pattern was not covered by the second *Neumeier* rule to begin with, and there was no damage limitation rule involved in *Schultz*.<sup>138</sup> In

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<sup>134</sup> Cf. *Mascarella v. Brown*, 813 F. Supp. 1015 (S.D.N.Y. 1993). In this case, a North Carolina plaintiff filed a wrongful death action against Dr. Brown, a New York domiciliary, for failure to diagnose her mother's breast cancer. The court applied the less generous New York law, which disallowed a cause of action for loss of society and companionship, refused punitive damages, and considered taxes in the computation of damages. The court referred to *Barkanic* and mechanically applied the second *Neumeier* rule, holding that "there is no reason to displace New York law, especially since the second *Neumeier* rule is even more categorical than the third." *Id.* at 1021.

<sup>135</sup> *Barkanic II*, 923 F.2d at 962-63.

<sup>136</sup> See *id.* at 963 ("[T]he only factors the New York Court of Appeals now considers relevant with respect to loss distribution issues are those factors incorporated in the three *Neumeier* rules.").

<sup>137</sup> Under the second *Neumeier* rule fact pattern, this would mean that the court would apply the *lex loci delicti* as soon as it finds a split domicile, the situs of the crash in one of the litigant's domiciles, and the local law of each litigant's domicile favoring them respectively.

<sup>138</sup> The reader will recall that *Schultz* applied the first and third *Neumeier* rule to a charitable immunity case. See *supra* note 97 and accompanying text.

other words, *Schultz's* extension of the second *Neumeier* rule to conflicting recovery rules in wrongful death actions was pure dictum. Besides, at the moment *Barkanic* was decided, the second *Neumeier-Schultz* rule had never been applied to an air crash fact pattern, and certainly not in a case involving an air crash occurring outside the United States.<sup>139</sup> Moreover, *Barkanic* was the first air crash case where several jurisdictions, including a foreign developing country, were particularly interested in the recovery issue, and where New York operated as a "neutral" forum.<sup>140</sup> Finally, the line of former pre- and post-*Babcock* New York air crash cases seemed to suggest a different result. In a large majority of these cases, the courts applied the law of the decedent's or beneficiaries' domicile on the recovery issue arising from an air crash.<sup>141</sup>

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<sup>139</sup> By the time that *Barkanic II* was decided, the second *Neumeier* rule had been discussed only once in the fact pattern of an actual case; see *Feldman*, 520 N.Y.S.2d at 477. *Feldman* involved an action by New York residents against Mexican residents for personal injuries sustained while vacationing in Mexico. Mexican law limited damages, while New York law provided for unlimited recovery. The court applied the Mexican damage limitation. See *supra* notes 109-12 and accompanying text.

<sup>140</sup> There were no parties involved in *Barkanic* who were domiciled in New York; neither did the crash occur in New York. The reader will recall that in all previously discussed air crash cases requiring a New York choice-of-law decision, the crash occurred in New York or one of the parties was domiciled in New York. See *O'Rourke*, 730 F.2d at 842 (the crash occurred in New York); *Gore*, 373 N.E.2d at 717 (the passenger resided and was domiciled in New York at the time of the accident); *Pearson*, 309 F.2d at 533 (New York domiciliary was killed); *In re Air Crash Disaster at Boston*, 399 F. Supp. at 1106 (the decedents and their beneficiaries were New York domiciliaries); *Junco*, 399 F. Supp. at 666 (New York decedents and beneficiaries); *Gordon*, 391 F. Supp. at 31 (New York decedent and beneficiaries); *Ciprari*, 245 F. Supp. at 819 (New York decedent); *Thomas*, 249 N.E.2d at 755 (the deceased were not domiciled but were employed in New York); *Long*, 213 N.E.2d at 796 (Pan Am was incorporated in New York); and *Kilberg*, 172 N.E.2d at 526 (New York domiciliary was killed).

<sup>141</sup> The reader will also recall that, of the previously discussed New York air crash cases, only *Ciprari* and *O'Rourke* applied the *lex loci delicti* on the recovery issue. All the other cases applied or suggested application of the law of the domicile or residence. See Mendelsohn, *supra* note 6, at 627 (noting that in air crash cases, "whether a court based its choice of law on public policy, . . . predominance of contacts or center of gravity, the choice always resolved itself in favor of the law of the victim's domicile or place of residence"). Even *O'Rourke* could easily be read as a rejection of the *lex loci delicti* in case of "an anachronistic law . . . drastically limit[ing] or eliminat[ing] the damage award." See *O'Rourke*, 730 F.2d at 850. Additionally, *Ciprari* could arguably be distinguished from the *Barkanic* fact pattern inasmuch as the tickets for the entirely domestic Brazilian ill-fated flight were purchased in Brazil

It would, therefore, certainly have been instructive and helpful if the Court of Appeals for the Second Circuit had done an interest analysis check on its mechanically obtained *Neumeier-Schultz* result in *Barkanic II*, and if it had at least clarified the underlying reasons for what it considered to be the just result.<sup>142</sup> Instead, the court ingenuously hid behind the *Schultz* dictum and added its own dictum stating generally that "*Kilberg* and its progeny are no longer good law."<sup>143</sup>

A 1993 New York Court of Appeals case confirms the suggested "*Feldman* combination" analysis.<sup>144</sup> In an attempt to clarify the current New York choice-of-law method, the New York Court of Appeals found an interest analysis check clearly appropriate in a second *Neumeier-Schultz* case.<sup>145</sup> *Cooney* involved conflicting contribution rules that were manifestly covered under the *Schultz* extension of the second *Neumeier* rule.<sup>146</sup> Moreover, all relevant second rule

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and not through a U.S. travel agent. Interestingly, this same fact also distinguishes *Ciprari* from a California case involving California residents who were killed on a domestic Mexican flight. The victims had purchased their tickets from the defendant Mexican airline through a travel agency in California where the defendant airline was doing business extensively. The court refused to apply the *lex loci delicti* (Mexico's damage limitation) because the defendant failed to show that Mexico's interest in protecting its airline from large damage awards outweighed California's interest in fully compensating its residents and in encouraging its residents' safety. *Hernandez v. Aeronaves de Mexico, S.A.*, 583 F. Supp. 331, 333 (N.D. Cal. 1984).

<sup>142</sup> Cf. *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277 (N.Y. 1993) (applying the first sentence of the second *Neumeier-Schultz* rule after having determined the appropriateness of the *Neumeier-Schultz* result under an interest analysis in a contribution case). See also *infra* notes 145-49.

<sup>143</sup> *Barkanic II*, 923 F.2d at 961. Indeed, the court did not have to make this statement because the *Barkanic* fact pattern (no New York parties involved, air crash occurring in a foreign country, and on a purely domestic flight within that country) was readily distinguishable from *Kilberg* and its progeny, which involved New York residents, U.S. interstate air transportation, and a purely fortuitous crash location.

<sup>144</sup> *Cooney*, 612 N.E.2d at 277.

<sup>145</sup> *Id.* *Cooney* dealt with a contribution action by a New York manufacturer of a defective industrial machine against the Missouri employer of an injured worker. The Missouri workers' compensation act precluded contribution actions against employers. New York law allowed such contribution actions.

<sup>146</sup> See *id.* at 282 (noting that "[c]ontribution rules—as involved in the present case—are loss allocating, not conduct regulating").

factors were present.<sup>147</sup> Confronted, however, with a loss allocation fact/issue pattern which differed from *Schultz*, the *Cooney* court decided to check the *Neumeier-Schultz* result under an interest analysis.<sup>148</sup> *Cooney's* combined "rules/interest analysis" method thus seriously places into question the Second Circuit's mechanical application of the second *Neumeier-Schultz* rule in *Barkanic*.

Therefore, in the light of New York's traditional favor for the law of the domicile in earlier air crash cases and given the exact opposite result reached in the fact-identical *Hernandez* case out of California,<sup>149</sup> it is worth now turning to an *a posteriori* examination of the validity and usefulness of the second *Neumeier-Schultz* rule in *Barkanic*, carefully considering and balancing the respective interests involved in this case. If, in light of *Cooney*, the application of Chinese law was justified under such an interest analysis, the second *Neumeier-Schultz* rule has proven its validity and efficacy in a *Barkanic*-type fact/issue pattern. If, however, an interest analysis establishes an unjustified *Neumeier-Schultz* result, an amendment of the second rule will have to be considered in *Barkanic*-type cases.

#### B. *BARKANIC* UNDER AN INTEREST ANALYSIS

An interest analysis approach seeks to effect the law of the jurisdiction having the greatest interest in resolving each particular issue involved.<sup>150</sup> An interest analysis approach, in other words, is designed to advance optimally the various social goals implicated in a multi-state or inter-

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<sup>147</sup> *Id.* at 283 (acknowledging that the case involved "a true conflict in the mold of *Neumeier's* second rule, where the local law of each litigant's domicile favors that party, and the action is pending in one of those jurisdictions"). "Under that rule, the place of injury governs, which in this case means that contribution is barred." *Id.*

<sup>148</sup> *Id.* at 282 (noting that the loss allocation issue in this split domicile case demanded a "more complicated [analysis], calling upon [the court] to evaluate the relative interests of jurisdictions with conflicting laws . . .").

<sup>149</sup> See *supra* note 141.

<sup>150</sup> See *Schultz*, 480 N.E.2d at 683 (citing *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963)). See also *Cooney*, 612 N.E.2d at 280 (citing *Schultz* and *Miller v. Miller*, 237 N.E.2d 877 (N.Y. 1968)).



national conflict-of-laws problem.<sup>151</sup> To determine the most interested state or the net maximum advancement of all competing policies, a court must first determine the policies that the applicable laws seek to implement. Subsequently, the court must determine which state's policy will be furthered by applying its law to the issue presented.<sup>152</sup> Applying such an analysis to *Barkanic*, the second question becomes key: which state's policy would be furthered by applying its law to the recovery issue? Let us first set out the relevant contacts of the occurrence and the parties with each jurisdiction involved.

Mr. Barkanic was domiciled in the District of Columbia and left no dependent survivors domiciled in the District. His mother, the dependent survivor and plaintiff in this case, was a Maryland domiciliary.<sup>153</sup> Mr. Fox, on the other hand, died domiciled in New Hampshire. He left a widow, also domiciled in New Hampshire, who became the second plaintiff in the *Barkanic* action.<sup>154</sup> New York was one of the U.S. terminal points covered by the defendant's CAB permit.<sup>155</sup> China Airlines maintained offices and was listed in public telephone directories in New York. The ill-fated flight was a domestic flight from Nanjing to Beijing. The tickets for the scheduled flight were bought from a Washington, D.C. agent for Pan American World Airways.<sup>156</sup> These tickets were changed, however, by the CAAC office in Nanjing, China, to the accident flight. The crash occurred somewhere between Nanjing and Beijing. All jurisdictions having potentially relevant contacts with the parties and the

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<sup>151</sup> See RICHMAN & REYNOLDS, *supra* note 14, at 212.

<sup>152</sup> The court must only consider factors which are significant, i.e., those relating to the underlying policy or "purpose of the particular law in conflict." *Miller*, 237 N.E.2d at 879. See also *Tooker v. Lopez*, 249 N.E.2d 394, 397 (N.Y. 1969) (citing *Babcock*).

<sup>153</sup> See Seidelson, *supra* note 128, at 443-44 nn.66 & 71.

<sup>154</sup> *Id.* at 429 n.6, 443 n.66.

<sup>155</sup> CAAC was authorized to operate in the United States by the Civil Aeronautics Board in 1980. This authorization allowed CAAC to engage in scheduled foreign air transportation to and from Honolulu, Los Angeles, San Francisco, and New York. See *Barkanic I*, 822 F.2d at 12.

<sup>156</sup> See *supra* note 120.

occurrence provided for unlimited recovery,<sup>157</sup> except for China which had a \$20,000 (U.S.) limit.<sup>158</sup>

The underlying policies for unlimited recovery in an air crash case can be based on several considerations.<sup>159</sup> New York's interests underlying its law of unlimited damages are to maximize recovery for its domiciliaries, avoid the possibility that its domiciliaries become public charges and/or ensure that medical creditors in the state will be paid.<sup>160</sup> Assuming now that all U.S. jurisdictions involved have adopted the forementioned underlying policies, the only states effectively interested in having their law applied in *Barkanic*, are those where the plaintiffs/beneficiaries of the wrongful death action (i.e., the survivors) are domiciled or reside.<sup>161</sup> The only U.S. jurisdictions whose recovery policy would be furthered by applying their law to the recovery issue are New Hampshire, the state where Mr. Fox's widow is domiciled, and Maryland, the domicile of Mr. Barkanic's mother.<sup>162</sup>

The underlying policy for China's limited recovery law, on the other hand, is presumably the prevention of out-

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<sup>157</sup> See D.C. CODE ANN. § 16-2701 (1989); N.H. REV. STAT. ANN. §§ 556:12, 13, 14 (1974); MD CTS. & JUD. PROC. CODE ANN. § 3-904 (1989); N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (McKinney 1981). This is based on the assumption that the Warsaw Convention, as supplemented by the 1966 Montreal Agreement, was not applicable to the Nanjing-Beijing leg. See *supra* note 11.

<sup>158</sup> See Seidelson, *supra* note 128, at 428-29 n.4. In 1982 the Chinese government amended its regulations to increase compensation for foreigners, overseas Chinese, and Chinese of Hong Kong involved in domestic accidents. The maximum amount of \$20,000 (U.S.) dollars was established according to a preference treatment and the Hague Protocol to the Warsaw Convention to which China had acceded. Citizens of China would be paid an amount equivalent to \$1,500 (U.S.).

<sup>159</sup> The courts must discover these policies using the "ordinary processes of construction and interpretation." RICHMAN & REYNOLDS, *supra* note 14, at 212.

<sup>160</sup> See *Feldman*, 520 N.Y.S.2d at 486.

<sup>161</sup> Cf. *Morgan Guar. Trust Co. v. Garrett Corp.*, 625 F. Supp. 752 (S.D.N.Y. 1986). Where the issue is loss allocation, "the significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort." *Id.* at 758 (citing *Schultz*, 491 N.Y.S.2d at 95). See also *Cooney*, 612 N.E.2d at 280 (acknowledging that "if competing 'postevent remedial rules' are at stake other factors [than the *locus delicti*] are taken into consideration, chiefly the parties' domiciles").

<sup>162</sup> In most cases the plaintiffs' or survivors' domicile will be the same as the deceased's domicile, which will also be the place where the estate is probated. In *Barkanic*, however, the only dependent survivor, Mr. Barkanic's mother, lived in a different state.

flows of capital and resources indispensable to the development of its infant airline industry.<sup>163</sup> Protection of an airline industry is of extraordinary public and national importance.<sup>164</sup>

In sum, New Hampshire's and Maryland's policies, furthered by unlimited recovery, would be advanced by respectively applying New Hampshire law to Mr. Fox's widow's wrongful death action and Maryland law to Mr. Barkanic's mother's wrongful death action. Doing so, however, would in either action thwart China's policy of protecting its infant airline industry from depletion of indispensable capital and resources.<sup>165</sup> The relation between the laws, policies, and contacts with each state involved in the Barkanic action can be diagrammed as follows:<sup>166</sup>

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<sup>163</sup> See George B. Reese, *Conflict of Laws*, 43 SYRACUSE L. REV. 213, 235-36 (1992) (noting that CAAC might find a New York size damage award "economically difficult or impossible to satisfy with obvious international political repercussions"). However, this ignores the mandatory insurance CAAC is required by the Department of Transportation to maintain on all of its flights to and from the United States. See 14 CFR § 205.5.

<sup>164</sup> Cf. *Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense*, 350 F.2d 468, 471 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966). One purpose of the Brazilian damage limitation in wrongful death actions against Brazil's airline was to protect an industry whose success "is a matter not only of pride and commercial well-being, but perhaps even of national security." *Id.*

<sup>165</sup> It is worth noting, however, that to the extent the risk to pay large hard currency damage awards is actually shifted to a third, non-Chinese party (e.g., foreign insurance companies), China's interest in having its law applied would be largely neutralized. China's remaining interest would then be limited to avoiding the payment of a deductible and to avoiding an increase of insurance premiums. Thus, depending upon the importance of deductible and premium increase, the conflicting interests in *Barkanic* could arguably be accommodated through an insurance mechanism. The "true conflict" would then be transformed into a "false conflict" requiring application of Maryland and New Hampshire unlimited recovery law. More information with regard to CAAC's insurance coverage would be necessary to develop this interesting argument. See also *infra* note 213.

<sup>166</sup> See generally William M. Richman, *Diagramming Conflicts: A Graphic Understanding of Interest Analysis*, 43 OHIO ST. L.J. 317 (1982).

1. *The Barkanic Wrongful Death Action*

	New York	D.C.	Maryland	China
contacts	- forum - CAAC does business	- domicile of the deceased - ticket purchased - CAAC does business through Pan AM	deceased's mother domiciled	- the crash - airline's main place of business - ticket changed
law	unlimited recovery	unlimited recovery	unlimited recovery	limited recovery (\$20,000)
policies	- full compensation for domiciliaries  - prevent domiciliaries from becoming public wards  - protect medical creditors	- full compensation for domiciliaries  - prevent domiciliaries from becoming public wards  - protect medical creditors	- full compensation for domiciliaries  - prevent domiciliaries from becoming public wards  - protect medical creditors	- protect airline industry against depletion of indispensable capital and resources
choice of law (rule-approach)	the <i>Cooney</i> "rules/interest analysis approach" combination <sup>167</sup>	interest analysis/ Second Restatement <sup>168</sup>	<i>lex loci delicti</i> <sup>169</sup>	<i>lex loci delicti</i> <sup>170</sup>

The preceding diagram first shows that the only states interested in having their law applied to the recovery issue at stake are Maryland and China. These are, indeed, the only states having the necessary connecting factor — the domicile of a party — between the application of their respective laws and the furtherance of their underlying policies.<sup>171</sup> Even more importantly, however, the diagram points out the "true conflict" between the interested states' laws. The underlying policy of each state points to a connecting factor in that state, which means that each state's policy would be

<sup>167</sup> See *Cooney*, 612 N.E.2d at 277.

<sup>168</sup> See Borchers, *supra* note 37, at 371.

<sup>169</sup> Where a wrongful death occurs in another state, the Maryland courts apply the law of such other state as though such foreign law were the law of Maryland. See *Wilson v. Fraser*, 353 F. Supp. 1 (D. Md. 1973); *Debbis v. Hertz Corp.*, 269 F. Supp. 671 (D. Md. 1967); *Kaufmann v. Service Trucking Co.*, 139 F. Supp. 1 (D. Md. 1956).

<sup>170</sup> See *General Principles of Civil Law of the People's Republic of China*, 34 AM. J. COM-PAR. L. 715, 742 (Whitmore Gray & Henry R. Zheng, trans., 1986).

<sup>171</sup> Washington, D.C. is not to be considered as an interested state because there are no domiciliaries/beneficiaries of the wrongful death action located there.

advanced if its law were applied to the recovery issue presented.

It is worth noting, though, that Maryland adheres to the traditional *lex loci delicti* choice-of-law rule.<sup>172</sup> Moreover, the Maryland courts seem to have no problem imposing the recovery ceiling provided for by a wrongful death statute of the state in which the tort occurred.<sup>173</sup> One could thus conclude that "if the *Barkanic* action had been brought before a Maryland court, that court presumably would have imposed the Chinese ceiling even to the economic jeopardy of the Maryland dependent survivor."<sup>174</sup> This conclusion, however, does not automatically allow the suggestion that in *Barkanic* Maryland had no interest in having its law applied, or that China had the more significant interest in imposing its ceiling on recovery.<sup>175</sup> Maryland's traditional choice-of-law rule and its pure jurisdiction-selecting result is, indeed, an irrelevant consideration under an interest analysis, simply because the rule and its result are not based on an interest analysis premise.<sup>176</sup> The attempt to transform a "true conflict"<sup>177</sup> into a "false conflict,"<sup>178</sup> by considering Maryland's traditional *lex loci delicti* rule and its presumable re-

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<sup>172</sup> See *supra* note 169; see also Borchers, *supra* note 37, at 371.

<sup>173</sup> See *Uppgren v. Executive Aviation Servs.*, 326 F. Supp. 709 (D. Md. 1971) (holding that the mere absence of a monetary limitation upon recovery under the Maryland wrongful death act does not of itself reflect such a strong Maryland public policy as to prevent enforcement of the Minnesota wrongful death statute's monetary limitation) (quoted in *Polglase v. Greyhound Lines*, 401 F. Supp. 335 (D. Md. 1975); cited in *Connor v. Hauch*, 437 A.2d 661 (Md. Ct. Spec. App. 1981)), *aff'd*, 453 A.2d 1207 (Md. 1983); see also *Walker v. Essex*, 569 A.2d 645 (Md. 1990).

<sup>174</sup> See Seidelson, *supra* note 128, at 445.

<sup>175</sup> But see Seidelson, *supra* note 128, at 445 (suggesting that Maryland's retention of *lex loci delicti* implies a more significant interest for China in imposing its ceiling).

<sup>176</sup> The New York *Neumeier-Schultz* rules could arguably be considered in an interest analysis to determine New York's interest. As these rules have been induced from interest analysis cases, they are a relevant parameter to measure New York's interest in loss allocation issues.

<sup>177</sup> A "true conflict" exists if the policy of more than one state would be furthered by applying its law to the issue presented. RICHMAN & REYNOLDS, *supra* note 14, at 212-13.

<sup>178</sup> A "false conflict" exists if the policy of only one state would be furthered by applying its law to the issue presented. A false conflict is considered the easy case and must be resolved by applying the law of the only interested state. *Id.*

sult, is thus not persuasive. The *Barkanic* action, therefore, presents a real "true conflict."

The next diagram similarly shows that the only states interested in having their law applied to the recovery issue at stake in the Fox wrongful death action are New Hampshire and China.

## 2. *The Fox Wrongful Death Action*

	New York	D.C.	New Hampshire	China
contacts	<ul style="list-style-type: none"> <li>- forum</li> <li>- CAAC does business</li> </ul>	<ul style="list-style-type: none"> <li>- ticket purchased</li> <li>- CAAC does business through Pan AM</li> </ul>	<ul style="list-style-type: none"> <li>- deceased's wife domiciled</li> <li>- deceased domiciled</li> </ul>	<ul style="list-style-type: none"> <li>- the crash</li> <li>- airline's main place of business</li> <li>- tickets changed</li> </ul>
law	unlimited recovery	unlimited recovery	unlimited recovery	limited recovery (\$20,000)
policies	<ul style="list-style-type: none"> <li>- full compensation for domiciliaries</li> <li>- prevent domiciliaries from becoming public wards</li> <li>- protect medical creditors</li> </ul>	<ul style="list-style-type: none"> <li>- full compensation for domiciliaries</li> <li>- prevent domiciliaries from becoming public wards</li> <li>- protect medical creditors</li> </ul>	<ul style="list-style-type: none"> <li>- full compensation for domiciliaries</li> <li>- prevent domiciliaries from becoming public wards</li> <li>- protect medical creditors</li> </ul>	<ul style="list-style-type: none"> <li>- protect airline industry against depletion of indispensable capital and resources</li> </ul>
choice of law (rule-approach)	the <i>Cooney</i> "rules/interest analysis approach" combination	interest analysis/ Second Restatement	Leflar's choice-influencing considerations <sup>179</sup>	<i>lex loci delicti</i>

In sum, the previous diagrams clearly reveal the "false conflict" between Chinese law and New York law and between Chinese law and D.C. law. Indeed, the respective diagrams reveal no significant New York or D.C. contacts with the recovery issue. In other words, all of the New York and D.C. contacts are unrelated to the underlying policies or recovery purposes of the conflicting laws. Conversely, the diagrams point out the "true conflict" between the Mary-

<sup>179</sup> See Borchers, *supra* note 37, at 372.

land and New Hampshire full recovery laws and the Chinese limited recovery rule.<sup>180</sup>

### C. CONSTITUTIONALITY ANALYSIS

Thus confronted with a "true conflict"<sup>181</sup> involving a "state international extraterritoriality" issue,<sup>182</sup> the choice of law must be consistent with the U.S. Constitution,<sup>183</sup> in particular, with the Due Process Clause of the Fourteenth Amendment.<sup>184</sup>

The current test for due process limitations on state choice-of-law was set in *Allstate Insurance Co. v. Hague*.<sup>185</sup> Under *Hague*, a "State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."<sup>186</sup> In short, a choice of law will be constitutionally permissible if that choice does not result in

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<sup>180</sup> The resolution of a "true conflict" is considered the most difficult issue in interest analysis. See RICHMAN & REYNOLDS, *supra* note 14, at 278 (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)).

<sup>181</sup> Note that the Constitution and the constitutionality test is implicated only by a "true conflict." A "false conflict" does not require a choice; the application of the law of the sole interested state automatically satisfies the constitutionality test. See RICHMAN & REYNOLDS, *supra* note 14, at 278 (quoting *Shutts*, 472 U.S. 797).

<sup>182</sup> Issues of "state international extraterritoriality" or "state international choice-of-law" arise if the facts of a case cross national borders. See Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1224 (1992).

<sup>183</sup> *Id.* at 1219 (noting that constitutional consistency is required "even when the case exhibits international and not purely interstate elements") (citing *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930)).

<sup>184</sup> U.S. CONST. amend XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .") The clause prohibits the application of law that is only casually or slightly related to the litigation. See *Shutts*, 472 U.S. at 819).

<sup>185</sup> 449 U.S. 302 (1981) (plurality opinion). Plaintiff's husband was killed in a motorcycle accident in Wisconsin. Both drivers were Wisconsin residents, and all of the vehicles were registered in Wisconsin. After the accident, plaintiff moved to Minnesota and brought suit there. Wisconsin law limited recovery to the coverage provided in one insurance policy, while Minnesota law permitted "stacking" (combining) of three policies. The Supreme Court upheld the application of Minnesota law.

<sup>186</sup> *Id.* at 312-13.

"unfair surprise."<sup>187</sup> Under this test, the Supreme Court upheld the application of Minnesota law in *Hague* because the plaintiff (widow) resided in Minnesota at the time the suit was brought, the defendant was doing business in Minnesota, and the deceased had been a member of the Minnesota work force.<sup>188</sup>

It is significant that the plaintiff's domicile was the only connection with Minnesota that was related to the recovery issue at stake and that gave this state a real interest in applying its law to the issue.<sup>189</sup> Justice Brennan noted, however, that the post-event resident connection, standing alone, was not sufficient to confer legislative jurisdiction on Minnesota.<sup>190</sup>

*Hague* did not express any view as to whether the defendant's doing business in a state would, standing alone, support the application of that state's law to unrelated issues.<sup>191</sup> Four years later, however, the Supreme Court suggested that this factor in and of itself would not suffice.<sup>192</sup> On the other hand, the Supreme Court subsequently held that a historically recognized ground for legislative jurisdiction or choice of law, such as the forum state's application of its own statute of limitations, was constitutionally adequate.<sup>193</sup>

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<sup>187</sup> See generally RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 520-21 (3d ed. 1986) (discussing the unfair surprise argument).

<sup>188</sup> *Hague*, 449 U.S. at 313-20.

<sup>189</sup> *Id.* at 319 (arguing that the post-accident move gave Minnesota an interest in fully compensating its "resident accident victims," keeping them "off welfare rolls" and enabling them "to meet financial obligations").

<sup>190</sup> *Id.* (holding that "a post-occurrence change of residence . . . was insufficient in and of itself to confer power on the forum State to choose its law") (citing *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936)).

<sup>191</sup> *Hague*, 449 U.S. at 320 n.29 ("We express no view whether the first two contacts, either together or separately, would have sufficed to sustain the choice of Minnesota law . . ."). Decedent was a member of Minnesota's work force; defendant did business in Minnesota.

<sup>192</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 819-23 (1985) (invalidating the application of Kansas law by the Kansas state court to a class action against Phillips by lessors of gaslands in 11 states for interest allegedly due on royalty payments). Although fewer than three percent of the plaintiffs and one percent of the leases had any apparent connection with the state of Kansas, the Kansas courts had applied Kansas law to every claim.

<sup>193</sup> See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 725-30 (1988). *Sun Oil* involved the same *Shutts* gas royalties issue. This time the Kansas state court found a false conflict



The question now is whether, in *Barkanic*, the application of Maryland or New Hampshire law, both providing for unlimited recovery, would have satisfied the *Hague* "contacts-interests-fairness" constitutionality test. Plaintiffs were domiciled in Maryland and New Hampshire, respectively, and both states presumably had an interest in maximizing their residents' recovery and keeping them off welfare rolls.<sup>194</sup> Thus, both states had "significant contacts . . . creating state interests," thus satisfying the first and second prongs of the *Hague* constitutionality test.<sup>195</sup> But, do these contacts suffice to make the choice of Maryland or New Hampshire law "neither arbitrary nor fundamentally unfair"?<sup>196</sup>

With Justice Brennan's remark in *Hague* in mind,<sup>197</sup> it could be argued that the domicile connection in itself would not have satisfied fundamental fairness in holding CAAC to Maryland and New Hampshire legislative standards. The domicile of Mr. Barkanic's mother and Mr. Fox's widow was, indeed, the only significant contact linking each jurisdiction to the controversy.<sup>198</sup> This link, however, was completely unrelated to China Airlines, which was not even doing business in those states. China Airlines could not reasonably have expected to be judged under New Hampshire or Maryland legislative standards for an air

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because the liability rules and interest rates were substantially the same in all involved states. The finding of a false conflict implied lack of injury and avoided the constitutional issue. The Kansas high court had further reasoned that the limitations issue was a procedural question governed by Kansas law. The U.S. Supreme Court affirmed the application of Kansas law.

<sup>194</sup> Cf. *Hague*, 449 U.S. at 319 (in which plaintiff (widow) resided in Minnesota at the time the suit was brought).

<sup>195</sup> See *supra* note 186 and accompanying text.

<sup>196</sup> This is the "fairness" prong of the *Hague* constitutionality test. See *Hague*, 449 U.S. at 312-13; see also Brilmayer & Norchi, *supra* note 182 at 1243 ("Contacts and interests in themselves do not demonstrate the fundamental fairness of holding a defendant to legislative standards.").

<sup>197</sup> See *supra* note 190 and accompanying text (a post-occurrence change of residence is insufficient in and of itself to confer legislative jurisdiction).

<sup>198</sup> Presumably, unlike in *Hague*, the plaintiffs did not move after the crash and prior to the litigation. The forum-shopping concern expressed in *Shutts* is therefore irrelevant in this case. See *Shutts*, 472 U.S. at 820. Nothing in these Supreme Court cases suggests, though, that a permanent domicile connection automatically satisfies the "fairness" test.

crash in China of a purely domestic flight.<sup>199</sup> Nor would the domicile connection be constitutionally adequate under the *Sun Oil* analysis.<sup>200</sup> Indeed, domicile is not a traditional basis for legislative jurisdiction.<sup>201</sup>

In sum, China Airlines would arguably be unfairly surprised to be held either to Maryland's or New Hampshire's unlimited recovery standards. Applying these states' laws would, therefore, violate the due process requirement of the Fourteenth Amendment.

D. INTEREST ANALYSIS AND A *BARKANIC*-TYPE  
HYPOTHETICAL<sup>202</sup>

But what if the plaintiffs had been New York domiciliaries? Unlike Maryland and New Hampshire, New York had no significant contacts with the recovery issue presented in *Barkanic*.<sup>203</sup> Under a pure interest analysis, the Second Circuit would thus have detected a "false conflict" and would have decided, as it did under the *Neumeier-Schultz* rules, not to apply New York law.

The key question then becomes whether the New York courts would apply New York law in a *Barkanic*-type case if the plaintiffs are New Yorkers.<sup>204</sup> *Barkanic* applies the second *Neumeier-Schultz* rule and generally states that *Rosenthal* and *Kilberg*, both cases involving New York domiciliaries "are no longer good law."<sup>205</sup> Is *Barkanic* really suggesting that "the plaintiff's domicile should now be given no

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<sup>199</sup> See Reese, *supra* note 163, at 235-36 (finding it "insensitive, if not foolhardy, to impose United States law on foreigners operating at home").

<sup>200</sup> See *supra* note 193.

<sup>201</sup> See Brilmayer & Norchi, *supra* note 182, at 1242.

<sup>202</sup> Assuming that the Maryland and New Hampshire domicile connection in and of itself satisfies the constitutionality test, the interest analysis *infra* Part IV.D. also applies to *Barkanic*.

<sup>203</sup> See *supra* notes 140-80.

<sup>204</sup> See Reese, *supra* note 163, at 236-37 ("[T]he question immediately comes to mind: what if plaintiffs had been New Yorkers?").

<sup>205</sup> *Barkanic II*, 923 F.2d at 961.

weight in a choice of law analysis so long as the tort occur[s] away from that place"?<sup>206</sup>

Let us examine this suggestion under the current New York choice-of-law method and assume, contrary to fact, that the plaintiffs in *Barkanic* were New York domiciliaries. New York, domicile of the plaintiffs, co-terminal point, stopping place in the international flight that brought Mr. Barkanic to China, and place where CAAC is engaged in substantial business, would probably have the constitutionally required nexus with this hypothetical *Barkanic* litigation to make the choice of its own law constitutionally permissible.<sup>207</sup>

After determination of New York's sufficient interest in the litigation to satisfy the constitutional threshold, the New York court must decide whether the interests of the jurisdictions having conflicting laws "can be accommodated without substantially impairing [each] other."<sup>208</sup> Thus, China's interest in limiting damages to secure the indispensable capital and resources for its infant airline industry must be balanced against New York's interest in securing proper and just compensation for its residents.<sup>209</sup>

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<sup>206</sup> See Reese, *supra* note 163, at 237 (doubting that this is a correct conclusion under New York choice-of-law analysis); see also *infra* note 243.

<sup>207</sup> See *supra* Part IV.C (analysis of the *Hague* constitutionality test); cf. *Cooney*, 612 N.E.2d at 279-80 (holding that New York's contacts, in the aggregate, were sufficient to satisfy the constitutional threshold where the defendant was present and did business in New York, where the plaintiff was a New York domiciliary, and where the machine causing the damage was ordered in New York and eventually shipped out of that state).

<sup>208</sup> *Cooney*, 612 N.E.2d at 282.

<sup>209</sup> Cf. *Ciprari v. Servicos Aereos Cruzeiro*, 245 F. Supp. 819 (S.D.N.Y. 1965) *aff'd*, 359 F.2d 855 (2d Cir. 1966). In *Ciprari*, a New York resident was killed on a domestic Brazilian flight. He bought his ticket in Rio de Janeiro. The Brazilian airline conducted only very limited and unrelated business in New York. The court applied the Brazilian damage limitation because Brazil had an interest in "the financial integrity of her local airlines" and "the only relationship or contact of New York [was] the fact that plaintiff [was] a resident of New York." *Id.* at 824-25. But see *Hernandez v. Aeronaves de Mexico*, 583 F. Supp. 331 (N.D. Cal. 1984) (involving California residents killed on a domestic Mexican flight). Decedents had purchased their tickets from defendant airline in California where the defendant was extensively doing business. The court refused to apply Mexico's damage limitation because the defendant failed to show that Mexico's interest in protecting its airline from large dam-

China indisputably has an interest in protecting its airline industry from potentially large damage awards. Such awards could, indeed, generally affect a developing nation's economic strength,<sup>210</sup> particularly damaging its politically<sup>211</sup> and economically<sup>212</sup> important airline industry.<sup>213</sup> Furthermore, China's damage limitation on wrongful death actions arising from air crashes was enacted in regulations of 1951 and renewed and amended as recently as 1982.<sup>214</sup> These regulations were doubtlessly enacted and renewed "with a view toward protecting what was [in 1951] and still is,"<sup>215</sup> an infant industry of extraordinary public and national

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age awards outweighed California's interest in fully compensating its residents and in encouraging their safety. *Id.* at 333.

<sup>210</sup> See *Ciprari*, 245 F. Supp. at 824 (citing *Tramontana v. S.A. Empresa*, 350 F.2d 468 (D.C. Cir. 1965)); cf. *Hernandez*, 583 F. Supp. at 333.

<sup>211</sup> Cf. *Tramontana*, 350 F.2d at 471 (finding that one purpose of Brazil's damage limitation was to protect an industry whose success "is a matter not only of pride and commercial well-being, but perhaps even of national security").

<sup>212</sup> *Id.* at 471 n.8 ("Air transportation has become increasingly important in Brazil, both because of the size of the country, and because of the relative inadequacy of surface transportation.").

<sup>213</sup> See *Reese*, *supra* note 163, at 235-36 (noting that CAAC might find a New York size damage award "economically difficult or impossible to satisfy with obvious international political repercussions"). The reader may recall, however, the argument that to the extent the risk of paying large hard currency damage awards can actually be shifted to a third, non-Chinese party (e.g., foreign insurance companies), China's interest in having its law applied would be greatly reduced, if not neutralized. See *supra* note 165.

<sup>214</sup> See *Seidelson*, *supra* note 128. An interesting point to consider is that the citizens of China would equally recover up to \$20,000 (U.S.) (under Warsaw-Hague) or \$75,000 (U.S.) (under Warsaw-Montreal) in case of a Warsaw Convention accident. See *LOWENFELD*, *supra* note 29, 7-110 (stating that "if a flight were subject to the Warsaw Convention rules, a passenger would be protected against a limit less than that stated in the Convention, whether or not the state where the accident occurred was a party to the Convention").

<sup>215</sup> See *Lynne Curry, Survey of Asian Aerospace: Breakneck Growth May Slow As Attention Turns to Safety—China's Aviation Industry*, FINANCIAL TIMES, Feb. 18, 1994 at 211 (noting that "[m]arred by a series of crashes in the last year, the breakneck growth of China's aviation industry is likely to slow as the country seeks to reverse its image as one of the most dangerous places in the world to fly"); see also *Sun*, *supra* note 122 (reporting the crash of a Chinese airliner 10 minutes after takeoff from the central Chinese tourist city of Xian, killing all 160 aboard, including two Americans). The article further states, "China, which has the world's fastest growing aviation market, has been struggling in recent years to improve its [poor] safety record. . . . and has asked for help from the West, particularly from the U.S. National Transportation Safety Board and the Federal Aviation Administration." *Id.*

importance" for a developing country.<sup>216</sup> Finally, China's limitation seemingly only applies to airplane accidents not subject to the Warsaw Convention.<sup>217</sup> It is, in other words, not an across-the-board ceiling on recovery for wrongful death, clearly demonstrating the focus of China's concern.<sup>218</sup>

But does not New York have an equivalent essential interest in its residents' full recovery for their actual pecuniary loss?<sup>219</sup> And does not the fact that the New York State Constitution prohibits any statutory limitation of wrongful death action damages equally demonstrate the focus of New York's concern?<sup>220</sup>

Manifestly, the interests of China and New York are irreconcilable in this case. To the extent the court allows unlimited recovery against CAAC, the policy underlying China's 1951-1982 regulations will be offended. Conversely, to the extent the New York plaintiffs receive less than their actual loss, the policy underlying New York's wrongful death statute providing for unlimited recovery is offended. It is obvi-

<sup>216</sup> Cf. *Tramontana*, 350 F.2d at 471.

<sup>217</sup> Chinese tort law generally provides for unlimited recovery. "Where personal injury is caused to a citizen, compensation must be paid for medical expenses, loss of income from work, expense of living as a disabled person, and similar expenses; when death is caused, there must also be payment for funeral expenses, as well as expenses such as necessary maintenance for the deceased's dependents." *General Principles of Civil Law of the People's Republic of China*, 34 AM. J. COMPAR. L. 715, 737-38 (Whitmore Gray & Henry P. Zheng, trans., 1986); accord Robert Force & Xia Chen, *An Introduction to Personal Injury and Death Claims in the People's Republic of China*, 15 TUL. MAR. L.J. 245, 276-279 (1991) (describing a case where the tortfeasor was required to compensate all of the decedent's lost income until retirement and 90% thereafter, reduced only by the amount the decedent would have spent for his or her needs).

<sup>218</sup> Cf. *Tramontana*, 350 F.2d at 471-72 (reading a similar specificity in Brazilian law as an enhanced interest for Brazil in having its ceiling applied).

<sup>219</sup> See John B. Austin, *A General Framework for Analyzing Choice-of-Law Problems in Air Crash Litigation*, 58 J. AIR L. & COM. 909, 963 n.132 (1993) (stating that the plaintiff state's interest in its residents' recovery for actual pecuniary loss is a common one shared by all states in regard to their domiciliaries: to ensure that plaintiffs receive proper relief for pecuniary loss and avoid becoming wards of the state); see also Lee S. Kreindler, *A Plaintiff's View of Montreal*, 33 J. AIR L. & COM. 528, 530 (1967) (noting that it is "absolutely basic and fundamental to American citizens that an injured person should be appropriately compensated for the loss he has sustained").

<sup>220</sup> See N.Y. CONST. art. I § 16 ("[T]he amount recoverable shall not be subject to any statutory limitation.").

ous that China's interest cannot be accommodated without sacrificing New York's interest and vice versa.<sup>221</sup> The "comparative impairment"-type analysis,<sup>222</sup> suggested by the New York Court of Appeals as a first resort to resolve the apparent impasse of a second *Neumeier-Schultz* rule case,<sup>223</sup> is not helpful in our hypothetical *Barkanic* fact pattern. The impairment of New York's policy seems to be the exact flip side of the impairment of China's policy. Indeed, if the court decides to apply Chinese law, the extent to which New York's full recovery policy is impaired is precisely proportionate to the effectuation of the Chinese limited damages policy. In the reverse situation, the advancement of the New York policy would be exactly proportionate to the extent of impairment of the Chinese policy.

Several choice-of-law theories suggest different solutions for resolving the impasse. Under the pure interest analysis approach, the forum should apply its own law in any true conflict case.<sup>224</sup> If the forum is disinterested, an unavoidable conflict exists between the interests of two other states, and the court cannot justifiably decline to adjudicate the

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<sup>221</sup> Cf. *Cooney*, 612 N.E.2d at 283 (finding it impossible to accommodate Missouri's and New York's competing interests in the given contribution case).

<sup>222</sup> The "comparative impairment" approach was originally developed by Professor William Baxter and subsequently adopted by California as a variation of interest analysis specifically designed to resolve true conflicts. Starting from the premise that all state interests are entitled to equal weight and willing to effectuate the greatest overall promotion of states' policies, this approach tries to solve the impasse by comparing the extent of impairment of each state policy and applying the law of the state whose policy would be most impaired were it not applied. See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); see also *Bernhard v. Harrah's Club*, 546 P.2d 719, 723 (Cal.), cert. denied, 429 U.S. 859 (1976).

<sup>223</sup> See *Cooney*, 612 N.E.2d at 281-82. After stating that "the interest of each State in enforcement of its law is roughly equal," the court suggests evaluating "the relative interests of the jurisdictions with competing laws" to see whether either law can be applied "without substantially impairing the other." *Id.* The court appears to use the "comparative impairment" approach, not to solve a "true conflict" but to detect "a false conflict," where the claim for application of one of the conflicting rules is so slender that the conflict is easily resolved in favor of the other rule. The court does not provide any guidance, however, as to when an impairment of interest is "substantial" and, therefore, at what point false conflict turns into true conflict, and vice versa.

<sup>224</sup> See WILLIS L.M. REESE ET AL., CONFLICT OF LAWS: CASES AND MATERIALS 488 (9th ed. 1990).

case, it should apply the law of the forum equally.<sup>225</sup> Under a pure interest analysis, the New York courts would thus grant unlimited recovery in both the real *Barkanic* fact situation<sup>226</sup> and in the hypothetical fact pattern.<sup>227</sup> The New York Court of Appeals has clearly distanced itself, however, from this solution, expressing in *Cooney* a distaste for bias in favor of the forum's law.<sup>228</sup>

Another way to resolve the impasse could be an attempt to determine the "better law."<sup>229</sup> But could the court honestly pretend that the consideration of a law, though "absurd and unjust" in the light of current U.S. socio-economic jurisprudential standards,<sup>230</sup> is equally "archaic, absurd and unjust" under international standards? Indeed, limitation of liability is still the rule in international aviation accidents,<sup>231</sup> and the "infant industry-protecting" purpose of

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<sup>225</sup> *Id.*

<sup>226</sup> In *Barkanic*, New York was an uninterested forum for pure interest analysis purposes, and the court would therefore have applied the forum law, which corresponded with New Hampshire's, Maryland's, or the District of Columbia's unlimited recovery law.

<sup>227</sup> In the hypothetical case, New York is an interested forum because the plaintiffs are domiciled there. The hypothetical further assumes that the New York contacts in the aggregate are sufficient to satisfy the constitutional threshold. See *supra* text accompanying note 186.

<sup>228</sup> *Cooney*, 612 N.E.2d at 281-82 (preferring a neutral tie breaker, "rebutting an inference that the forum State is merely protecting its own domiciliary or favoring its own law"); see also *Feldman*, 520 N.Y.S.2d at 483 n.12 (noting that "New York, although employing the language of governmental interest analysis, has distanced itself from Professor Currie's view that the forum should apply its own law in any true conflicts case").

<sup>229</sup> The "better law" approach has been developed by Professor Robert A. Leflar. Professor Leflar believes a law is better if it is "superior" to another law when judged under current "socio-economic jurisprudential standards." ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* 297 (4th ed. 1986).

<sup>230</sup> Today, general limitations on amounts recoverable for pecuniary losses in wrongful death actions have been repealed by all U.S. states. See Lowenfeld, *supra* note 1, at 174 n.82 (noting that by 1988, none of the 50 states still limited damages recoverable for pecuniary loss under wrongful death statutes; in 1966, 17 states had statutory wrongful death limits for pecuniary loss); see also *supra* note 20.

<sup>231</sup> International air travel has traditionally been governed by the Warsaw system consisting of the Warsaw Convention (imposing a \$8,300 (U.S.) damage limitation), the Hague Protocol (imposing a \$16,600 (U.S.) damage limitation), and the Montreal Agreement (imposing a \$75,000 (U.S.) damage limitation). Kimberlee S. Cagle, *The Role of Choice of Law in Determining Damages for International Aviation Accidents*, 51 J. AIR L. & COM. 953, 954 (1986).

that rule is probably still socio-economically justified when airlines of developing countries are involved.<sup>232</sup>

Still another solution was suggested in *In re Air Crash Disaster Near Chicago*,<sup>233</sup> where the Court of Appeals of the Seventh Circuit broke the "tie," balancing the policies of a third jurisdiction interested in having its law applied to the recovery issue. If the New York court adopted this solution, it would grant unlimited recovery in both the real *Barkanic* fact situation and our hypothetical fact pattern. Indeed, in either situation, there are more interested states providing for unlimited recovery than states having a limited recovery rule. Finally, the court could weigh the relative importance of the conflicting policies involved to break the impasse. To weigh the conflicting policies involved in *Barkanic*, Professor Seidelson suggests giving a high priority to China's national security interest, which implicates "the protection and preservation of human life—as many as one billion lives."<sup>234</sup>

In *Cooney*, the New York Court of Appeals made it clear, however, that it considered the *locus delicti* to be the appropriate "tie breaker" in a case where the interested states were determined to have substantially equal interests.<sup>235</sup> For the first time, the New York Court of Appeals gave its rationale for this preference. None of its reasons, however, seems to be related to the furtherance of state interests and policies.

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<sup>232</sup> An important goal of the 1929 Warsaw Convention was precisely to limit the potential liability of the carrier in order to enable airlines to attract indispensable capital. See LOWENFELD, *supra* note 29, 7-27, 7-28.

<sup>233</sup> 644 F.2d 594, 625-28 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981). Where Missouri wished to punish McDonnell Douglas Corp., a Missouri-based corporation, for any wrongdoing related to an air crash in Illinois, and California wanted to shield the defendant, who was doing business in California, from excessive liability, the interests of Illinois in protecting airplane-related industries tipped the "scales against the allowance of punitive damages." *Id.* at 626.

<sup>234</sup> Seidelson, *supra* note 128, at 452 (suggesting that the New York Court of Appeals would find China's interest to be more significant and would therefore apply China's ceiling on the recovery issue).

<sup>235</sup> *Cooney*, 612 N.E.2d at 281-82.



The primary reason why *locus delicti* tips the balance is that "ordinarily it is the place with which both parties have voluntarily associated themselves."<sup>236</sup> Moreover, the situs of the tort is a "neutral factor, rebutting an inference that the forum State is merely protecting its own domiciliary or favoring its own law."<sup>237</sup> Finally, the court took into consideration the fact that "the place of injury was the traditional choice of law crucible."<sup>238</sup> Another factor, which has equally little to do with the furtherance of state interests but which the court considered in an attempt to escape a *Neumeier-Schultz* second rule impasse, was the "protection of reasonable [individual] expectations."<sup>239</sup>

In both the real *Barkanic* fact situation and our hypothetical fact pattern, the *locus delicti* was unquestionably located in China, where both businessmen purposefully went to create and further business opportunities for their respective companies. With regard to the party expectations involved, we argued above that CAAC reasonably expected a limited recovery standard to apply to a crash entirely within the Chinese territory.<sup>240</sup> As to the plaintiffs' expectations to receive unlimited recovery for their losses,<sup>241</sup> there are no objective reasons why plaintiffs' expectations should outweigh the defendant's expectations, particularly in light of the well-known liability limitations in international aviation,<sup>242</sup>

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<sup>236</sup> *Id.* at 283 (citing Korn, *supra* note 3, at 801).

<sup>237</sup> *Id.* at 281-82 (citing *Schultz*, 480 N.E.2d at 687).

<sup>238</sup> *Id.* at 282; *cf.* *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (appearing to grant importance to the traditional choice-of-law basis in the constitutionality test).

<sup>239</sup> *Cooney*, 612 N.E.2d at 283 (citing the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 6 (2)(d) (1969); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 327 (1980) (Stevens, J., concurring); *Schultz*, 480 N.E.2d at 684).

<sup>240</sup> See *supra* text accompanying note 199.

<sup>241</sup> See Kreindler, *supra* note 219, at 530 (noting that when a client walks into his office, "whether he finds ultimately that his rights are going to be controlled by Warsaw, Hague or whatever, the basic assumption is that he is entitled to compensation for the loss sustained").

<sup>242</sup> See *supra* note 231. Besides, would one reasonably expect to recover on an unlimited basis for a crash on an internal Chinese flight, while under the Montreal Agreement all recovery is on a limited basis in case of any crash of an international flight to or from the United States?

and even more in light of the victims' probable awareness of the Chinese damage limitations.<sup>243</sup>

In sum, the current New York Court of Appeals choice-of-law analysis clearly points to the application of Chinese law because the interests of the respective jurisdictions are irreconcilable, the crash occurred in China, and, to the extent that expectations are at all relevant in the given case, limited recovery would more closely comport with the reasonable expectations of those involved.<sup>244</sup>

### E. THE PUBLIC POLICY EXCEPTION

Now, what about the traditional escape route? Under the current New York choice-of-law method, could the application of the Chinese damage limitation be set aside invoking the New York public policy exception?<sup>245</sup> *Cooney* imposes a

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<sup>243</sup> The victims had travelled together to China on a number of prior occasions for the same business purposes and received notice of the damage limitations in the issued tickets. See Appellee's Brief, *supra* note 8, at 5 & 34. An interesting question arises though where the *locus delicti*, unlike in *Barkanic*, becomes largely fortuitous, and the accident flight is not covered by the Warsaw system (e.g., a U.S. interstate flight). In light of *Cooney*, party expectations might then become an important consideration. Where the defendant airline, not acting exclusively in its home state, cannot claim to have relied on any particular law to plan its conduct, the expectation factor could even become the predominant "tie breaker" pointing to the passenger's domicile. Could the passenger reasonably have expected any other law to apply to his recovery claim than the law of his domicile or residence:

that law with which [he] was most familiar and had the greatest connection. . . . the law which was developed in the light of and which in so many ways governed the economic conditions that the passenger was accustomed to; . . . the law that he no doubt made his plans around before the fatal accident; . . . the law under which his estate will be probated and his survivors receive their proper shares. . . . the law of the state or nation where his survivors will more than likely continue to live.

Mendelsohn, *supra* note 6, at 628 (reading the ultimate application of the law of the victim's domicile into the *Kilberg* public policy exception). In other words, *Cooney* allows the suggestion that the *Barkanic* court went too far in stating that "Kilberg and its progeny are no longer good law." See *supra* text accompanying note 7.

<sup>244</sup> Cf. *Cooney*, 612 N.E.2d at 284 (considering unavailability of contribution to comport more closely with the reasonable expectations of both parties in conducting their business affairs).

<sup>245</sup> *Id.* at 284-85 (noting that the public policy concept can only be considered "after the court has first determined, under choice of law principles, that the applicable substantive law is not the forum's law") (citing *Schultz*, 480 N.E.2d at 687).

two-prong test.<sup>246</sup> There must be a nexus with the forum substantial enough to invoke its public policy,<sup>247</sup> and the foreign law must be "truly obnoxious."<sup>248</sup>

In *Barkanic*, the appellants did not overcome the "contacts" prong. There being no relevant connection with New York other than the fact that New York was the forum state, the Court of Appeals for the Second Circuit held that the appellants failed to establish "that there [were] enough important contacts between the parties, the occurrence and the New York forum to implicate [New York's] public policy and thus preclude enforcement of the foreign law."<sup>249</sup>

But, would the court have come to the same conclusion had the appellants been New York domiciliaries? Would, under the current New York choice-of-law method, the domicile connection trigger the New York public policy exception in a *Barkanic*-type case? There is little doubt that in case of a New York domicile connection, New York's interest in the case would be "sufficient to warrant scrutiny under the public policy exception."<sup>250</sup> The remaining question then becomes whether a foreign law limiting damages for wrongful death is "truly obnoxious."

In *Schultz and Cooney*, the New York Court of Appeals set a high "obnoxiousness" standard for successfully invoking the public policy exception. The court observed that a different "scheme of legislation . . . is not enough to show that public policy forbids [the court] to enforce the foreign right . . . " and that the court is "not so provincial as to say that every solution of a problem is wrong because [the

<sup>246</sup> *Id.* at 284-85.

<sup>247</sup> *Id.* at 284.

<sup>248</sup> *Id.* at 285.

<sup>249</sup> *Barkanic II*, 923 F.2d at 964 (citing *Schultz*, 480 N.E.2d at 688).

<sup>250</sup> *Cf. Cooney*, 612 N.E.2d at 284 (holding that New York's nexus was sufficient where a New York domiciliary might be cast in liability under foreign law that was contrary to New York law); *see also Schultz*, 480 N.E.2d at 688 (noting that New York's public policy was implicated where decedent was a resident, had purchased his ticket and boarded his flight in New York, and the defendant carried on extensive operations in New York) (referring to *Kilberg*).

court] deal[s] with it otherwise at home.”<sup>251</sup> Furthermore, the court noted that “public policy is not measured by individual notions of expediency and fairness or by a showing that the foreign law is unreasonable or unwise.”<sup>252</sup>

The post-*Neumeier* New York Court of Appeals did not yet have the opportunity to apply the obnoxiousness test to a foreign or sister state limitation on recovery that would have been otherwise applicable under the *Neumeier* rules.<sup>253</sup> In *Feldman*, however, the New York Supreme Court found that the Mexican limitation on damages did not violate New York’s public policy even though it might be “distasteful to many and [was] surely disadvantageous to the [New York] plaintiffs.”<sup>254</sup>

Furthermore, referring to *Feldman*, the *Cooney* court found that the public policy exception used in the pre-*Babcock* cases was often nothing more than a choice-of-law mechanism used to escape from prevailing choice-of-law rules that permitted no flexibility.<sup>255</sup> This New York Court of Appeals’ finding and its general reference to *Feldman*, which expressly held that a foreign damage limitation did not violate New York’s public policy, strongly suggests that a foreign damage limitation is not so offensive to the New York public policy as to be “truly obnoxious.”

It is worth noting that the court did not cite *Kilberg* as an example of the public policy exception merely substituting

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<sup>251</sup> *Cooney*, 612 N.E.2d at 285 (citing Justice Cardozo in *Loucks v. Standard Oil Co.*, 120 N.E. 198 (N.Y. 1918)); cf. *Schultz*, 480 N.E.2d at 688 (citing the same passage from *Loucks*). Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90, cmt. c (1971) (stating that mere differences between the law of the forum and the foreign jurisdiction are insufficient to justify application of the public policy exception; the foreign law must offend fundamental policies.).

<sup>252</sup> *Cooney*, 612 N.E.2d at 285 (quoting *Schultz*, 480 N.E.2d at 679).

<sup>253</sup> *Schultz* involved the charitable immunity doctrine. The court did not need to decide the obnoxiousness issue in the case because the contacts test was not satisfied. See *Schultz*, 480 N.E.2d at 688-89. In *Cooney*, the court had to deal with a foreign law preventing contribution and found that “contribution [was] not a deeply rooted tradition of the common weal” and that “availability of contribution [was] not invariably guaranteed.” *Cooney*, 612 N.E.2d at 285.

<sup>254</sup> *Feldman v. Acapulco Princess Hotel*, 520 N.Y.S.2d 477, 488 (N.Y. Sup. Ct. 1987).

<sup>255</sup> *Cooney*, 612 N.E.2d at 285.

a choice-of-law mechanism.<sup>256</sup> Thus, despite the court's suggestive language in *Cooney*, the precise status of the New York public policy exception with regard to damage limitations in wrongful death actions is still not completely settled. New York plaintiff-domiciliaries, therefore, appear still to have an argument in future air crash cases to sustain the "heavy burden" of proving that a damage limitation is offensive to New York's public policy.

The foregoing analysis leads to the conclusion that, under the current New York choice-of-law method, the relevant factors in breaking the *Barkanic*-type impasse, i.e., the *locus delicti* and the individual expectations, point to the application of Chinese law. Moreover, given the extremely high public policy standard formulated in *Schultz* and the negative suggestive language in *Cooney* with regard to the exception's applicability to foreign damage limitations, it is rather unlikely in the given circumstances that the Chinese damage cap was so "truly obnoxious" as to offend New York's public policy.

Therefore, under the New York choice-of-law method, the New York Court of Appeals would probably reach the same result as the Second Circuit in a *Barkanic*-type case,<sup>257</sup> applying foreign law to the recovery issue. Only a New York plaintiff-domiciliary would have a slight chance to escape from the foreign recovery limits by arguing the New York public policy exception. But to invoke the New York public policy exception successfully, the future New York plaintiff-domiciliary would have to meet a heavy burden of proof: He must first convince the court that the *Kilberg* public pol-

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<sup>256</sup> The court cited *Mertz v. Mertz*, 3 N.E.2d 597 (N.Y. 1936) (a car accident case where wife and husband were New Yorkers and where the court invoked the public policy exception to avoid the application of Connecticut's spousal immunity doctrine) as an example of a pre-*Babcock* case in which the same result would have been obtained under today's choice-of-law principles. See *Cooney*, 612 N.E.2d at 285.

<sup>257</sup> Whether the New York Court of Appeals would reach the same result where the *locus delicti* is completely fortuitous, unlike in *Barkanic*, and where the accident flight is not covered by the Warsaw system (e.g., the crash of a U.S. interstate flight) is at least questionable. See *supra* note 243 (arguing the potential viability of the *Kilberg* doctrine after *Barkanic*).

icy exception was real and not merely a choice-of-law escape mechanism.

## V. *BARKANIC*, THE IMPORTANCE OF A SUPPLEMENTAL COMPENSATION PLAN ILLUSTRATED

A supplemental compensation plan, not some choice-of-law "tie breaker," should ultimately resolve a *Barkanic*-type impasse. The foregoing sections have revealed the fundamental conflict of interests in a *Barkanic*-type case. To the extent that a U.S. court allows unlimited recovery under U.S. standards against a developing country's airline in a *Barkanic* context, the developing country's policy to protect its infant airline industry will be offended.<sup>258</sup> Indeed, unlimited recovery under U.S. standards usually implies an outflow of indispensable hard currency to the United States from a developing country with a much lower standard of living.<sup>259</sup> The country with the lower living standard will thus *ipso facto* subsidize the United States and ultimately suffer a loss in balance of payments.<sup>260</sup> Conversely, however, to the extent that U.S. plaintiffs receive less than their actual loss, the policy underlying a U.S. wrongful death statute providing for unlimited recovery is offended.<sup>261</sup>

It is thus obvious, that whatever choice-of-law rule, approach, or method a court uses, the developing country's interest cannot be accommodated without sacrificing the

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<sup>258</sup> See *supra* note 165 and accompanying text. Recall here, however, that to the extent the risk of hard currency outflow can be shifted to a non-Chinese entity (e.g., a foreign insurance company), China's interest in having its law applied could be largely neutralized. See *supra* notes 165 & 213.

<sup>259</sup> See ALEKSANDER TOBOLEWSKI, *MONETARY LIMITATIONS IN AIR LAW: LEGAL, ECONOMIC AND SOCIO-POLITICAL ASPECTS* 118-19 (1986).

<sup>260</sup> Cf. *Special ICAO Meeting on Limits for Passengers Under the Warsaw Convention and the Hague Protocol*, at I-9, ICAO Doc. 8584-LC/154 (Feb. 1, 1966) (suggesting that an increase in damage limitations implies an increase in insurance premiums and that therefore all passengers would have to pay increased air fares). Only a small wealthy percentage would benefit from the higher limit, a situation where "the peasant . . . pay[s] for the comfort of the king." *Id.* The "peasants" are the passengers, receiving compensation below the limit while having paid more for their ticket as a result of the higher insurance costs. See TOBOLEWSKI, *supra* note 259, at 120-21.

<sup>261</sup> See *supra* notes 159-65 and accompanying text.

U.S. interest and vice versa. Any choice-of-law rule, approach, or method will ultimately impair one of the involved interests and fail to realize the greatest overall effectuation of states' policies. I would suggest, therefore, not to resolve a *Barkanic*-type impasse by choice-of-law, but by a supplemental compensation plan as provided for in the Third Montreal Protocol.<sup>262</sup> Enabling legislation for a U.S. supplemental compensation plan has been most recently proposed on July 2, 1992 by Senators Mitchell and Ford.<sup>263</sup>

The operation of the U.S. supplemental compensation plan needs to be considered in relation to the Warsaw system.<sup>264</sup> This system only applies to "international air transportation."<sup>265</sup> Under the Warsaw Convention or the Hague

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<sup>262</sup> See Protocol to Amend Certain Rules Relating to International Carriage, Mar. 8, 1971, ICAO Doc. 9147 [hereinafter Third Montreal Protocol]. Article 35A of the Third Montreal Protocol provides as follows:

No provision contained in this convention shall prevent a State from establishing and operating within its territory a system to supplement the compensation payable to claimants under the convention in respect of death, or personal injury, of passengers. Such a system shall fulfill the following conditions:

- (a) it shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this convention;
- (b) it shall not impose upon the carrier any financial or administrative burden other than collecting in that State contributions from passengers if required so to do;
- (c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carrier whose services they have used;
- (d) if a passenger has contributed to the system, any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefits of the system.

<sup>263</sup> S. 2945, 102d Cong., 2d Sess. § 2(A)(3) (1992).

<sup>264</sup> The Warsaw system refers to the body of treaties and agreements consisting of the Warsaw Convention, *supra* note 11; the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Transportation by Air Signed at Warsaw on 12 October 1929, *done* Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol]; and the Montreal Agreement, *supra* note 11.

<sup>265</sup> See *supra* note 11. In interpreting whether a carriage is international, the U.S. courts have generally adopted the position that the terms of the contract prevail. See Cagle, *supra* note 231, at 960. The reader will recall that the "international transportation" issue and the existence of a Warsaw/Montreal cause of action was never litigated in *Barkanic*. See *supra* note 11.

Protocol, international airline liability is limited to \$8,300<sup>266</sup> and \$16,600,<sup>267</sup> respectively, unless the claimant can prove "willful misconduct" by an airline.<sup>268</sup> Under the 1966 Montreal Agreement, airlines flying to and from the United States have accepted liability up to \$75,000.<sup>269</sup> The Third Montreal Protocol provides for a system of absolute, limited liability.<sup>270</sup> For death and personal injury, the Protocol eliminates the "willful misconduct" exception<sup>271</sup> and increases the airline's liability to approximately \$130,000.<sup>272</sup> Additionally, the Protocol provides for a supplemental compensation plan under which each Contracting State can establish and operate a system through which damages in excess of the \$130,000 limitation could be recovered.<sup>273</sup>

The proposed U.S. enabling legislation would amend the 1958 Federal Aviation Act to establish and operate such a supplemental compensation plan (SCP).<sup>274</sup> The SCP essentially provides for an insurance policy. All airlines making international flights to and from the United States would be required to designate an agent to negotiate insurance coverage with a Plan Administrator, subject to approval by the Secretary of Transportation.<sup>275</sup>

All passengers embarking on international flights to and from the United States would pay a compensation plan contribution as part of the advertised ticket price up to a maximum of five dollars per ticket in 1992 dollars.<sup>276</sup> For death and personal injury, claimants would then have a right to recover up to \$130,000 directly from the airline under the Third Montreal Protocol and an unlimited additional

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<sup>266</sup> Warsaw Convention, *supra* note 11, art. 22(1).

<sup>267</sup> Hague Protocol, *supra* note 264, art. XI.1.

<sup>268</sup> Warsaw Convention, *supra* note 11, art. 25.

<sup>269</sup> Montreal Agreement, *supra* note 11.

<sup>270</sup> See Third Montreal Protocol, *supra* note 262.

<sup>271</sup> Third Montreal Protocol, *supra* note 262, art. IV (as incorporated from the 1971 Guatemala Protocol).

<sup>272</sup> Third Montreal Protocol, *supra* note 262, art. II.

<sup>273</sup> Third Montreal Protocol, *supra* note 262, art. XIV (as incorporated from the 1971 Guatemala Protocol).

<sup>274</sup> See S. 2945, 102d Cong., 2d Sess. pmb. (1992).

<sup>275</sup> S. 2945, 102d Cong., 2d Sess. § 1702(a) (1992).

<sup>276</sup> *Id.* § 1704.



amount for economic and non-economic injuries from the SCP.<sup>277</sup> The proposed legislation also provides for the law of the domicile of the claimant as the law applicable to the recovery claims brought in the United States under the SCP.<sup>278</sup>

Finally, it is noteworthy that the *Barkanic* situation would in any case be covered by the SCP because it expands its unlimited coverage to U.S. citizens flying on foreign airlines between foreign points of origin and destination, who may not have rights of recovery under the Warsaw Convention.<sup>279</sup> Therefore, where recovery exceeding the \$130,000 (U.S.) limit is paid out of the SCP, which is funded exclusively by the international air traveler, the SCP obviously accommodates the conflicting interests involved in a *Barkanic*-type case: U.S. citizens recover under U.S. standards, while an excessive outflow of hard currency, indispensable to develop a safe airline industry in a developing country, can be avoided. By resolving the fundamental conflict of compensation interests involved in a *Barkanic*-type case with a maximum overall effectuation of states' policies, the supplemental compensation plan thus offers a very attractive alternative for any choice-of-law rule, approach, or method.

## VI. CONCLUSION

The preceding analysis leads to the conclusion that in *Barkanic* the Court of Appeals for the Second Circuit misinterpreted the current New York choice-of-law method. In light of *Cooney* and given the line of former air crash cases clearly favoring the law of the domicile, the Second Circuit should certainly have checked its "*Neumeier-Schultz*" rule result under an interest analysis. Even so, an interest analysis under the current New York choice-of-law method ultimately leads to the same result the *Barkanic* court reached. Confronted with a "true conflict," the *locus delicti* breaks the

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<sup>277</sup> *Id.* §§ 1701-1703.

<sup>278</sup> *Id.* § 1703(e).

<sup>279</sup> *Id.* § 1702(a).

"tie" and points to Chinese law providing for a \$20,000 damage limitation. Only a New York plaintiff has a slight chance to overcome the foreign recovery limit under the New York public policy exception. The required "obnoxiousness" standard will be met only if that New York plaintiff can convince the court that the *Kilberg* public policy exception is real and not merely a choice-of-law escape mechanism.

Because the fundamental conflict of interests in a *Barkanic*-type case cannot be fully accommodated by a choice-of-law rule, approach, or method, I suggest resolving this conflict by way of a supplemental compensation plan as provided for in the Third Montreal Protocol. Such a plan will allow U.S. citizens to fully recover under U.S. standards, while avoiding an excessive outflow of hard currency, which is necessary to build a safe airline industry in a developing country, thus realizing a maximum overall effectuation of states' policies.



## **Panel Discussion**

