Journal of Air Law and Commerce

Volume 56 | Issue 1 Article 6

1990

Choice of Law Issues in Mass Tort Litigation

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CHOICE OF LAW ISSUES IN MASS TORT LITIGATION

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I. INTRODUCTION

OVER THE PAST twenty years, mass tort actions have become pervasive in the American legal system. The term "mass tort action" may include mass disaster actions,[1] toxic torts,[2] and traditionally defined mass torts, such as actions related to asbestos exposure.[3] Frequently, these actions are multistate, involving either injuries to people domiciled in different states[4] or countries,[5] or sim-

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[1] Mass disasters are those resulting from multi-victim, single-occurrence events such as aircraft crashes, bus accidents, and train accidents. *See, e.g.*, In re Air Crash Disaster near Chicago, Ill., May 25, 1979, 644 F.2d 594 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981) (271 persons perished in the crash of an American Airlines DC-10 aircraft); In re Air Crash at Dallas/Fort Worth Airport, Aug. 2, 1985, 720 F. Supp. 1258 (N.D. Tex. 1989) (137 people perished in the crash of a Delta Airlines L-1011 aircraft).

[2] Toxic tort actions generally arise from the release of hazardous substances into the environment causing physical harm to persons living in the vicinity of the release. *See, e.g.*, Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (discharge of hazardous substances into the ground causing contamination of ground water which fed residential wells); In re Love Canal Actions, 92 A.D.2d 416, 460 N.Y.S.2d 850 (N.Y. App. Div. 1983) (dumping of hazardous waste in a landfill over which residential homes were later built).

[3] Mass torts may be defined as "multiple occurrences of various related harms over time." Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1044 n.19 (1986). Examples of mass torts as used in this sense include exposure to asbestos, *see, e.g.*, Standal v. Armstrong Cork Co., 356 N.W.2d 380 (Minn. Ct. App. 1984); ingestion of diethylstilbestrol (DES), *see, e.g.*, Mertens v. Abbott Laboratories, 595 F. Supp. 834 (D.N.H. 1984); and use of an intrauterine birth control device, *see, e.g.*, Rosenfeld v. A. H. Robins Co., 63 A.D.2d 11, 407 N.Y.S.2d 196, *appeal dismissed*, 46 N.Y.2d 731, 385 N.E.2d 1301, 413 N.Y.S.2d 374 (1978).

[4] *See, e.g.*, In re Air Crash Disaster at Washington, D.C., Jan. 13, 1982, 559 F.

ilar injuries occurring over an extended period of time to persons living in different states.[6] In addition, these actions often are filed in federal district courts on the basis of diversity jurisdiction, thus lending a further element of multistate interests. This multistate aspect of mass tort actions inevitably leads to choice of law problems.[7]

At the same time, the past twenty years have brought about a dramatic shift in state court approaches to choice of law problems. While choice of law problems are not new, for the most part courts have traditionally resolved these conflicts based on a vested interest theory solidified in the *Restatement of Conflict of Laws* published in 1934.[8] The *First Restatement* instructs that choice of law issues in torts should be handled with reference to the *lex loci delicti* or place of the wrong.[9] Almost from its inception scholars and commentators have criticized the *First Restatement*'s approach as being too rigid and mechanical in applica-

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Supp. 333 (D.D.C. 1983). The lawsuits consolidated in this action involved domiciliaries of at least seven different states and the District of Columbia. *Id.* at 340-41.

[5] *See, e.g.*, In re Paris Air Crash, Mar. 3, 1974, 399 F. Supp. 732, 739 (C.D. Cal. 1975) (estimating that this accident involved claims by persons domiciled in twenty-four different countries and twelve different states).

[6] *See, e.g.*, In re Bendectin Litig., 857 F.2d 290, 298 (6th Cir. 1988) (in this action alone, 1,180 claims had been filed against a drug manufacturer in 844 multidistrict cases alleging that ingestion of its product by pregnant women resulted in birth defects in their offspring), *cert. denied, sub nom.* Hoffman v. Merrell Dow Pharmaceuticals, Inc., 109 S. Ct. 788 (1989); Eli Lilly & Co. v. Home Ins. Co., 794 F.2d 710, 713 n.4 (D.C. Cir. 1986) (estimating that between 1970 and 1986 over 600 lawsuits had been filed against this particular manufacturer alone for DES-related illnesses and diseases) *cert. denied*, 479 U.S. 1060 (1987); Forty-Eight Insulations, Inc. v. Johns-Manville Prod. Corp., 472 F. Supp. 385, 388 n.1 (N.D. Ill. 1979) (as of September 5, 1978, 517 personal injury suits had been filed against a single distributor for asbestos-related illnesses and diseases).

[7] *See generally* Comment, *The "Limited Generosity" Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts*, 38 EMORY L.J. 457 (1989) (arguing that choice of law problems should be resolved by resorting to a limited generosity class action and by applying the substantive law of the defendant's principal place of business to the issues); Note, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077 (1987) (proposing that Congress enact a federal choice of law statute to govern the issues in multidistrict mass tort litigation).

[8] RESTATEMENT OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT].

[9] *Id.* § 384; *see infra* notes 29-40 and accompanying text for a discussion of the FIRST RESTATEMENT.

tion.[10] These scholars have promoted various "solutions" to this rigidity problem,[11] and state courts facing choice of law situations have recently started to adopt many of the proposed alternatives.

This Comment addresses the most common choice of law issues facing courts in the context of mass tort actions. Part II analyzes the choice of law approaches or rules presently used in courts throughout the United States.[12] These include the traditional rule of *lex loci delicti*,[13] Currie's governmental-interest analysis,[14] the center of gravity or grouping of contacts test devised by New York state courts,[15] the choice-influencing considerations favored by Robert Leflar,[16] and the most significant relationship approach adopted by the *Restatement (Second) of Conflict of Laws*.[17]

Part III addresses specific choice of law issues facing courts in mass tort actions. The major problems in this area are those relating to the imposition of punitive dam-

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[10] *See e.g.* D. CAVERS, THE CHOICE OF LAW PROCESS (1965); B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); Ehrenzweig, *A Proper Law in a Proper Forum: A Restatement of the Lex Fori Approach*, 18 OKLA. L. REV. 340 (1965).

[11] For example, Professor Ehrenzweig favors the *lex fori* approach, *see infra* note 12, and Professor Currie devised the governmental-interest analysis, *see infra* notes 62-78 and accompanying text.

[12] Another approach, *lex fori*, is used in only two states, Kentucky and Michigan. *See, e.g.*, Foster v. Leggett, 484 S.W.2d 827, 829 (Ky. Ct. App. 1972) ("The basic law is the law of the forum, which should not be displaced without valid reasons."); Sexton v. Ryder Truck Rental, Inc., 413 Mich. 406, 406, 320 N.W.2d 843, 854 (1982) ("[I]n Michigan courts, the courts will apply the *lex fori*, not the *lex loci delicti*, and we do so without reference to any particular state policy.") Because of the limited use of this test, it is not discussed in this Comment. In addition, neither Kentucky nor Michigan have addressed a mass tort action involving choice of law problems.

[13] *See infra* notes 29-40 and accompanying text for discussion of the traditional rule.

[14] *See infra* notes 62-78 and accompanying text for a discussion of the governmental-interest analysis.

[15] *See infra* notes 107-122 and accompanying text for a discussion of the center of gravity test.

[16] *See infra* notes 131-139 and accompanying text for a discussion of the choice-influencing considerations approach.

[17] RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter RESTATEMENT (SECOND)]; *see infra* notes 146-155 and accompanying text for a discussion of the most significant relationship approach.

ages,[18] the application of statutes of limitation and borrowing statutes,[19] and the availability of a cause of action.[20] These issues are examined from the perspective of state and federal courts applying the various choice of law tests. In general, there are a bewildering number of choices, combinations, and permutations. The application of different approaches to these issues frequently leads courts to different conclusions about which state's laws should be applied under a given set of circumstances, with a few notable exceptions in the area of mass accident litigation.[21]

II. CHOICE OF LAW APPROACHES

Choice of law problems arise in the area of torts when a court determines that the laws of more than one state could apply to the cause of action or to a particular issue in the action. In a typical automobile accident case, the plaintiff is injured in one state while domiciled in another. If the plaintiff and defendant are husband and wife, the question often centers on whether or not the defendant can rely on the defense of interspousal immunity. If the state where the accident occurred permits this defense but the state of the parties' domicile does not, the court faces a conflict between two competing and contradictory state laws.[22] The court must then look to its own choice of law rules to determine which state's substantive law is to be properly applied to the issue.

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[18] *See infra* notes 182-250 and accompanying text for a discussion of punitive damages.

[19] *See infra* notes 251-346 and accompanying text for a discussion of statutes of limitations and borrowing statutes.

[20] *See infra* notes 347-393 and accompanying text for a discussion of the availability of a cause of action.

[21] *See Air Crash Disaster near Chicago*, 644 F.2d at 594 *and Air Crash Disaster at Washington, D.C.*, 559 F. Supp. at 333 (both federal courts, after exhaustive analysis, chose to apply the law of the place of injury to the issue of punitive damages to avoid complicated trial proceedings).

[22] There are numerous cases involving this fact pattern. *See, e.g.*, Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966); Nelson v. American Employers' Ins. Co., 258 Wis. 252, 45 N.W.2d 681 (1951); Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931).

This choice of substantive state law is fairly straightforward when a state court is applying its own state's choice of law rules. The situation becomes more complicated, however, when suit is brought in a federal court. In *Erie R.R. v. Tompkins*,[23] the United States Supreme Court determined that when a federal court acquires jurisdiction over an action based on diversity of citizenship it must apply the substantive law of the state in which it is sitting.[24] Three years later, in *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[25] the Court extended the *Erie* holding to require a federal court in this situation to apply the substantive law of the state in which it sits, including that state's choice of law rules.[26]

This background is essential to an understanding of all choice of law issues in mass tort actions. Since each state is free to adopt its own choice of law rules and federal courts sitting in diversity actions are required to follow those rules, it is necessary to look at the various approaches used by courts today. Simply identifying the approach of a particular court, however, does not necessarily make application of the test straightforward. In a much quoted passage, one court has stated that

> [t]he law on "choice of law" in the various states and in the federal courts is a veritable jungle, which, if the law can be found out, leads not to a "rule of action" but a reign of chaos dominated in each case by the judge's "informed guess" as to what some *other* state than the one in which he sits *would* hold *its* law to be.[27]

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[23] 304 U.S. 64 (1938).

[24] *Id.* at 78. "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Id.*

[25] 313 U.S. 487 (1941).

[26] *Id.* at 496. "The conflict of law rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts." *Id.* The Court recently affirmed *Klaxon* in Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3, 5 (1975) ("The conflict-of-law rules to be applied by a federal court in Texas must conform to those prevailing in the Texas state courts."); *see also* Van Dusen v. Barrack, 376 U.S. 612 (1964) (federal court must follow the substantive laws of the state in which it sits when jurisdiction is based on diversity of citizenship).

[27] *In re* Paris Air Crash Mar. 3, 1974, 399 F. Supp. 732, 739 (C.D. Cal. 1975) (emphasis added).

Thus, merely identifying a particular set of rules does not lead to the conclusion that the rules are applied even-handedly or consistently.[28]

A. *The Traditional Rule*

Courts using the traditional rule for resolving conflict

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[28] *Compare* In re Bendectin Litig., 857 F.2d 290 (6th Cir. 1988), *cert. denied, sub nom.* Hoffman v. Merrell Dow Pharmaceuticals, Inc., 109 S. Ct. 788 (1989) *with* Wetherill v. University of Chicago, 548 F. Supp. 66 (N.D. Ill. 1982). In deciding their choice of law dilemmas, both courts applied the most significant relationship test of the RESTATEMENT (SECOND), as the choice of law for the states in which they sat.

In *Bendectin Litig.*, perhaps because of the complexities of the case, the Sixth Circuit Court of Appeals applied only Ohio's choice of law rules, despite the fact that many of the cases had been filed originally in other jurisdictions and were consolidated only for pretrial and trial purposes. The court determined that Ohio, as the place of manufacture of the product involved in the suit, had the most significant relationship with the substantive issues. *Bendectin Litig.*, 857 F.2d at 305. Other factors such as the domiciles of parties and places of injury were considered irrelevant. *Id.*

In *Wetherill*, the District Court for the Northern District of Illinois engaged in a more complete analysis of the most significant relationship test and determined that Illinois, as the place of injury, had the most significant relationship with the substantive issues. *Wetherill*, 548 F. Supp. at 68. Here also, the domiciles of the plaintiffs were not considered significant. *Id.*

Other cases applying the most significant relationship test to similar fact patterns stress different factors in determining the place having the most significant relationship with the substantive issues. *See, e.g.*, Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434, 437 (Mo. 1984). The court held that "[a] disease has no significant relationship to the place of one's residence." *Id.* Rather, the place where the parties' relationship was centered, in this case the place of employment, was held to be the place with the most significant relationship to the issues. *Id. But see* In re Air Crash Disaster at Boston, Mass., July 31, 1973, 399 F. Supp. 1106 (D. Mass. 1975). Here, the court, applying the most significant relationship test to some of the claims in the action, held that "Vermont has a strong interest in assuring that next of kin are fully compensated for the tortious deaths of residents." *Id.* at 1112. For a discussion of the most significant relationship test, see *infra* notes 146-155 and accompanying text.

In other cases, the courts give little, if any, indication of the method used to determine which state's substantive laws should be applied. *See, e.g.*, Plummer v. Lederle Laboratories, 819 F.2d 349 (2d Cir. 1987). Here, the court merely stated that "New York's choice of law rules, which apply to this action . . . dictate that California substantive law applies because that is the place where plaintiff's injury occurred." *Id.* at 355. This statement would appear to indicate that New York follows the traditional rule of *lex loci delicti* in resolving choice of law issues. However, New York abandoned the rule for the more analytical center of gravity test twenty-four years prior to the holding in this case. For a discussion of the center of gravity test, see *infra* notes 107-122 and accompanying text.

of laws issues in tort actions apply the law of the state in which the activity giving rise to the action occurred.[29] Another way to phrase this is that the court will apply the *lex loci delicti*. The *Restatement of Conflict of Laws*[30] embraces this rule, heavily influenced by the vested rights and territorial prerogatives philosophies of early twentieth century theorists.[31]

The vested rights theory focuses on the operation of law in space.[32] Space is viewed as that geographic area within which a sovereign state has the authority to impose its laws.[33] A state cannot enforce its laws outside its territory but has every right to do so exclusively within its boundaries.[34] Thus, the initial issue is the determination of the legal rights the state has created and to whom those rights attach or extend.[35] Once a right exists, that right follows a person everywhere, even across state bounda-

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[29] *Buckeye*, 203 Wis. 248, 234 N.W. at 342. "[T]he law governing the creation and extent of tort liability is that of the place where the tort was committed." *Id.*

[30] FIRST RESTATEMENT § 378. "The law of the place of wrong determines whether a person has sustained a legal injury." *Id.* Section 378 comment b states: "Whether a particular harm which a plaintiff has sustained constitutes an injury for which he may recover compensation is determined by the law of the place of wrong." *Id.*

[31] *See, e.g.*, J. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); A. DICEY, CONFLICTS OF LAWS (5th ed. 1932). Justice Holmes was also a major proponent of the vested rights theory which permeated many of his opinions. *See, e.g.*, Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904); Western Union Tel. Co. v. Brown, 234 U.S. 542 (1914).

[32] J. BEALE, *supra* note 31, § 1.1. "The branch of the law called for convenience *The Conflict of Laws* deals primarily with the application of laws in space." *Id.*; *see also* Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945). "Conflict of laws deals primarily with the application of law in space . . . ." *Id.* at 379.

[33] J. BEALE, *supra* note 31, § 4.12. "Law operates by extending its power over acts done throughout the territory within its jurisdiction . . . ." *Id. See also* Cheatham, *supra* note 32, at 379. "Legal rights are created by the operation of law on acts done in the territory within its jurisdiction . . . ." *Id.*

[34] *See* FIRST RESTATEMENT § 1(1). "No state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law . . . ." *Id.* "A state has no power to create rights or interests beyond its boundaries, but . . . it has the power to create some interests which will be recognized as valid in other states." FIRST RESTATEMENT § 42 comment a. *See also* BEALE, *supra* note 31, § 4.12. "By its very nature law must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction." *Id.*

[35] *See* Cheatham, *supra* note 32, at 379. "The fundamental inquiry, therefore, is

ries.[36] Another state has a legal obligation to recognize the right created in the state in which it arose.[37] Application of the vested rights theory allows a court to focus on a single issue, theoretically leading to uniformity and predictability in application of legal rights wherever enforcement is sought.[38]

In applying this theory to a tort action, the forum court will focus on the location of the place where the last act necessary to give rise to a cause of action occurred.[39] Invariably, this is the place of injury or wrongful death. Once the place of injury has been determined, the law of that state will be applied to the cause of action regardless of any interest the forum may have in the outcome of the case.[40]

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what right could a law create, and what was the law applicable at the time of occurrence . . . ." *Id.*

[36] *See Slater*, 194 U.S. at 126. Justice Holmes, writing for the majority, found that "[t]he theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation . . . which, like other obligations, follows the person, and may be enforced wherever the person may be found." *Id.*

[37] *See* J. BEALE, *supra* note 31, at 1969. "A right having been created by the appropriate law, the recognition of its existence should follow everywhere." *Id. See also* FIRST RESTATEMENT § 384 stating: "If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states. If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state." *Id.*

This general proposition, however, ignores the principle of comity by which a foreign law is given recognition only by permission of the forum. *See* Cheatham, *supra* note 32, at 374 (stating that in conflict of laws, the term comity refers "to the action of the courts of one nation or state when asked to use a law to enforce the judgment of a court of another nation or state").

[38] *See, e.g.*, Hauch v. Connor, 295 Md. 120, 453 A.2d 1207 (1983). In reaffirming its adherence to the rule of *lex loci delicti*, the Maryland Court of Appeals stated that "[a] virtue of the rule . . . is the predictability and certainty as to which state's tort law will govern." *Id.* at 125, 453 A.2d at 1210.

[39] FIRST RESTATEMENT § 377. "The place of wrong is the state where the last event necessary to make an actor liable for an alleged tort takes place." *Id. See also* H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS (3d ed. 1949). "The tort is complete only when the harm takes place, for this is the last event necessary to make the actor liable for the tort." *Id.* at 263-64.

[40] *See, e.g.*, J. BEALE, *supra* note 31, § 391.1. "The law of the place where the fatal injury was inflicted governs the cause of action for death, not the law of the place where defendant acted or was negligent, or the place of death." *Id.*

Despite overwhelming scholarly criticism,[41] eighteen states continue to adhere to the traditional rule for resolving choice of law problems in torts.[42] The courts' rationales for continuing to use this rule are uniformity of result and predictability of application.[43] Some courts have cited the confusion in the entire area of choice of law as a reason for retaining the traditional rule.[44]

The traditional rule can, however, lead to unfair and unpredictable results in the area of mass torts. For example, the disease asbestosis results from repeated exposure to asbestos-based products over a period of several years.[45] Often the person seeking compensation for this disease has worked with asbestos products in a number of different states over many years. If suit is brought in a court which applies the *lex loci delicti* rule, the place of injury is open to debate because there is often no way to determine the place of the last act necessary to cause the

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[41] *See supra* note 10 for a partial list of those scholars criticizing the FIRST RESTATEMENT.

[42] Alabama, Delaware, Georgia, Indiana, Kansas, Maryland, Montana, Nevada, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming apply the traditional rule of *lex loci delicti*. *See*, Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 591-92 (1983); Smith, *Choice of Law in the United States*, 38 HASTINGS L. J. 1041 (1987) (updating Kay's research).

[43] *See, e.g.*, *Hauch*, 295 Md. at 125, 453 A.2d at 1210.

[44] *See, e.g.*, Winters v. Maxey, 481 S.W.2d 755 (Tenn. 1972). "In our examination of cases using the 'dominant contacts' rule, we have not been able to discern that they provide any 'uniform common law of conflicts' to take the place of the uniform rule of *lex loci delicti*." *Id.* at 758.

In a recent mass tort action involving injuries allegedly resulting from use of DES, the federal district court found that "[t]he Tennessee Supreme Court expressly has rejected the 'interest analysis' or 'dominant contacts' rule for choice of law questions." Trahan v. E.R. Squibb & Sons, Inc. 567 F. Supp. 505, 507 (M.D. Tenn. 1983).

[45] Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981). The district court noted that

> [a]sbestos is generally cumulative; the continued exposure to asbestos dust and fibers increases both the risk and the severity of the disease. Its latent period makes it *legally and medically* impossible to state with certainty when asbestosis was first contracted or which exposure to asbestos caused or contributed to the disease.

Id. at 1355 (emphasis added) (references omitted).

plaintiff's injuries.[46] If this determination cannot be made, the forum court will not know which state's laws should be applied to the issues in the suit.

To avoid the harsh results often obtained from application of the traditional rule, courts have developed an elaborate set of escape devices.[47] The devices most commonly employed in mass tort actions are substance-procedure characterization and public policy. For example, although the *First Restatement* recognizes the need for a forum to apply foreign law to a tort action under certain circumstances,[48] it acknowledges that the laws of the forum govern all matters of procedure.[49] If the court perceives that application of foreign substantive law will lead to harsh results in the action before it, it will sometimes hold that the issue, while substantive law in another state, is actually procedural law in the forum state.[50] This allows

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[46] Courts facing this issue have managed to bypass it by assuming that the last place of employment was the place of the wrong. *See, e.g.*, Leonard v. Johns-Manville Sales Corp., 309 N.C. 91, 91, 305 S.E.2d 528, 529 (1983) (The plaintiff "was exposed to asbestos while working at several different locations. His last exposure occurred . . . in the state of Virginia.").

[47] The escape devices identified by the commentators include *renvoi*, subject matter characterization, substance-procedure characterization, public policy, notice and proof of foreign law, and *depeçage*. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 46 (3d ed. 1986).

[48] *See supra* note 37 and accompanying text.

[49] FIRST RESTATEMENT § 585. "All matters of procedure are governed by the law of the forum." *Id.*

[50] *See, e.g.*, Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). The Court of Appeals of New York held that the imposition of punitive damages in a wrongful death action was a procedural matter in New York, although it was a substantive issue in Massachusetts, the location of the injury. The court found that while the law of Massachusetts would ordinarily apply because at the time of this decision New York adhered to the traditional rule of *lex loci delicti* in tort actions, it was appropriate to apply New York's rule on punitive damages. The court's reasoning on this issue was not fully developed. It merely found that

> [a]s to conflict of law rules it is of course settled that the law of the forum is usually in control as to procedures including remedies. . . . It is open to us . . . to treat the measure of damages in this case as being a procedural or remedial question controlled by our own State policies.

Id. at 41-42, 172 N.E.2d at 529, 211 N.Y.S.2d at 137.

The court also used public policy, based on the New York Constitution, to avoid application of Massachusetts law to this case. Article 1, § 16 provided that "[t]he

the court to apply its own law to the facts.[51]

Courts also do not hesitate to determine that application of foreign law may violate some public policy of the forum,[52] despite Judge Cardozo's admonition that public policy should be invoked to avoid foreign law only when that law "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[53] In *Mizell v. Eli Lilly & Co.*,[54] the United States District Court for South Carolina determined that *lex loci delicti* is the choice of law rule used in South Carolina.[55] Because the alleged injury to the plaintiff occurred in California, the court held that California substantive law, rather than forum law, should apply to the issues.[56] In *Mizell*, the plaintiff complained of injuries suffered as a result of her mother's use of diethylstilbestrol (DES) during pregnancy.[57] California law permits the use of the theory of market-share liability in DES cases when the actual manufacturer of the DES used cannot be identified.[58] The court found, however, that al-

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right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." N.Y. CONST. art. 1, § 16. The court held that application of Massachusetts law which recognized a limitation on the amount of recovery in wrongful death actions, "is so completely contrary to our public policy that we should refuse to apply [it]." *Kilberg*, 9 N.Y.2d at 40, 172 N.E.2d at 528, 211 N.Y.S.2d at 136.

[51] *Kilberg*, 9 N.Y.2d at 42, 172 N.E. 2d at 529, 211 N.Y.S.2d at 138.

[52] *See, e.g., Trahan*, 567 F. Supp. at 510. Although North Carolina was the place of injury and ordinarily its substantive laws would be applied because the forum, Tennessee, followed the *lex loci delicti* rule, North Carolina had not adopted a strict liability theory of recovery in product liability actions whereas Tennessee had. The court held that there was "such a compelling public policy concern as to declare this an exception" to the application of the traditional rule and applied Tennessee law to the action. *Id.*

[53] Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918).

[54] 526 F. Supp. 589 (D.S.C. 1981).

[55] *Id.* at 594 ("Under South Carolina choice of law rules . . . all matters relating to the right of action are governed by the *lex loci delicti* . . . .").

[56] *Id.* at 595. The court found that since, according to the plaintiff's complaint, all events relevant to her injury occurred in California, "California must be considered 'the place of the wrong' . . . [and] California substantive law should govern the right [sic] of the parties." *Id.*

[57] *Id.*

[58] *Id.* "Of utmost significance to the outcome of these actions, this body of

lowing use of the market-share liability theory of recovery would violate South Carolina public policy of adherence to traditional and "fundamental principles of tort law."[59] The court held, therefore, that South Carolina law would be applied.[60] As a result, the plaintiff could proceed only against the actual manufacturer. Because the plaintiff could not identify the actual manufacturer, she could not recover for her injuries.[61]

B. *Governmental-Interest Analysis*

Professor Brainard Currie developed the governmental-interest analysis[62] in response to what he perceived to be illogical results achieved by employing the traditional rules for resolving choice of law problems. According to Currie, "the central problem of conflict of laws [is defined] as that of determining the appropriate rule of decision when the interests of two or more states are in conflict — in other words, of determining which interest

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substantive law would include the California Supreme Court's adoption of the novel tort theory of 'market-share' liability . . . ." *Id.* Under the theory of market-share liability adopted by the California Supreme Court, if the plaintiff cannot identify the manufacturer of a product alleged to have caused her injuries, as long as she joins in the action manufacturers of "a substantial share of the DES her mother might have taken," the plaintiff can seek recovery from each manufacturer joined on the basis of its share of the DES sales market. Sindell v. Abbott Laboratories, 26 Cal.3d 558, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied*, 449 U.S. 912 (1980).

[59] *Mizell*, 526 F. Supp. at 596. In support of its holding, the *Mizell* court relied on an earlier DES case in which the same district court refused to apply the market-share liability theory. In Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981), the court held that "[t]he unequivocal law of South Carolina is the plaintiff in a negligence action has . . . the burden of proving that the injury or damage was caused by the actionable conduct of the particular defendant." *Id.* at 1018. In approving this holding, the *Mizell* court stated that "[t]he Court places the burden of proof of proximate cause squarely on the plaintiff. Application of this burden-shifting theory [market-share liability] would violate established public policy." *Mizell*, 526 F. Supp. at 596.

[60] *Id.* at 596-97. "Market share liability represents a radical departure from the body of products liability law that has been developed in South Carolina. . . . [T]his court will apply the substantive law of the forum, South Carolina, to this action, since to do otherwise would violate the public policy of this forum." *Id.*

[61] *Id.*

[62] Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).

shall yield."[63] In resolving choice of law issues using the governmental-interest analysis, Currie insisted that courts should consider only "the policies reflected in the laws of the involved states and the interest of each state, in light of those policies, in having its law applied on the point in issue . . . ."[64]

Currie proposed that a court applying a governmental-interest analysis to a choice of law issue use a five-step process. First, the court should always consider applying the law of the forum, even when foreign elements are involved in the case.[65] Second, if it appears that the substantive law of another state may be appropriately applied, the court must determine the governmental policy involved in the law of the forum.[66] Next, if appropriate, the forum court should look at the governmental interest of any other state whose law may be appropriate for application.[67] If the forum state has no interest in having its law applied to the issue in the case, the law of the other state should be used if that state does have an interest which would be sufficiently advanced by having its law applied.[68] Finally, if both states have an equal interest in the matter, the law of the forum state should be applied.[69]

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[63] Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 173 [hereinafter Currie, *Notes on Methods*].

[64] Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 182 (1977).

[65] Currie, *Notes on Methods, supra* note 63, at 178. "Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum." *Id.*

[66] *Id.* "When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum." *Id.* Determining the forum's governmental policy at this juncture is necessary, according to Currie, in order to ascertain whether, despite the apparent foreign interest in the issues, "the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy." *Id.*

[67] *Id.* "If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy." *Id.*

[68] *Id.* "If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law." *Id.*

[69] *Id.* "If the court finds that the forum has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has

It is this last consideration, in which both states have an equal interest, that Currie viewed as a true conflicts problem.[70] Currie suggested that if equal interests are present, the forum court should reconsider the policies or interests of each state to determine whether a modified interpretation of one or the other policy would permit the forum to determine that one state's interests would be best served by applying its law to the case.[71] If reconsideration is not possible, however, then the law of the forum still should be used.[72] By doing so, the court avoids making a qualitative decision on the relative value of each state's interest which Currie believed to be outside the scope of judicial authority.[73]

Central to the governmental-interest analysis is Currie's unique definition of a false conflict.[74] Ordinarily, a false

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an interest in the application of its contrary policy." *Id.* This was also Currie's position in situations where the forum has no interest to advance in the lawsuit but two or more other states do. In these situations, Currie thought that the forum should apply its own law rather than make a qualitative decision about which third state's interests would be best promoted by having its laws applied to the dispute. *See* Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1243 (1963) [hereinafter Currie, *Comments*].

[70] *See* Sedler, *supra* note 64, at 188-89. "Where a reconsideration of the policies and interests of the involved states persuades the court that the conflict cannot be avoided by a more moderate and restrained interpretation of the policy or interest of one state, the case represents the true conflict . . .[and] the forum must advance its own policy and interest and apply its own law." *Id.*

[71] Currie, *Comments*, *supra* note 69, at 1242. "If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict." *Id.*

[72] *Id.* at 1242-43. "If upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum." *Id.*

[73] Currie, *Notes on Methods*, *supra* note 63, at 176. "[W]here several states have different policies, and also legitimate interests in the application of their policies, a court is in no position to 'weigh' the competing interests, or evaluate their relative merits, and choose between them accordingly." *Id. See also* Sedler, *supra* note 64, at 188. *But see* Henry v. Richardson-Merrell, Inc., 508 F.2d 28 (3d Cir. 1975). In *Henry*, the court of appeals stated that New Jersey employed the governmental-interest analysis in which "[a] state is deemed interested only where application of its law to the facts in issue will foster that state's policy," but not on a quantitative basis. *Id.* at 32. Rather, "[t]he qualitative nature of contacts is considered." *Id.*

[74] *See* Sedler, *supra* note 64, at 186. "When a consideration of the policies and interests of the involved states leads to the conclusion that one state has an inter-

conflict arises when the law of the forum differs from that of another state whose law might be applied to the issue but application of either law will produce the same results.[75] Under Currie's theory, a false conflict is one in which only one state has an interest in advancing its policy.[76] Since only one state has an interest, there is no choice of laws problem.[77] Currie was of the opinion that most choice of law situations involve false conflicts because it is unusual to find more than one state with a legitimate governmental interest worth advancing in a given lawsuit.[78]

Two states, New Jersey[79] and California,[80] have adopted

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est in having its law applied on the point in issue while the other state does not, the false conflict is presented." *Id.* The Supreme Court of Pennsylvania employed this analysis in Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964). *Griffith* involved the limitation of liability in a wrongful death action resulting from an aircraft crash. The court held that Colorado, although the place of injury, had no interest to advance by having its limitation on liability applied to a lawsuit involving nonresidents because the place of injury was purely fortuitous. Instead, the court found that Pennsylvania, the domicile of the decedent, had a greater interest in having its law of liability applied because the state "is vitally concerned with the administration of decedent's estate and the well-being of the surviving dependents . . . . " *Id.* at 1, 203 A.2d at 807.

[75] *See, e.g.*, In re Air Crash Disaster at Washington, D.C., on Jan. 13, 1982, 559 F. Supp. 333, 342 (D.D.C. 1983) (declining to apply a choice of law analysis to the issue of negligence because "there is no conflict as to the negligence law among the various interested jurisdictions [so] the Court will apply the negligence law of the District of Columbia").

[76] B. CURRIE, *supra* note 10, at 726. "A true problem arises only when the laws of two or more states are in conflict, in the sense that each state has an interest in the application of its distinct legal policy . . . . [C]hoice-of-law rules . . . are utterly indefensible when, in application to false problems, they simply subvert the interest of the only interested state." *Id.*

[77] *Id.* at 189. "When one of two states . . . has a legitimate interest in the application of its law and policy and the other has none, there is no real problem; clearly the law of the interested state should be applied." *Id.*

[78] *Id.* at 582. "The system ought not to concern itself with cases in which there is no conflict of interests between states. Because of the way in which it is constructed, however, it does provide for such cases, thus creating false problems and, as often as not, solving them badly." *Id.*

[79] *Henry*, 508 F.2d at 31-32 ("[I]n a series of cases . . . New Jersey courts have adopted the governmental interest approach to choice of law questions."); Beckwith v. Bethlehem Steel Corp., 185 N.J. Super. 50, 50, 447 A.2d 207, 212 (N.J. Super. Ct. L. Div. 1982) ("New Jersey courts . . . [give] strong consideration to the governmental interest approach.").

[80] Hurtado v. Superior Ct. of Sacramento County, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974). In introducing its analysis of the choice of law

the governmental-interest analysis for dealing with choice of law issues in torts. Although California, through the influence of Justice Traynor, was an early adherent to Currie's analysis,[81] the California Supreme Court has modified its approach to true conflicts situations.[82] For those problems, California employs a "comparative impairment" analysis by which the law of the forum is not automatically applied.[83] Rather, the court looks at the interests of each state to determine which would be more impaired if its law were not applied to the issue.[84] If the court determines that the foreign state's interest in its policy is stronger than that of the forum, the court will apply the foreign state's law to resolve the issue.[85] Similarly, it

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problem in this wrongful death action, the California Supreme Court stated that "[w]e [have] adopted . . . a rule requiring an analysis of the respective interests of the states involved (governmental interest approach) the objective of which is 'to determine the law that most appropriately applies to the issue involved.' " *Id.* at 579-80, 522 P.2d at 669, 114 Cal. Rptr. at 109 (quoting Reich v. Purcell, 67 Cal. 2d 551, 554, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34 (1967)).

[81] *See, e.g.*, Reich v. Purcell, 67 Cal. 2d 551, 553, 432 P.2d 727, 729, 63 Cal. Rptr. 31, 33 (1967) ("The forum must search to find the proper law to apply based upon the interests of the litigants and the involved states.").

[82] *See* Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978); Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976).

[83] *Bernhard*, 16 Cal. 3d at 320, 546 P.2d at 723, 128 Cal. Rptr. at 219.

[84] *Id.* The court stated:

> [T]he "comparative impairment" approach to the resolution of such conflict seeks to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state. This analysis proceeds on the principle that true conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied.

Id. In a later case, the California Supreme Court refined the comparative impairment approach, finding that it "attempts to determine the relative commitment of the respective states to the laws involved . . . [incorporating] several factors for consideration: the history and current status of the states' laws; the function and purpose of those laws." *Offshore Rental*, 22 Cal. 3d at 166, 583 P.2d at 727, 148 Cal. Rptr. at 873.

[85] *Offshore Rental*, 22 Cal. 3d at 169, 583 P.2d at 729, 148 Cal. Rptr. at 875. In *Offshore Rental*, the California Supreme Court faced a choice of law problem regarding the plaintiff's recovery for "loss of services of a 'key' employee whom defendant negligently injured on defendant's premises in Louisiana." *Id.* at 160, 583 P.2d at 723, 148 Cal. Rptr. at 869. A conflict existed between the laws of California, the plaintiff's state of incorporation and principal place of business, which permitted recovery under those circumstances, and Louisiana, the place of

is unclear whether New Jersey ever followed Currie's true conflicts analysis because the cases indicate that New Jersey courts, both state and federal, have had no hesitation in applying the law of another state in a true conflicts situation.[86]

Six other states use the governmental-interest analysis in combination with another method of resolving choice of law problems.[87] Generally, the most significant relationship test of the *Restatement (Second) of Conflict of Laws*[88] is combined with the governmental-interest analysis. Although the governmental-interest analysis requires the forum to engage in greater examination of the issues than the traditional test, it too suffers from rigidity and mechanical application. The main problem stems from the fact that it is often impossible for the courts in one state to determine the governmental interest of another state.[89] There is, at least in a mass tort action, a tendency

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injury, which did not permit recovery. In holding that Louisiana's law should be applied, the court stated "[w]e do not believe that California's interest in the application of its law . . . are so compelling as to prevent an accommodation to the stronger, more current interest of Louisiana . . . . Louisiana's interest would be the more impaired if its law were not applied . . . ." *Id.* at 169, 583 P.2d at 729, 148 Cal. Rptr. at 875.

[86] *See, e.g.*, *Henry*, 508 F.2d at 28 (federal court sitting in New Jersey applied the Quebec statute of limitations to a case involving injuries caused by thalidomide despite the fact that New Jersey was the home of the manufacturer, thus rejecting New Jersey's interest in regulating the activities of its domestic corporations).

[87] Hawaii, Louisiana, Massachusetts, Oregon, Pennsylvania and Washington. Kay, *supra* note 42, at 593. This author, writing in 1983, also identified Arkansas as following the governmental-interest analysis, in combination with another approach. In 1987, however, Arkansas adopted the choice-influencing considerations approach to resolving choice of law issues in tort cases. *See* Schlemmer v. Fireman's Fund Ins. Co., 292 Ark. 344, 730 S.W.2d 217 (1987); *see also* Smith, *supra* note 42, at 1053-55.

[88] RESTATEMENT (SECOND) §§ 6, 145.

[89] *Compare* Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969) *with* Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965). Both cases involved virtually identical facts. In *Dym*, plaintiff, a New York domiciliary, was injured while riding as a passenger in an automobile driven by another New York domiciliary while both were temporarily residing in Colorado. The court of appeals denied the plaintiff recovery on the basis of Colorado's guest statute, holding that while New York had an interest in protecting its domiciliaries, Colorado had a greater interest in regulating conduct within its borders. "Colorado has an interest in seeing that the negligent defendant's assets are not dissipated in order that the persons in the car of the blameless driver will not have

to pay lip service to the analysis as an excuse to apply the forum's substantive law.

One illustrative case is *In re Paris Air Crash, March 3, 1974*.[90] The proceedings arose as a result of the crash of a Turkish Air Lines aircraft in France.[91] Multiple suits were filed in eleven different United States District Courts and consolidated for discovery and trial in the District Court for the Central District of California.[92] Because the crash occurred in a foreign country and also involved alleged strict product liability against two United States corporations,[93] choice of law problems arose on the issue of the amount of recoverable damages.[94]

The dictates of *Klaxon* require a federal court, in cases based on diversity of citizenship, to apply the substantive law of the state in which it sits, including that state's choice of law rules.[95] In a proceeding comprised of cases originally filed in different jurisdictions, the court must apply the laws of the original forums, including each fo-

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their right to recovery diminished by the present suit." *Dym*, 16 N.Y.2d at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.

In *Tooker*, plaintiff, a New York domiciliary, was killed in an automobile accident in which she was a passenger in the vehicle driven by another New York domiciliary. The accident occurred while both parties were residing in Michigan. In this case, however, the New York Court of Appeals permitted recovery even though Michigan would have barred the claim because of its guest statute. The court attempted to distinguish its holding in *Dym*, but conceded that "[t]he primary point of division in *Dym v. Gordon* focused . . . upon the construction placed on the Colorado guest statute which, upon reflection, we conclude was mistaken." *Tooker*, 24 N.Y.2d at 574-75, 249 N.E.2d at 397, 301 N.Y.S.2d at 523.

See generally Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393 (1980) (stating that "the discrepancy between governmental interests and actual legislative intent has been overlooked only because, in the vast majority of cases, legislatures have no actual intent on territorial reach with which to contrast Currie's results").

[90] 399 F. Supp. 732 (C.D. Cal. 1975).

[91] *Id.* at 735.

[92] *Id.* at 736.

[93] *Id.*

[94] *Id.* at 739.

[95] *Klaxon*, 313 U.S. at 496. "We are of opinion that the prohibition declared in *Erie Railroad v. Tompkins* . . . against . . . independent determinations [of law made by federal courts sitting in diversity of citizenship cases] extends to the field of conflict of laws." *Id.*

rum's choice of law rules.[96] In *Paris Air Crash*, without explanation, the court applied California's governmental-interest analysis to each claim, regardless of the original forum.[97] In a confusing explanation, the court first held that California's choice of law rules relating to damages required the court to follow the law of the decedent's domicile at the time of the crash.[98] Since the court viewed this as an overwhelming task,[99] it proceeded to analyze the availability of damages collectively on the basis of a governmental-interest analysis.[100] The court found that California was the only jurisdiction to have an interest in the measure of damages issue because of its policies of avoiding the "imposition of excessive financial burdens on its resident defendants" and providing "a uniform rule of liability and damages."[101] The court also held that the

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[96] *See, e.g., Air Crash Disaster at Washington, D.C.*, 559 F. Supp. at 340. "Since federal subject matter jurisdiction arises from the parties' diversity of citizenship, [the] Court must follow the choice of law rules of the states where the various actions were originally filed." *Id.*

[97] *Paris Air Crash*, 399 F. Supp. at 741. It is possible the court thought that *Klaxon* did not apply in a case involving a possible advancement of a federal government interest, although it does not appear that any of the plaintiffs raised a federal question in his or her complaint. Nevertheless, the court stated that it "must consider more than the *California* governmental interest. It must include the *United States interest* in this multi-nation situation . . . ." *Id.* at 745 (emphasis in original).

[98] *Id.* at 741. This conclusion was based on the court's interpretation of the California Supreme Court's holding in *Reich*, 67 Cal.2d at 554, 432 P.2d at 730, 63 Cal. Rptr. at 34. This was not the holding in *Reich*, however. The *Reich* court specifically held that "[a]s the forum we must consider all of the foreign and domestic elements and interests involved in this case to determine the rule applicable." *Id.* After analyzing all the involved states, the *Reich* court did apply the law of the decedent's domicile. This holding does not imply that California courts would always do so, but rather it clearly indicates that the courts will review each situation on a case by case basis.

[99] *Paris Air Crash*, 399 F. Supp. at 742 ("How many countries or states are actually involved as to either claimants or decedents neither the Court nor his staff has had time to tabulate, and accurate and complete information has not been supplied to the Court by the parties.").

[100] *Id.* at 742-45 (discussing various California state decisions applying the governmental-interest analysis).

[101] *Id.* at 743 (Quoting at length from *Hurtado*, 11 Cal.3d at 584, 522 P.2d at 672, 114 Cal. Rptr. at 112, the court determined that the three aspects of a cause of action for wrongful death, compensation for survivors, deterrence of conduct, and limitation, if any, upon damages recoverable "compel application of the California law of damages.").

federal government had a recognized interest because of its position as the primary regulator of air safety.[102] Since no federal statute addressed damages, the court held that California law would exclusively govern the measure of damages available.[103]

Near the end of the opinion, the court acknowledged that some of the claims had been filed in other jurisdictions and that these filings required the court to follow the laws of those jurisdictions.[104] The court determined, apparently, that this requirement extended only to those jurisdictions' laws on damages, not their choice of law rules.[105] Upon referring to only one jurisdiction's law on damages, the court held that none of the other jurisdictions' laws differed substantially from California's and, in any event, the interests of California and the federal government outweighed those of any other state or foreign country.[106]

C. *Center of Gravity Test*

In contrast to other modern choice of law approaches which are the product of scholarly reaction to the traditional rule of *lex loci delicti*, the New York Court of Appeals judicially developed the center of gravity or grouping of contacts test.[107] In applying the center of gravity test, the forum court looks at all jurisdictions having an interest in the action.[108] In theory, those states' contacts are then grouped together on a quantitative and qualitative ba-

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[102] *Id.* at 746 (finding that "the United States has a great concern with [aircraft] designers and manufacturers of such product").

[103] *Id.* at 747.

[104] *Id.* at 749 ("A transferee court is required to follow the laws of the transferor state in various matters.").

[105] *Id.*

[106] *Id.*

[107] Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954) (contract actions); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (tort actions).

[108] *See, e.g., Babcock*, 12 N.Y.2d at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750 (comparing the contacts of Ontario, the place of injury, and New York, the domicile of all parties).

sis.[109] The state having the most significant contacts with the issue under consideration is then determined to be the center of gravity for that issue and, therefore, the state whose laws will be applied.[110] The rationale for this test is cited as "justice, fairness and the best practical result."[111]

North Dakota is the only state other than New York to adopt the center of gravity approach.[112] The test was, however, very influential in shaping the methodology adopted by the *Restatement (Second)*.[113] Unlike the *Restatement (Second)*'s most significant relationship test, though, the center of gravity test does not focus on factors such as ease of application of another state's law or maintenance of interstate order.[114] Rather, the center of gravity test attempts to direct the court's attention to the most logical place where the parties' interests intersect.[115]

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[109] *Id.* at 481-82, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

> The merit of such a rule is 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 thereby allowing the forum to apply the policy of the jurisdiction most intimately concerned with the outcome of the particular litigation."

Id. (quoting *Auten*, 308 N.Y. at 161, 124 N.E.2d at 102).

[110] *See, e.g.*, *Dym*, 16 N.Y.2d at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466 ("Finally we come to the question of which state has the more significant contacts with the case such that its interest should be upheld.").

[111] *Babcock*, 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749. "Justice, fairness and 'the best practical result' may best be achieved by giving controlling effect to the law of the jurisdiction which . . . has the greatest concern with the specific issues raised in the litigation." *Id.*

[112] Issendorf v. Olson, 194 N.W.2d 750, 756 (N.D. 1972) (adopting the "significant contacts" approach to apply its own law on contributory negligence to an out-of-state accident between two North Dakota residents). In its holding, the court analyzed the relative merits of the center of gravity test and Leflar's choice-influencing factors approach. *Id.* at 755. After quoting at length from *Babcock*, the court stated, "We adopt with this case the significant-contacts approach as the choice of law and abandon the *lex loci delicti* doctrine." *Id.* at 756.

[113] Kay, *supra* note 42, at 526; *see also Babcock*, 12 N.Y.2d at 482, 191 N.E.2d at 283, 240 N.Y.S.2d at 749. "The 'center of gravity' rule of *Auten* has . . . supplanted the prior rigid and set contract rules in the most current draft of the Restatement of Conflict of Laws." *Id.*

[114] *See infra* notes 146-155 and accompanying text for a discussion of the RESTATEMENT (SECOND).

[115] *See, e.g.*, *Dym*, 16 N.Y.2d at 126, 209 N.E.2d at 795, 262 N.Y.S.2d at 468 (holding that "consideration of where and how a relationship was formed are significant" in guest statute cases).

The New York courts have struggled with their use of the center of gravity test.[116] Initially heralded as a method for avoiding unfair results in situations where the place of injury is fortuitous,[117] application to a given set of facts is often mercurial. In the first tort cases to which the test was applied, the Court of Appeals shifted its approach in each case and produced contradictory results.[118] In a later series of cases, the court attempted to wed the test to the governmental-interest analysis.[119] When this proved unworkable, the court reduced the center of gravity test to a series of rules equally as rigid as those it had sought to avoid.[120] The test has now been reduced to one of contact counting with little regard for the quality or significance

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[116] *Compare* Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972) *with Tooker*, 24 N.Y.2d at 569, 249 N.E.2d at 394, 301 N.Y.S.2d at 519. In *Tooker*, the New York Court of Appeals described the center of gravity test in terms very similar to those used by the California courts to describe the governmental-interest analysis. "New York's 'grave concern' in affording recovery for the injuries . . . [of] a New York domiciliary . . . is evident merely in stating the policy which our law reflects. . . . Michigan has no interest in whether a New York plaintiff is denied recovery against a New York defendant where the car is insured here." *Tooker*, 24 N.Y.2d at 577, 249 N.E.2d at 398-99, 301 N.Y.S.2d at 525.

In *Neumeier*, on the other hand, the court held that in cases involving out of state accidents resulting in injuries to New York residents, specific rules were available to guide the courts in their decisions. "There is, however, 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. . . . " *Neumeier*, 31 N.Y.2d at 127, 286 N.E.2d at 457, 335 N.Y.S.2d at 69.

[117] *Babcock*, 12 N.Y.2d at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

[118] *Compare Tooker*, 24 N.Y.2d at 569, 249 N.E.2d at 394, 301 N.Y.S.2d at 519 *with Dym*, 16 N.Y.2d at 120, 209 N.E.2d at 792, 262 N.Y.S.2d at 463. Both cases involved injuries to New York domiciliaries suffered in out of state accidents. The driver of the vehicle in each case was also a New York domiciliary whose vehicle was registered and insured in New York. Both accidents occurred while the parties were temporarily residing and attending school in other states. In *Dym*, the court held that the Colorado guest statute barred plaintiff's claim against the driver. *Dym*, 16 N.Y.2d at 128, 209 N.E.2d at 797, 262 N.Y.S.2d at 470. In *Tooker*, the court held that although Michigan's guest statute barred the plaintiff's claim, it declined to apply the guest statute and, instead, permitted the plaintiff's claim to go forward under New York negligence law. *Tooker*, 24 N.Y.2d at 580, 249 N.E.2d at 399, 301 N.Y.S.2d at 528.

[119] *See* Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

[120] *Neumeier*, 31 N.Y.2d at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70 (listing three principles to be followed in resolving guest statutes in conflict problems).

of those contacts to the issue at hand.[121] Finally, the New York Court of Appeals continues to contend that in most tort actions the traditional rule of *lex loci delicti* applies.[122] The federal courts and lower state courts are left to muddle through their analysis of choice of law issues.

The problems with the center of gravity test are illustrated by two cases involving mass tort actions. In *Plummer v. Lederle Laboratories*,[123] the Second Circuit reviewed a suit filed in a New York federal district court. The court of appeals summarily decided to apply California substantive law to the issue of adequacy of warnings about the effects of an allegedly dangerous product because California was the location where the injury complained of occurred.[124] Proper application of the center of gravity test may have led to the same conclusion. Nevertheless, the court engaged in no analysis of the grouping of contacts required for proper consideration of which state's laws should be applied to the issue,[125] such as the place of manufacture and the domiciles of the parties. Instead, the court seemed to apply the traditional rule.[126]

Similarly, the District Court for the Eastern District of New York sitting in a diversity action in a mass tort case[127] followed the lead of the *Plummer* court and referred only to the facts that the plaintiff resided in New York and the injury occurred there in deciding that New York substantive law should apply to a products liability action arising from an allegedly defective polio vaccine.[128] No reference

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[121] *Id.*

[122] *Id.* ("Normally, the applicable rule of decision will be that of the state where the accident occurred. . . .").

[123] 819 F.2d 349 (2d Cir.) (plaintiff alleging injury resulting from exposure to a polio vaccine), *cert. denied*, 484 U.S. 898 (1987).

[124] 819 F.2d at 355.

[125] *Id.*

[126] *Id.* "New York's choice of law rules . . . dictate that California substantive law applies because that is the place where plaintiff's injury occurred." *Id.*

[127] Jones v. Lederle Laboratories, 695 F.Supp. 700 (E.D.N.Y. 1988).

[128] *Id.* at 705. "[P]laintiff is a New York resident and the incident giving rise to this action occurred in New York. Under these circumstances, the parties do not dispute that New York would apply its substantive law" even though the court recognized it had jurisdiction on the basis of diversity of citizenship. *Id.*

was made to the place of business of the defendant nor to the place where the corporate decisions giving rise to the injury were made.[129] Logically, both of these locations should be considered in making a decision under the center of gravity test.[130]

D. *Choice-Influencing Considerations*

Robert Leflar first propounded the factors of the choice-influencing considerations approach for resolving choice of law problems in 1966.[131] This approach is based primarily on policy concerns.[132] Under the choice-influencing considerations approach, the court looks at five factors in reaching its conclusion on which state's laws should be applied to the issue: predictability of result, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interests and application of the better rule of law.[133]

According to Leflar, in a tort action, the first factor should have little, if any, impact on the court's decision regarding which state's laws to apply to the action.[134] In addition, in a domestic tort action, no international or interstate claims of "sovereign power" exist to cause concern.[135] Leflar further believes that a court is quite capable of applying the laws of its sister states, as long as

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[129] *Id.*

[130] *See Babcock*, 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

[131] Leflar, *Choice-Influencing Considerations in Conflicts of Law*, 41 N.Y.U. L. REV. 267 (1966) [hereinafter Leflar, *Choice*]; Leflar, *Conflicts Law: More Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

[132] Leflar, *Choice*, *supra* note 131, at 277. "Not only the extrastate origin of part of the facts, but also other state's laws as facts in the forum state's litigation, may affect the forum's total 'interest' and policies." *Id.*

[133] *Id.* at 282.

[134] *Id.* at 310. "Predictability of result . . . is completely irrelevant. Parties do not plan this sort of tort [negligence actions] with reference to survival rules . . . ." *Id.*

[135] *Id.* at 311. "In respect to maintenance of interstate order, [in a tort action] neither state will be much affected or annoyed by what the other state does." *Id.*

it is able to apply its own procedural rules to the action.[136]

Currently, five states adhere to the choice-influencing considerations approach.[137] Some of its factors have been included in the *Restatement (Second)*'s most significant relationship test.[138] The choice-influencing considerations approach is much more proactive than the governmental-interest analysis because it permits courts to weigh various governmental interests and determine their current importance to each interested state. The approach allows the court an opportunity to relieve itself of the burden of an unfair or archaic law if it determines that another state's law is the better law to be applied.[139]

In *Standal v. Armstrong Cork Co.*,[140] a products liability action based on exposure to asbestos-based products, the Minnesota Court of Appeals faced the issue of whether a successor corporation was responsible for injuries caused by products produced by a defunct corporation.[141] Minnesota law provided that the successor corporation was not liable.[142] Pennsylvania law, the site of manufacture of the asbestos products, stated that a successor corporation was responsible for injuries caused by its predecessor in interest.[143] The court reviewed the facts of the case in light of the five factors of the choice-influencing consider-

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[136] *Id.* at 288. "There is without question a good reason for a court's applying its own procedural rules." *Id.*

[137] Arkansas, Minnesota, New Hampshire, Rhode Island and Wisconsin. Kay, *supra* note 42, at 565-66; Smith, *supra* note 42 at 1053-55, 1138-42.

[138] Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 315-16 n.1 (1972) (stating that "Professor Leflar's 'choice-influencing considerations' are essentially similar to the factors" of Section 6 of the RESTATEMENT (SECOND)).

[139] Leflar, *Choice*, *supra* note 131, at 299-300. "Judges can appreciate . . . that their forum law in some areas is anachronistic, behind the times, a 'drag on the coattails of civilization,' or that the law of some other state has these benighted characteristics." *Id.*

[140] 356 N.W.2d 380 (Minn. Ct. App. 1984).

[141] *Id.* at 381.

[142] *Id.* at 382. Minnesota adheres to a typical test of corporate successor liability in which the successor corporation is not responsible for prior obligations unless it agrees to be.

[143] *Id.* at 382-83. Pennsylvania holds a successor corporation liable under a product-line rule. That is, if the successor continues to produce a product, it is responsible for all past, present and future liabilities arising out of that product.

ations approach.[144] It determined that application of Pennsylvania law under the circumstances would provide predictability in future lawsuits arising as a result of the predecessor's activities. The court also determined that Minnesota courts are capable of administering Pennsylvania law and, finally, that use of Pennsylvania law would actually promote Minnesota's governmental interest in providing compensation, while application of Minnesota law would not promote this interest.[145]

E. *The Approach of the Restatement (Second) of Conflict of Laws*

The *Restatement (Second) of Conflict of Laws* has nominally retained the *lex loci delicti* test of the *First Restatement* with respect to tort actions.[146] According to the *Restatement (Second)*, the law of the place of injury is to be applied to tort actions unless it is determined that another state has a more significant relationship with the incident giving rise to the action.[147] Determination of whether another state has a more significant relationship with the activity giving rise to the injury is reached by applying a two-step analysis to the facts and issues of the case. First, the court reviews the contacts each state has with the parties, the place of injury, the place of conduct, and the place where the parties' relationship was established.[148] Rather than merely counting contacts to make a determination, the court weighs the importance of these contacts on the basis of the issues involved in the action.[149]

Once the contacts and their importance to the cause of

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[144] *Id.* at 381-82. The court did not bother with the better choice of law factor, however, because it felt that the other factors clearly pointed to application of Pennsylvania law.

[145] *Id.* at 382-83.

[146] RESTATEMENT (SECOND) § 146.

[147] *Id.* "In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship . . . ." *Id.*

[148] *Id.* § 145.

[149] *Id.* § 145(2):

action have been established, the court reviews them in light of six principles set forth in Section 6 of the *Restatement (Second)*[150] and makes a final determination as to which state has the most significant relationship to the issue at hand. These principles include the policies of the forum, the expectations of the parties, the predictability of result, the ease of application of the selected substantive law, the policies of other interested states and the order of national and international systems.[151]

The most significant relationship test combines many aspects of other choice of law theories in vogue today. It allows for examination of competing governmental interests.[152] It takes into account the place of the injury.[153] Finally, it permits a weighing of all these competing interests to determine which state's law should apply.[154] Conspicuously absent is a requirement that a determination be made as to the better rule of law. This determination of the better rule of law is not considered because, according to the view of the commentators, it inappropri-

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Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to a tort issue include:
(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, of the parties is centered.
These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id.

[150] *Id.* § 6.

[151] *Id.* § 6(2).

[T]he factors relevant to the choice of the applicable rule of law include: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Id.

[152] *See* Reese, *supra* note 138, at 317; RESTATEMENT (SECOND) § 6.

[153] RESTATEMENT (SECOND) § 145(2).

[154] *Id.*

ately places the judiciary in a legislative role in which the court can override an applicable state law it considers outdated or unfair to the parties.[155]

An important part of the *Restatement (Second)* approach is the concept of issue splitting or *depeçage*.[156] Use of issue splitting allows the court to analyze the issues in a cause of action separately to determine which state's law should be applied to each.[157] This technique is particularly useful in actions involving the availability of punitive damages and limitations on the amount of actual recovery permissible in wrongful death actions.[158] For example, in *In re Air Crash Disaster at Boston, Massachusetts on July 31, 1973*,[159] the choice of law problem involved a number of issues, among them a limitation on compensatory damages in wrongful death actions.[160] The proceedings in this case were the result of a consolidation of claims originally filed in several different jurisdictions.[161] Consistent with *Klaxon*, the district court held that "the applicable damage provisions must be determined in each case by applying the substantive law of the original forum, including its choice of law rules."[162]

With respect to the limitation on compensatory dam-

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[155] *See, e.g.*, Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679 (1963). "[T]he *Restatement* is written from the viewpoint of a neutral forum which has no interest of its own to protect and is seeking only to apply the most appropriate law." *Id.* at 692.

[156] RESTATEMENT (SECOND) § 145 comment d. "Each issue is to receive separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states." *Id. See also* Reese, *Depeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973). "[W]ith respect to each issue, the court should seek to apply the relevant rule of the state which has the greatest concern in the determination of that issue." *Id.* at 59.

[157] Reese, *supra* note 156 at 60. "[C]ases can be expected to arise with some frequency where not only do different states have the greatest concern in the determination of different issues but where the relevant rules of these states with respect to these issues are not the same . . . ." *Id.*

[158] *See, e.g.*, In re Air Crash Disaster near Chicago, Ill., May 25, 1979, 644 F.2d 594 (7th Cir.), *cert. denied*, 454 U.S. 878 (1982); *Air Crash Disaster at Washington D.C.*, 559 F. Supp. at 338; *Air Crash Disaster at Boston*, 399 F. Supp. at 1107-08.

[159] 399 F. Supp. 1106 (D. Mass. 1975).

[160] *Id.* at 1107.

[161] *Id.* at 1108.

[162] *Id. Contra Paris Air Crash*, 399 F. Supp. at 732.

ages, the court reviewed this issue in connection with the claims originally filed in Vermont[163] and Massachusetts.[164] For the Massachusetts claims, the court held that Massachusetts law limiting the amount of recovery would be applied to all claims originally filed there because at the time of this decision Massachusetts adhered to the traditional rule of *lex loci delicti*.[165] In analyzing the Vermont claims, however, the court applied the most significant relationship test.[166] The court found that Massachusetts' only contact with the claims was that it was the place of the aircraft crash.[167] Vermont, on the other hand, was the domicile of the decedents and the place where the relationship of the parties was centered.[168] Because of these factors, the court concluded that Vermont's contacts were significant. The court further held that Vermont had a strong interest in having its policy of no limitation on the amount of recovery in wrongful death actions applied to these claims.[169] On the other hand, Massachusetts' interest in having its limitation on recovery statute applied was considered minimal.[170] After weighing all these factors,

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[163] *Air Crash Disaster at Boston*, 399 F. Supp. at 1108-12.

[164] *Id.* at 1115-16.

[165] *Id.* at 1115. "Massachusetts adheres to the traditional *lex loci delicti* choice of law rule in tort cases so that all substantive aspects of a cause of action are governed by the law of the place where the injury occurred." *Id.*

[166] *Id.* at 1111. Vermont had not previously adopted the most significant relationship test. The court held, however, because the Vermont Supreme Court had done so for contracts actions, it would likely do so for tort actions, if the right issue were presented. The court held that "the widespread rejection of the traditional rule by other courts . . . compels the conclusion that the Vermont Supreme Court would abandon the *lex loci* rule and would adopt the 'significant contacts' rule . . . to determine the law governing the damages recoverable in this action." *Id. But see* Smith, *supra* note 42, at 1151. Smith points out that the Vermont state courts have not had occasion to review a choice of law problem in a tort action in recent years. In his opinion, "[t]he Vermont Supreme Court has been slow to adopt a modern choice of law theory. Although the cases are old, they indicate a continued adherence to lex loci delicti in tort . . . ." *Id.*

[167] *Air Crash Disaster at Boston*, 399 F. Supp. at 1112.

[168] *Id.*

[169] *Id.* (stating that "Vermont has a strong interest in assuring that next of kin are fully compensated for the tortious death of residents").

[170] *Id.* "Massachusetts' sole contact with this litigation is the happenstance that the accident occurred there. This contact alone is insufficient to support application of the damage provision of its statute." *Id.*

the court held that, with respect to the no limitation issue, the Vermont claimants were entitled to have Vermont's statute applied to their actions.[171]

Sixteen states have adopted the position of the *Restatement (Second)* in dealing with tort actions,[172] and many others use it in combination with one of the other approaches. The *Restatement (Second)'s* proponents view the approach not as a mechanical test, but rather as an approach requiring analysis on a case-by-case basis.[173] One problem that arises is that the test is a fairly recent innovation and many state courts have not faced facts requiring them to accept or reject the approach. As a result, some federal courts in mass tort actions have taken the matter into their own hands.[174] These courts have determined that the courts in the states in which the federal courts sit would adopt the most significant relationship test if given the opportunity to do so.[175] While a federal court is permitted to make such determinations in the face of uncertain direction from a state court,[176] it is argued that this is

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[171] *Id.*

[172] Alaska, Arizona, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Maine, Massachusetts, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, and Texas. Kay, *supra* note 42, at 556-57; Smith, *supra* note 42, at 1051-52, 1059-60, 1095-96, 1121-23.

[173] Reese, *supra* note 138, at 315. "By approach is meant a system which does no more than state what factor or factors should be considered in arriving at a conclusion. An example of an approach is section 6 of the *Restatement (Second) of Conflict of Laws*." *Id.*

[174] *See, e.g., Air Crash Disaster at Boston*, 399 F. Supp. at 1111. In this case, the court applied the choice of law rule of Vermont as well as the choice of law rules of the other original forums. The district court specifically held that if Vermont were given the option it would apply the most significant relationship test of the RESTATEMENT (SECOND). *Id. See also Air Crash Disaster at Washington, D.C*, 559 F. Supp. at 361. The court found that with respect to the state of Maryland the rule of *lex loci delicti* "no longer has any vitality in that state and that the Court of Appeals of Maryland would not apply it [*lex loci delicti*] were the instant matters now before it." *Id.* at 362. Both courts making these decisions were not sitting in the states whose choice of law rules they opted to change.

Significantly, two months prior to the *Air Crash Disaster at Washington, D.C.* decision, the Maryland Supreme Court had declined to abandon the traditional rule for tort action. Hauch v. Connor, 295 Md. 120, 453 A.2d 1207 (1983).

[175] *Air Crash Disaster at Washington D.C.*, 559 F. Supp. at 362; *Air Crash Disaster at Boston*, 399 F. Supp. at 1111.

[176] *See generally* Snyder v. Hampton Indus., Inc., 521 F. Supp. 130, 137 (D. Md.

not an appropriate area for the federal courts to exercise this option.[177]

III. Choice of Law Issues in Mass Torts

Due to the number of different choice of law approaches used throughout the United States, no single application of these approaches exists even in those jurisdictions applying the same approach. To further complicate matters, the majority of mass tort actions are filed or removed to the federal court system on the basis of diversity of citizenship of the parties.[178] While the federal courts are obligated to apply the choice of law rule in force in the state in which they sit,[179] remarkably those courts often impose new choice of law rules.[180] Even in those situations where the federal court applies an existing state choice of law rule, that application is often uneven or receives only cursory attention by the court.[181]

This section deals with the three more common situations in which choice of law issues arise in mass tort ac-

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1981) (when a state court has not considered a particular issue of law, a federal court sitting in that state has the right to determine how the state court would rule on the issue), *aff'd*, 758 F.2d 649 (4th Cir. 1985).

[177] *See, e.g.*, Saloomey v. Jeppesen & Co., 707 F.2d 671 (2d Cir. 1983). "There is no real uncertainty as to what choice-of-law rule Connecticut's Supreme Court would apply in this case." *Id.* at 680 (Cardamone, J., dissenting). Nevertheless, the majority abandoned Connecticut's *lex loci delicti* rule in favor of the most significant relationship in an air crash case. *Id.* at 679. The Connecticut Supreme Court did not abandon the rule until 1986. *See* O'Connor v. O'Connor, 201 Conn. 632, 519 A.2d 13 (1986).

[178] *See, e.g.*, Alexander v. Richardson-Merrell, Inc., 541 F. Supp. 93, 95 (S.D.N.Y. 1982) ("The Court has subject matter jurisdiction . . . based on diversity between plaintiffs . . . and defendants . . . ."); In re Air Crash Disaster at Boston, Mass., July 31, 1973, 399 F. Supp. 1106, 1107 (D. Mass. 1975) ("Jurisdiction is predicated solely on diversity of citizenship.").

[179] Klaxon Co. v. Stentor Elec. Mfg. Co. 313 U.S. 487 (1941). For a discussion of this holding, see *supra* note 26 and accompanying text.

[180] *See, e.g.*, Saloomey v. Jeppesen & Co., 707 F.2d 671 (2d Cir. 1983); In re Air Crash Disaster at Washington, D.C., Jan. 13, 1982, 559 F. Supp. 333 (D.D.C. 1983); *Air Crash Disaster at Boston*, 399 F. Supp. at 1106.

[181] *See, e.g.*, Knaysi v. A.H. Robins Co., 679 F.2d 1366 (11th Cir. 1982) (court applied New York law rather than Florida law with no explanation); Sibley v. KLM-Royal Dutch Airlines, 454 F. Supp. 425 (S.D.N.Y. 1978) (New York federal district court applied Massachusetts law to a wrongful death action arising out of a plane crash in the Canary Islands with no explanation).

tions: the availability of punitive damages in wrongful death actions, the use of statutes of limitations and borrowing statutes to defeat or permit a cause of action, and the availability of a cause of action.

A. *The Availability of Punitive Damages in Wrongful Death Actions*

In actions resulting from a mass air accident, plaintiffs frequently seek punitive damages, in addition to compensatory damages, from the air carrier and the manufacturer of the aircraft. The plaintiffs often allege willful misconduct and egregious conduct in the manufacture and maintenance of the downed aircraft.[182] A number of states permit the imposition of punitive damages in wrongful death actions on the grounds that such an imposition deters future tortious conduct of a similar nature,[183] encourages corporate accountability,[184] and promotes air safety.[185] Many other states, however, specifically disallow punitive damages in wrongful death actions.[186] The poli-

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[182] In re Air Crash Disaster near Chicago, Ill., May 25, 1979, 644 F.2d 594, 604 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981). In this action, plaintiffs claimed that the manufacturer of the aircraft engaged in egregious conduct in the manufacture and design of the aircraft and that the airline's conduct in maintaining the aircraft was egregious, in order to bolster their claims for punitive damages. *Id.*; *see also Air Crash Disaster at Washington, D.C.*, 559 F. Supp. at 353 ("The primary purpose of imposing punitive damage assessments is to punish egregious conduct of a defendant and deter future wrongful conduct . . . . ").

[183] RESTATEMENT (SECOND) OF TORTS § 908 (1) and comment a (1979). "Punitive damages are . . . awarded against a person . . . to deter him and others like him from similar conduct in the future." *Id.* § 908(1). *See also* K. REDDEN, Punitive Damages § 2.1, at 23-24 (1980); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 7-8 (1982).

[184] *Air Crash Disaster near Chicago*, 644 F.2d at 613. In outlining one state's policy behind permitting imposition of punitive damages, the court found that the state's interest in deterring egregious conduct by resident corporate defendants was so strong that "[t]o find otherwise would be to gut the very concept of corporate accountability." *Id.*

[185] *Air Crash Disaster at Washington, D.C.*, 559 F. Supp. at 337. In explaining the District of Columbia's reasons for permitting punitive damages in wrongful death actions, the court found that "the policies . . . of preventing air disasters and promoting safe air travel are advanced by . . . punitive damage assessments in actions such as this." *Id.*

[186] *See, e.g.*, CAL. CIV. CODE § 3294 (West 1970 & Supp. 1990) (permitting recovery of punitive damages only in cases "where the defendant has been guilty of

cies underlying denial of punitive damages include protection of resident corporate defendants[187] and avoidance of excessive liabilities on the part of resident defendants.[188]

These conflicting policies meet head on in mass accident cases when the parties are domiciled or have their principal place of business or operations in different states, one allowing the imposition of punitive damages and the other denying recovery for punitive damages.[189] The court must determine which state's law will control.[190] The process becomes more complex when both the manufacturer and the airline are defendants in the same action and have their nerve centers in different states.[191] To complicate the problem even further, individual cases are often consolidated into a single proceeding and the court, under the dictates of *Klaxon*, must apply the choice of law rules for each state in which the actions

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oppression, fraud, or malice, express or implied . . . ."). Cases construing California's policy that punitive damages are not available in wrongful death actions include Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 450, 551 P.2d 334, 353, 131 Cal. Rptr. 14, 33 (1976); Pease v. Beech Aircraft Corp., 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974).

[187] *Air Crash Disaster near Chicago*, 644 F.2d at 614. A state's rule disallowing punitive damages protects "the economic well-being of the corporations." *Id. See also* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (2d Cir. 1967). In his opinion for the court, Judge Friendly was concerned that "the apparent impracticability of imposing an effective ceiling on punitive awards . . . can end the business life of a concern . . . with many innocent stockholders suffering extinction of their investments for a single management sin." *Id.*

[188] *Air Crash Disaster near Chicago*, 644 F.2d at 610. ("The purpose of denying punitive damages is to avoid excessive liability.").

[189] *See, e.g.*, Freeman v. World Airways, Inc., 596 F. Supp. 841, 842-43 (D. Mass. 1984). The plaintiffs urged the court to apply the law of their state of domicile, which allowed for punitive damages, while the defendants argued for imposition of the laws of their principal places of business, none of which allowed for punitive damages. *Id.*

[190] *Id.* at 845. "To resolve the conflict in this diversity case, this court must apply the choice of law rules of the forum states." *Id.*

[191] *See e.g., Air Crash Disaster near Chicago*, 644 F.2d at 604-05. This case involved two defendants, the manufacturer of the aircraft and the airline. The manufacturer had its principal place of business in Missouri, was a Maryland corporation, and manufactured the aircraft in California. The airline was a Delaware corporation and had its base of operations for maintenance in Oklahoma. Its principal place of business was in dispute but was ultimately determined to be New York for the purposes of this litigation. *Id.*

were originally filed.[192]

In *In re Air Crash Disaster near Chicago, Illinois on May 25, 1979*,[193] wrongful death actions were filed in six different jurisdictions against both the manufacturer of the aircraft and the airline.[194] All claims were consolidated into one proceeding for pretrial and trial purposes.[195] The primary issue involved in the case was the availability of punitive damages.[196] The court began its opinion by analyzing the interests of the relevant states in applying their laws regarding the availability of punitive damages. The court held that all the involved states had an interest in having their laws applied and, thus, a true conflict existed.[197] Because of the multidistrict aspect of the proceeding, the court reviewed each claim with reference to the choice of law rules used in each of the six original forums.[198]

The court applied the most significant relationship test of the *Restatement (Second)* to those actions originally filed in Illinois.[199] In reviewing the contacts listed in Section 145, the court determined that the significant contacts were the place of the alleged misconduct of both defendants and their principal places of business.[200] The court also considered the place where the relationship of the parties was centered a significant contact but found that location unclear[201] and, therefore, did not include it in its

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[192] *Air Crash Disaster at Washington, D.C.*, 559 F. Supp. at 340. "Since federal subject matter jurisdiction arises from the parties' diversity of citizenship, this Court must follow the choice of law rules of the states where the various actions were originally filed." *Id.*

[193] 644 F.2d at 594.

[194] *Id.* at 604. The original places of filing were Illinois, California, New York, Michigan, Hawaii and Puerto Rico.

[195] *Id.* at 604 n.1.

[196] *Id.* at 604.

[197] *Id.* at 608.

[198] *Id.* at 610. "[S]ince federal jurisdiction is based on diversity of citizenship, the choice-of-law rules to be used are those choice-of-law rules of the states where the actions were originally filed." *Id.*

[199] *Id.* at 611 (citing Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593 (1970) as support).

[200] *Id.* at 612, 616.

[201] *Id.*

final analysis.[202]

With respect to both defendants, the court held that of the two states with the most significant contacts to the issue, one state permitted punitive damages and the other did not.[203] Section 175 of the *Restatement (Second)* provides that the law of the place of injury shall apply in wrongful death actions unless another state has a more significant relationship with the issue.[204] The court determined that, because neither the place of the alleged misconduct nor the principal place of business was any more significant than the other, the interests of certainty, predictability, uniformity and ease of application[205] dictated that the law of the place of injury would control on this issue.[206] Based on Illinois law, the court held that punitive damages would not be available for those claims originally filed in Illinois.[207]

The court next applied the governmental-interest, comparative impairment analysis to the issue for those claims originally filed in California.[208] With respect to each defendant, the state in which the alleged misconduct occurred and the state of the principal place of business both had an equally strong interest in having their punitive damages laws applied to the actions.[209] The court held that the principal place of business state had a strong interest in its policy of denying punitive damages and that

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[202] *Id.*

[203] *Id.* at 606-08.

[204] RESTATEMENT (SECOND) § 175. "In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship. . . ." *Id.*

[205] *Air Crash Disaster near Chicago*, 644 F.2d at 615. The court applied the principles set forth in RESTATEMENT (SECOND) § 6. *See supra* note 151 and accompanying text.

[206] *Air Crash Disaster near Chicago*, 644 F.2d at 615-16. The court held that, although the place of injury was fortuitous, Illinois nevertheless had "very strong interests in not suffering air crash disasters and also in promoting airplane safety" and that the state had expended significant amounts of money in the cleanup effort. *Id.*

[207] *Id.* at 616.

[208] *Id.* at 621.

[209] *Id.* at 623-24, 626-28.

application of its rule would achieve that state's goal of protecting corporate defendants from excessive awards.[210] On the other hand, the court found that the policy of permitting punitive damages in the state in which the alleged misconduct occurred could be achieved "by means other than enforcement of the statute in question," such as filing criminal charges against the manufacturer.[211] Thus, the court held that the policy of denying punitive damages would be most impaired if it were not applied to the claims originally filed in California.[212]

The analysis of the claims from the remaining four jurisdictions was much less detailed. The court found that New York's center of gravity test was similar to the most significant relationship test used in Illinois.[213] Therefore, the court held that punitive damages also would not be available for those claims originally filed in New York.[214] With respect to the Michigan claims, the court found that Michigan's choice of law rules were unclear but that given its strong history of adherence to the rule of *lex loci delicti*, a Michigan court facing these claims probably would apply the traditional rule.[215] Since the place of injury was Illinois, which does not permit recovery of punitive damages, no punitive damages were available to the Michigan claimants.[216] The same analysis was applied to the Puerto Rico claims since that jurisdiction clearly followed the traditional rule.[217] Finally, for the Hawaii claims, the court admitted that it could not clearly identify Hawaii's

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[210] *Id.* at 624, 627.

[211] *Id.*

[212] *Id.* at 625, 628.

[213] *Id.* at 628 ("In *Babcock*, the court . . . announced a rule it viewed as equivalent to the Restatement (Second)'s 'most significant relationship test.'" (citing Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749 (1963)).

[214] *Id.* at 629.

[215] *Id.* at 630. The Michigan Supreme Court subsequently abandoned the *lex loci delicti* rule for the *lex fori* approach. *See* Sexton v. Ryder Truck Rental, Inc., 413 Mich. 406, 320 N.W.2d 843 (1982).

[216] *Air Crash Disaster near Chicago*, 644 F.2d at 630.

[217] *Id.* (citing Jiminez Puig v. Avis Rent-A-Car System, 574 F.2d 37 (1st Cir. 1978)).

choice of law rule.[218] It held, therefore, that the law of the original forum with respect to punitive damages should be applied to these cases.[219] Since Hawaii did not permit punitive damages, those claimants who filed in Hawaii were denied punitive damages.[220]

Similarly, in *In re Air Crash Disaster at Washington, D.C. on January 13, 1982*,[221] the court faced choice of law questions relating to the availability of punitive damages against both the manufacturer and the air carrier in wrongful death actions arising from claims originally filed in eight different states representing three different choice of law approaches.[222] Relying on the precedent set in *Air Crash Disaster near Chicago*,[223] the court engaged in its analysis of the issue in accordance with the choice of law rules for each of the eight original forums, combining review when those rules overlapped.[224] For those actions originally filed in Pennsylvania, the court applied a combined governmental-interest, most significant relationship analysis.[225] The court held that among the interested states, a true conflict was present because some interested states denied punitive damages while others allowed them.[226] In looking at the law of the original forum, as dictated by the governmental-interest analysis, the court held that Pennsylvania, the domicile of the decedents, had no interest in the imposition of punitive damages against nonresident defendants as long as the claimants were adequately compensated for actual damages.[227]

Having dispensed with the governmental-interest analy-

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[218] *Id.*

[219] *Id.* at 631. "We conclude that where the choice-of-law cannot be determined, absent an affirmative showing to the contrary, the court should presume that the forum would apply its own law." *Id.*

[220] *Id.*

[221] 559 F. Supp. at 333.

[222] *Id.* at 339.

[223] 644 F.2d at 610-11.

[224] *Air Crash Disaster at Washington, D.C.*, 559 F. Supp. at 340, 352-62.

[225] *Id.* at 354.

[226] *Id.* at 347-48.

[227] *Id.* at 354 (finding that Pennsylvania "would not be interested in the imposition of punitive damages in a case involving an out-of-state air crash").

sis portion of Pennsylvania's choice of law rule, the court then applied the most significant relationship test to the issue.[228] In its discussion, the court included the claims originally filed in Massachusetts because Massachusetts' choice of law rule was also the most significant relationship test.[229] In applying the test of the *Restatement (Second)*, the court placed exclusive importance on weighing the importance of the policies of the original forums and other interested states.[230] By focusing on policy considerations, the court's examination of the contacts of the various states and parties to the issue is difficult to distinguish from its application of the governmental-interest analysis.[231]

After determining that the interests of the principal place of business were not significant,[232] the court examined the interests of the place of the alleged misconduct of each defendant and the place of injury.[233] With respect to the claims against the first defendant, the air carrier, the site of the alleged misconduct—the airport from which the flight had originated seconds before it crashed—was considered significant.[234] The court held, however, that although the airport was located in Virginia, it was the District of Columbia's airport and the District had concurrent jurisdiction over activities at the airport.[235] Since the District of Columbia was also the site of the accident, the court found that its interests were more significant than those of Virginia, the nominal location of the airport.[236] Therefore, the court held that the District

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[228] *Id.* at 354-55.

[229] *Id.* The court also extended the most significant relationship test to those claims originally filed in Maryland. *Id.* at 361-62.

[230] *Id.* at 355.

[231] *Id.* at 353, 355-56.

[232] *Id.* at 355-56.

[233] *Id.*

[234] *Id.*

[235] *Id.* The court stated the "the District of Columbia shares with Virginia an interest in the safe operation of the airport." In addition, the court noted that at the time of the crash Virginia did not provide for punitive damages. *Id.* at 356.

[236] *Id.* The court also found that "the fact that Virginia recently has changed its position on the denial of punitive damages and now will permit an assessment

of Columbia laws providing for punitive damages in wrongful death actions would be available against this defendant.[237]

The claims against the second defendant, the aircraft manufacturer, also focused on the place of alleged misconduct, in this case the place of manufacture of the aircraft.[238] In an interesting analysis, the court held that because the District of Columbia was the place of injury, the inquiry regarding which state had the greater interest in the issue of punitive damages would include two components, "the state's connection with the defendant alleged to have caused the injury . . . and the state's connection with the injury itself."[239] The court found that Washington, the state in which the defendant's alleged misconduct occurred, had a strong policy of not permitting punitive damages in order to protect resident corporations from excessive liability.[240] It determined that the state had consciously subordinated its residents' interest in collecting punitive damages from tortious domestic corporations.[241] The court concluded that while the state may have made its decisions with respect to its own residents, "the sovereignty of other states prevents it from placing on that scale the rights of those injured elsewhere."[242] Therefore, the jurisdiction of the place of injury had the greater interest in having its policy permitting punitive damages applied.[243] With respect to the remaining claims filed in other jurisdictions, the court

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thereof is strongly suggestive that denying punitive damages was not a significant policy of the Commonwealth at the time of the crash." *Id.*

[237] *Id.*

[238] *Id.* at 355-56 (finding that "it is evident that jurisdictions having a greater interest in this issue would be those where the conduct or any non-fortuitous injury took place").

[239] *Id.* at 357.

[240] *Id.* at 359.

[241] *Id.* "While Washington State has made a considered choice not to allow the assessment of punitive damages, that choice necessarily includes a balancing of the interests of resident tortfeasors against the interests of that state in preventing harm caused by tortious conduct." *Id.*

[242] *Id.*

[243] *Id.*

held that the original forums all nominally retained the choice of law rule of *lex loci delicti*.[244] This reasoning permitted the court to apply the District of Columbia's law to the remaining claims, with the result that the plaintiffs' punitive damage claims were not barred.[245]

In both of these cases, the courts completely discounted any interest of the state of domicile of the plaintiff.[246] The courts believed that a state of domicile had no interest in imposing punitive damages because that state's interest in a wrongful death action was limited to protecting the well-being of the plaintiff.[247] The courts felt this wellbeing would be adequately handled by an award of compensatory damages.[248] Nevertheless, as between the state of domicile and the place of injury, particularly when the place of injury is purely fortuitous, it would be better practice for the court to apply the law of the domicile of the plaintiff.[249] Although use of the law of the place of injury undoubtedly makes the court's task simpler,[250] it places too much emphasis on the laws of a state having little qualitative contact with the issues in the case.

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[244] *Id.* at 359-61. The court considered the laws of Virginia and Georgia. *Id.*

[245] *Id.*

[246] *Air Crash Disaster near Chicago*, 644 F.2d at 624; *Air Crash Disaster at Washington, D.C.*, 559 F. Supp. at 353.

[247] *E.g.*, *Air Crash Disaster near Chicago*, 644 F.2d at 613. The court found that the interests of the states of domicile were "limited to assuring that the plaintiffs are adequately compensated for their injuries and that the proceeds of any award are distributed to the appropriate beneficiaries." *Id.*

[248] *Id.* "Once the plaintiffs are made whole by recovery of the full measure of compensatory damages to which they are entitled under the law of their domiciles, the interests of those states are satisfied." *Id.* *See also Air Crash Disaster at Washington, D.C.*, 559 F. Supp. at 353 (stating that the "primary purpose of imposing punitive damage assessments is to punish egregious conduct of a defendant . . . *not* to compensate a plaintiff"; therefore, "a state whose only connection with this litigation is that it was the domicile of a plaintiff or victim has no interest in the imposition of punitive damage liability"). *But cf. Air Crash Disaster at Boston*, 399 F. Supp. at 1112 (holding that domicile of decedent had a strong interest in making sure that victims' families were afforded a complete ability to sue for both punitive and compensatory damages).

[249] *See Air Crash Disaster at Boston*, 399 F. Supp. at 1112.

[250] *See, e.g.*, *Paris Air Crash*, 399 F. Supp. at 741-42 (expressing the court's frustration at the problems involved in determining the domiciles of almost 200 persons killed in the crash of a foreign airliner at a foreign airport).

B. *Statutes of Limitations and Borrowing Statutes*

In choice of law problems, courts have traditionally categorized statutes of limitations as procedural matters.[251] This classification permits the forum to apply its own statute of limitations to any action before it, even when the laws of another state are applied to the substantive issues.[252] The forum court will automatically use its statute of limitations in two situations. First, if the cause of action is barred under foreign law, but timely under the forum's statute, the forum will permit the action to proceed. Second, if the cause of action is barred under forum law, the foreign statute of limitations is ignored, and the forum will refuse to entertain the action.[253] The rationale underlying this position is that "limitation periods reflect the policy of the forum that substantial justice can be achieved only within the [statute's] prescribed time period."[254]

Two exceptions to this policy have been developed judicially in most jurisdictions. If a statute of limitations is specifically included in a statute creating the cause of action, the limitations provision is considered substantive.[255] Likewise, if the statute of limitations itself relates to a specific cause of action, it is viewed as substantive.[256] In the event the forum determines that either exception is applicable to the cause of action, it will apply the foreign state's statute of limitations.[257]

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[251] *See* FIRST RESTATEMENT § 585. "All matters of procedure are governed by the forum." *Id.* Furthermore, the FIRST RESTATEMENT posits that "[t]he court at the forum determines according to its own Conflict of Laws rule whether a given question is one of substance or procedure." *Id.* § 584. For a brief discussion of the historical development of the distinction between substantive and procedural issues resulting in statutes of limitations being categorized as procedural, see Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 ARIZ. ST. L.J. 1, 5, n.3.

[252] Grossman, *supra* note 251, at 5, 11.

[253] *Id.* at 11.

[254] *Id. See also* FIRST RESTATEMENT § 603 & comment a, § 604.

[255] R. WEINTRAUB, *supra* note 47, at 57.

[256] *Id.*

[257] Grossman, *supra* note 251, at 12.

Borrowing statutes have created a third exception.[258] These statutes allow the forum to borrow the shorter statute of limitations of another state and apply it to the cause of action in the forum, regardless of which state's substantive laws are applied to the issues.[259] Borrowing statutes provide that a claim is barred in the forum if it is barred in another jurisdiction, generally the jurisdiction in which the claim arose or in which one or more parties reside.[260] Borrowing statutes have been enacted in approximately thirty-eight jurisdictions.[261]

The use of a borrowing statute allows the court to resolve some of the problems caused by indiscriminate application of its own limitations period, such as flagrant forum shopping.[262] Such a statute, however, may create different problems by defeating an otherwise valid claim simply because the action arose in a foreign jurisdiction with a shorter limitations period.[263] To counteract the perceived inequities of both the traditional classification of statutes of limitations and borrowing statutes, a new section covering statutes of limitations was added to the *Restatement (Second)* in 1988.[264] The effect of the new Section 142 is that, in those states adopting the section, statutes of limitations will be treated as substantive issues in choice of law situations, subject to analysis under the principles of Section 6.[265] Additionally, the courts in at least

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[258] R. WEINTRAUB, *supra* note 47, at 58. "A common statutory exception to the procedural treatment of statutes of limitations is the 'borrowing' statute." *Id.*

[259] *Id.* "Such a statute borrows a statute of limitations of another jurisdiction and makes the foreign statute applicable at the forum." Weintraub also points out that "[w]hen the foreign statute of limitations is borrowed, it is interpreted and applied as it would be in the state from which it is borrowed." *Id.* at 58, n.51.

[260] Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MTN. L. REV. 287, 298-99 (1960).

[261] *See* Sedler, *The Truly Disinterested Forum in the Conflict of Laws: Ratliff v. Cooper Laboratories*, 25 S.C.L. REV. 184, 186 (1973); Ester, *Borrowing Statutes of Limitations and Conflict of Laws*, 15 U. FLA. L. REV. 33, 79, n.2 (1963).

[262] *See* Ester, *supra* 262, at 40; RESTATEMENT (SECOND) § 142 Comment b.

[263] RESTATEMENT (SECOND) § 142 Comment b.

[264] RESTATEMENT (SECOND) § 142.

[265] *Id.* "Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6." *Id.* Subsection 2 of § 142 states:

one state, New Jersey, which has no borrowing statute, regard statute of limitations problems as substantive issues.[266] This categorization permits New Jersey courts to analyze such problems using a governmental-interest approach, just as they do for all substantive choice of law problems.[267]

Statutes of limitations often play a critical role in mass tort litigation. For example, traditional statutes of limitations for physical injuries require a plaintiff to file suit within a relatively short period of time after occurrence of the incident giving rise to the injury.[268] Many mass tort actions involve physical injury or disease brought about by exposure to a product, but the injury or disease does not manifest itself until several years after exposure.[269] If the forum has a traditional statute of limitations and considers its statute of limitations a procedural matter, a cause of action for injuries occuring under these circumstances will be defeated, even though an identical claim would go forward if brought in a different forum with a longer limitations period.[270]

> The forum will apply its own statute of limitations permitting the claim unless:
> (a) maintenance of the claim would serve no substantial interest of the forum; and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

Id.

Comment b to § 142 further indicates that "[i]n light of the recommendation of this Section to give statutes of limitations the same analysis as other substantive choice-of-law issues, borrowing statutes should probably either be repealed or amended to conform to the policies of this Section." *Id.* § 142 Comment b.

[266] *See* Pine v. Eli Lilly & Co., 201 N.J. Super. 186, 492 A.2d 1079 (N.J. Super. A.D. 1985).

[267] *Id.* at 186, 492 A.2d at 1082. "[T]he underlying analysis of whether New Jersey should apply its limitations statute or that of the foreign state is essentially akin to the 'governmental interest' test in resolving choice of substantive law issues." *Id.*

[268] *See, e.g.*, VA. CODE ANN. § 8.01-243 (1984 and Supp. 1989) (two year limit on causes of action begins to run as of the date of injury) (amended 1986 and modified for asbestos caused injuries by § 8.01-249(4)(Supp. 1989)).

[269] *See generally* Comment, *DES: The Patchwork Quilt of Tort Law*, 2 N. ILL. U.L. REV. 370, 372 n.8 (1982) (indicating that the symptoms of DES exposure do not manifest themselves for at least ten years).

[270] *See* Locke v. Johns-Manville Corp., 221 Va. 951, 959, 275 S.E.2d 900, 905

To counteract the harshness of traditional statutes of limitations, a growing number of states have enacted or implemented the so-called "discovery rule" for certain classes of personal injury cases involving medical malpractice and products liability.[271] Although implementation of the discovery rule varies among jurisdictions, generally the rule provides that a cause of action does not arise until such time as the plaintiff knows or through reasonable diligence should know that she has been injured by the defendant's product.[272] The statute of limitations period then begins to run from that time.[273] Thus, a plaintiff may be exposed to a product *in utero* and only many years later develop a chronic or fatal illness as a result of such exposure. In a jurisdiction following the discovery rule, the plaintiff will be able to proceed with her cause of action following diagnosis of the illness, provided the action is commenced within the time period provided for in the statute.[274]

(1981). The Virginia Supreme Court held that Virginia's two year statute of limitations begins to run from the time plaintiff was injured and that the time "is to be established from available competent evidence, produced by a plaintiff or a defendant, that pinpoints the precise date of injury with a reasonable degree of medical certainty." *Id.* This case has probably been overruled by implication by passage of Virginia's discovery rule statute of limitations applicable only to asbestos related illnesses. See VA. CODE ANN. § 8.01-249(4) (Supp. 1989).

[271] *See, e.g.* N.Y. CIV. PRAC. L. & R. § 214-c(2) (McKinney Supp. 1990):

> [T]he three year period within which an action to recover damages for personal injury . . . caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body . . . must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

Id.

[272] *See, e.g.*, Cathcart v. Keene Ind. Insulation, 324 Pa. Super. 123, 471 A.2d 493 (Pa. Super. 1984) (interpreting the Pennsylvania two year statute of limitations to accrue only when the plaintiff knew or should have known of his or her injury and the likely cause); Jarusewicz v. Johns-Mansville Prod. Corp., 188 N.J. Super. 638, 458 A.2d 156 (Super. Ct. Law Div. 1983) (interpreting the New Jersey two year statute of limitations to accrue only when the plaintiff knew or should have known of his or her injury and the likely cause).

[273] *See, e.g.*, Kelly v. Johns-Manville Corp., 590 F. Supp. 1089, 1095 (E.D. Pa. 1984).

[274] There are many cases supporting this conclusion. *See, e.g.*, G.D. Searle & Co.

1. *Statutes of Limitations as Procedural Law*

The tension between the traditional rule and the discovery rule often arises in mass tort litigation when the activity giving rise to the injury, such as a corporate decision to market a product later determined to cause severe physical problems,[275] occurs in a state different from the one in which the injury occurred. If one state follows the traditional rule and the other follows the discovery rule, and the forum views its statutes of limitations as a procedural matter, the timeliness of the plaintiff's action will depend solely on whether the forum is the state using the discovery rule.

From the plaintiff's perspective, adoption of a discovery rule statute of limitations, whether done judicially or by legislation, has greatly enhanced mass tort litigation. Provided the plaintiff brings his claim within the applicable time period after discovery of his injury, it will not be barred on statute of limitations grounds, regardless of when he was exposed to the product causing his injury. Problems arise for the plaintiff, however, when the court in which he has filed his claim concludes that his action includes some out of state elements, requiring the court to apply its state's borrowing statute to the statute of limitations issue.[276]

Most borrowing statutes provide that another state's statute of limitations should govern a cause of action if the alleged injuries arose in the other state.[277] Reliance on a borrowing statute involves a bifurcated approach for de-

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v. Superior Court, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (Ct. App. 1975); Harig v. Johns-Manville Prod. Corp., 284 Md. 70, 394 A.2d 299 (1978); Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977).

[275] *See, e.g.*, Mitchell v. United Asbestos Corp., 100 Ill. App. 3d 485, 426 N.E.2d 350 (1981) (plaintiff, an Illinois domiciliary, was injured by the defendant's products which had been manufactured in other states).

[276] *See, e.g.*, Nance v. Eagle Picher Indus., Inc., 559 So.2d 93 (Fla. Dist. Ct. App. 1990). The court determined that Virginia had the most significant relationship with the action and employed Florida's borrowing statute to apply Virginia's two year statute of limitations resulting in the plaintiff's action being timebarred. *Id.*

[277] *See, e.g.*, 42 Pa. Cons. Stat. § 5521(b) (1981). "The period of limitations applicable to a claim accruing outside this Commonwealth shall be either that pro-

termining the applicable statute of limitations.[278] First, the forum must decide where the cause of action arose or accrued. When the forum views its borrowing statute as procedural device, it will apply its own laws to determine where the claim arose.[279] Second, if the court determines that the cause of action did arise in another state, it will then employ its borrowing statute to apply the other state's statute of limitations to the plaintiff's claim, provided that it is shorter than that of the forum.[280]

For example, in *Renfroe v. Eli Lilly & Co.*,[281] both plaintiffs were exposed to DES *in utero* while their mothers were residing in Missouri.[282] At the time of the action, one plaintiff lived in Ohio and the other in California. Their complaints were filed in the United States District Court for the Eastern District of Missouri.[283] In the district court proceeding, the court held that Missouri's borrowing statute should be applied to the plaintiffs' claims if they originated in any other state.[284] Although the court granted summary judgment for some of the defendants against only one of the plaintiffs, both sides requested that the issue of the applicability of Missouri's borrowing statute to the claims be certified for immediate appeal to the court of appeals.[285]

The Eighth Circuit found that in ruling on this issue it was obligated to apply Missouri law and that Missouri viewed statute of limitations as procedural matters, gov-

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vided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim." *Id.*

[278] *See, e.g., Mitchell*, 100 Ill. App. 3d at 485, 426 N.E.2d at 350.

[279] *Id.*, 426 N.E.2d at 360 (reaching the conclusion, however, that the forum's borrowing statute was inapplicable because the cause of action arose in Illinois).

[280] *See* Ester, *supra* note 262, at 66. Borrowing statutes, with few exceptions, provide that "[i]f the forum's [statute of limitations] period has expired, plaintiff's action is barred even though not barred by the law of the jurisdiction in which the cause of action had its initial contact." *Id.*

[281] 686 F.2d 642 (8th Cir. 1982).

[282] *Id.* at 644.

[283] Renfroe v. Eli Lilly & Co., 541 F. Supp. 805 (E.D. Mo. 1982).

[284] *Id.* at 806.

[285] *Renfroe*, 868 F.2d at 645.

erned by Missouri law.[286] According to Missouri's borrowing statute, a claim that is barred by the laws of a state "in which it originated" is also barred in the Missouri courts.[287] The court of appeals began its analysis of the applicability of the borrowing statute by determining where the plaintiffs' actions arose. The court held that a claim originated where the last element of the cause of action occurred.[288] The plaintiffs claimed that their actions arose in the state in which they were exposed to DES. The court found, however, that under Missouri law, the last necessary element in a cause of action is a plaintiff's discovery of discernible damages.[289] In the case of the plaintiffs in *Renfroe*, the court determined that the last element was not present until the plaintiffs had learned of their illnesses,[290] and further that their claims did not accrue until they knew or should have known that exposure to DES had caused their injuries.[291] Both plaintiffs discovered their injuries while residing in other states.

Although one plaintiff was living in California when she was diagnosed with cancer, the court of appeals agreed with the district court that Missouri's borrowing statute was inapplicable to her claims because she may have been residing in Missouri when she discovered the link between her cancer and DES.[292] In the case of the second plaintiff, the court held that the Missouri borrowing statute did apply to her claims because she was living in Ohio when her cancer was diagnosed and she discovered the link be-

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[286] *Id.* at 646 (citing Guaranty Trust Co. v. York, 326 U.S. 99, 108-09 (1945) and Keaton v. Crayton, 326 F. Supp. 1155, 1157-58 (W.D. Mo. 1969) as support).

[287] Mo. REV. STAT. § 516.190 (Supp. 1990).

[288] *Renfroe*, 686 F.2d at 647.

[289] *Id.* ("According to Missouri law, a cause of action does not accrue until the plaintiff has sustained at least some damage capable of ascertainment.")

[290] *Id.* "When the cancer developed and became capable of ascertainment, the final element of the cause of action occurred and [the plaintiffs'] respective causes of action accrued . . . ." *Id.*

[291] *Id.* at 648 (approving the district court's holding that "the plaintiffs' causes of action did not accrue until . . . the plaintiffs knew or should have known that DES caused their injuries").

[292] *Id.*

tween her cancer and DES in California.[293] The court accepted the district court's finding that it was impossible to determine where this plaintiff's claims had accrued.[294] The court of appeals then approved the lower court's decision to examine both Ohio's and California's statutes of limitations to determine whether either would allow the plaintiff's action to proceed.[295] The court found that while California's statute would bar all of the plaintiff's claims, Ohio's would permit some of them.[296]

Revival statutes have been enacted in some states[297] to counteract the harsh results of a statute of limitations seen as barring otherwise valid claims for injuries with long latency periods.[298] The ability of a plaintiff to rely on a revival statute to bring an otherwise timebarred claim, often hinges on a court's application of its borrowing statute to determine whether its own statute of limitations should apply or whether that of another state is more appropriate.[299] In two recent cases, courts in New York have reached different conclusions in applying that state's revival statute to actions for injuries resulting from exposure to toxic substances.[300]

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[293] *Id.* at 649.

[294] *Id.*

[295] *Id.*

[296] *Renfroe*, 686 F.2d at 651.

[297] *See, e.g.*, N.Y. CIV. PRAC. L. & R. § 214-c(2) (McKinney Supp. 1990). The statute provides that an action for personal injuries caused by latent effects of certain types of toxic substances "which was barred as of the effective date of this act or which was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired is hereby revived," for a period of one year. *Id.*

[298] *See, e.g.*, Besser v. E.R. Squibb & Sons, Inc., 146 A.D.2d 107, 539 N.Y.S.2d 734, 737 (Sup. Ct. A.D. 1989) ("[T]he revival statute is concerned solely with the harshness of a time-bar that focused on a victim's exposure to a toxic substance.").

[299] *See, e.g.*, Celotex Corp. v. Meehan, 523 So.2d 141 (Fla. 1988) (applying the Florida borrowing statue to permit the plaintiff to take advantage of New York's revival statute, allowing him to go forward with his suit for personal injuries suffered as a result of exposure to asbestos).

[300] *Compare Besser*, 146 A.D.2d at 107, 539 N.Y.S.2d at 734 (applying New York's borrowing statute to defeat the plaintiff's claim under New York's revival statute) *with* Scalone v. Celotex Corp., 718 F. Supp. 215 (S.D.N.Y. 1989) (applying New York's borrowing statute to permit the plaintiff's claim under New York's revival

In *Besser v. E.R. Squibb & Sons, Inc.*,[301] a New York state court found that a plaintiff whose injuries occurred out of state could not rely on the revival statute to reinstate her initial complaint even though she filed her initial complaint in New York.[302] The plaintiff was a resident of New York when she filed her second suit although she had been a non-resident at the time of her original complaint.[303] The court found that the purpose behind enactment of the revival statute is to provide a bridge between New York's older strict statute of limitations and its newly enacted discovery statute of limitations.[304] In effect, the revival statute permits plaintiffs with otherwise timebarred claims the same opportunity to bring a claim for personal injuries caused by toxic substances as a plaintiff with newly discovered injuries.[305]

The court determined that the legislative intent of the revival statute is to provide a window for timebarred claims only for injuries arising within the state.[306] Since plaintiff's injuries occurred out of state, the court held that the revival statute did not apply to her claim, despite the fact that she filed her original claim in New York.[307] The court apparently believed the plaintiff had moved to New York solely for the purpose of taking advantage of the revival statute.[308] The court took the position that to allow the plaintiff's claim under these circumstances would encourage forum shopping.[309]

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statute), *and Meehan*, 523 So.2d at 141 (applying Florida's borrowing statute to permit the plaintiff's claim under New York's revival statute).

[301] 146 A.D.2d at 107, 539 N.Y.S.2d at 734.

[302] *Id.*, 539 N.Y.S.2d at 735.

[303] *Id.*

[304] *Id.* The statute's "focus was on the elimination of New York's 'last exposure' rule and the adoption of a 'discovery' statute of limitations." *Id.*

[305] *Id.*, 539 N.Y.S.2d at 738.

[306] *Id.* "The Legislature's remedial purpose was merely to remove the obstacle of the last exposure rule." *Id.*

[307] *Id.*

[308] *Id.*, 539 N.Y.S.2d at 739.

[309] *Id.*, 539 N.Y.S.2d at 738 ("New York residents . . . will have access to the New York courts, while nonresident plaintiffs will be barred from forum shopping.").

More importantly, however, the court relied on New York's borrowing statute for support of its position.[310] The court held that when a nonresident brings his or her claim in New York, the court hearing the complaint is obligated to apply the statute of limitations of the state in which either the injury occurred or was discovered.[311]

Shortly after the decision in *Besser*, the District Court for the Southern District of New York faced an application of New York's revival statute to a claim brought by a nonresident for injuries resulting from exposure to asbestos products in New York. In *Scalone v. Celotex Corp.*,[312] the court held that nonresidents may rely on the benefits of the statute when the injuries are alleged to have occurred within New York.[313] The court allowed the plaintiff's action to go forward despite the fact that his original complaint had been filed in New Jersey and had apparently been dismissed there as timebarred under that state's statute of limitations.[314] In dismissing the defendant's argument that the court should rely on New York's borrowing statute in determining when the plaintiff's cause of action arose for statute of limitations purposes, the court found the interaction between the revival statute and the borrowing statute requires New York's statute of limitations to be applied for injuries occurring within the state[315] rather than the law of the state where the action accrued.[316]

2. *Statutes of Limitations as Substantive Law*

Section 142 of the *Restatement (Second)* was recently revised to provide for treatment of statutes of limitations choice of law issues in the same manner as substantive law

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[310] *Id.*, 539 N.Y.S.2d at 737.
[311] *Id.*, 539 N.Y.S.2d at 739.
[312] 718 F. Supp. at 215.
[313] *Id.* at 216.
[314] *Id.*
[315] *Id.* at 217.
[316] *Id.* The court concluded that for purposes of the revival statute, the place of accrual is the same as the place of injury. *Id.*

problems.[317] Adoption of the *Restatement (Second)*'s position would allow courts more flexibility in determining the appropriate statute of limitations when more than one state has some relationship with the cause of action, even if the forum has enacted a borrowing statute. In *Bates v. Cook, Inc.*,[318] the Florida Supreme Court approved the use of Section 142 and associated commentary for resolving statute of limitations and borrowing statute choice of law issues.[319]

Recently, the Florida Supreme Court applied the *Bates* holding to a mass tort litigation action involving injuries resulting from exposure to asbestos-based products. In *Celotex Corp. v. Meehan*,[320] the court jointly considered three separate actions, although most of its analysis was devoted to Mr. Meehan's claim. The court began its discussion by explaining the *Bates* decision and reiterating its commitment to analyzing statute of limitations and borrowing statute issues using the most significant relationship criteria set out in Section 145 of the *Restatement (Second)*.[321]

The court identified New York and Florida as states with possible contacts to the plaintiff's cause of action. Applying the contacts listed in Section 145, the court found that the place of the injury causing conduct, the plaintiff's domicile at the time of exposure to the asbestos products, the defendant's principal place of business, and the place where the parties relationship of employer-employee was centered were all in New York.[322] Florida's

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[317] For a discussion of Section 142 of the RESTATEMENT (SECOND), see *supra* notes 264-266 and accompanying text.

[318] 509 So.2d 1112 (Fla. 1987).

[319] *Id.* at 1114-15. The court held that "just as in the case of other issues of substantive law, the significant relationships test should be used to decide conflicts of law questions concerning the statute of limitations . . . . The borrowing statute will only come into play if it is determined that the cause of action arose in another state." *Id.*

[320] 523 So.2d at 141.

[321] *Id.* at 144. "In view of our *Bates* decision, the application of [Florida's borrowing statute] is not clearly dependent on whether there are significant relationships which establish that the cause of action arose in another state." *Id.*

[322] *Id.* at 146.

only contact was that it was the state in which the plaintiff's injury manifested itself and was diagnosed.[323] The court held that, considering all the circumstances, New York had a more significant relationship with the plaintiff's claim.[324]

Based on its holding, the court concluded that the cause of action arose in New York and, therefore, it was appropriate to employ Florida's borrowing statute to apply New York's statute of limitations.[325] At the time the plaintiff filed his claim, the New York statute required the action to be filed within three years after his last exposure to the asbestos products.[326] The court determined that under New York law, Florida's borrowing statute barred the plaintiff's action.[327] The court allowed the claim to proceed, however, under the provisions of New York's revival statute which became effective while the plaintiff's appeal was pending before the court.[328]

For many years, the courts in New Jersey have treated statute of limitations issues in the same manner as substantive choice of law problems. In *Heavner v. Uniroyal, Inc.*,[329] the New Jersey Supreme Court held that it would no longer treat statute of limitation problems as procedural matters in causes of action involving application of another state's substantive law.[330] Although the court did not fully develop its methodology, it concluded that when New Jersey has no interest in a cause of action other than as that of the forum, a New Jersey court will not apply its

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[323] *Id.*

[324] *Id.* ("In our opinion, the criteria clearly show that New York has the significant relationship with Meehan.").

[325] *Id.*

[326] *Id.* at 145. The court found that "[u]nder New York law in effect at the time this claim was filed . . . Meehan's cause of action arose and accrued in 1944, the final year of Meehan's employment in the Brooklyn shipyards. Further, the New York statute of limitations expired in 1947 . . . [and] New York had expressly rejected the discovery standard." *Id.*

[327] *Id.* at 146.

[328] *Id.* For a discussion of New York's revival statute see *supra* notes 298-317 and accompanying text.

[329] 63 N.J. 130, 305 A.2d 412 (1973).

[330] *Id.*

statute of limitation and allow the action to proceed when it would be barred in another state having an interest in the outcome of the action.[331] This position is consistent with New Jersey's use of governmental-interest analysis for resolving substantive choice of law issues.

The Third Circuit Court of Appeals faced a conflicting statutes of limitations issue in *Henry v. Richardson-Merrell, Inc.*[332] In this case, the court had to decide whether Quebec's or New Jersey's statute of limitations applied to a case involving birth defects caused by thalidomide, a drug manufactured in New Jersey but ingested by the plaintiff's mother in Quebec.[333] The New Jersey statute of limitations tolled a cause of action for a minor until he reached the age of twenty-one.[334] The Quebec statute required the action to be brought within two years of the date of injury, which in this action was two years from the date plaintiff's mother ingested the thalidomide.[335]

Rather than dismissing the case on grounds of *forum non conveniens* as other courts in similar situations have done,[336] the court reviewed the issue by application of New Jersey's governmental-interest analysis.[337] The court found that even though the product had perhaps been produced and tested in New Jersey,[338] the fact that the drug had been taken in Quebec pursuant to a prescription provided by a Quebec physician, coupled with the fact that the plaintiff was a lifetime resident of Quebec, pointed to a greater governmental interest on the part of Quebec.[339] The court also reviewed the competing poli-

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[331] *Id.* 305 A.2d at 414.

[332] 508 F.2d 28 (3d Cir. 1975).

[333] *Id.*

[334] N.J. REV. STAT. § 2A:14-21 (1987). The statute calls for a tolling of causes of action for personal injury until a minor reaches the age of twenty-one. *Id.*

[335] QUE. REV. STAT. art. 2262 (1972).

[336] *See, e.g.*, Dowling v. Richardson-Merrell, Inc. 727 F.2d 608 (6th Cir. 1984).

[337] *Henry*, 508 F.2d at 35-36.

[338] *Id.* at 31.

[339] *Id.* at 35. At some point, one of the defendant's subsidiaries produced the active ingredient of the defendant's brand of thalidomide in New Jersey. The court found that this was insufficient to provide New Jersey with an interest in the action because the defendant was a nationwide corporation with "more substan-

cies behind both statutes of limitations and determined that New Jersey's interest in its tolling provision was not intended for extension to distant plaintiffs "whose legislature had failed to afford similar protection."[340] New Jersey's interest, therefore, was found insufficient to warrant application of its statute of limitations.[341]

The policies behind statutes of limitations and borrowing statutes are to bar stale claims and to prevent forum shopping.[342] Borrowing statutes are effective in promoting these policies because they invariably require use of the shorter of the two statutes of limitations under consideration by the forum court.[343] In the absence of a borrowing statute, it is unclear whether application of the *Restatement (Second)*'s Section 142 will accomplish the same goals. If the state with the more significant relationship to the action has a longer statute of limitations, use of Section 142 would require the forum to employ that statute, resulting in the action proceeding when it may have been barred by the forum's own statute of limitations. New Jersey's approach to these problems is similar to that of Section 142 even though a different choice of law approach is utilized. In at least one case,[344] this has resulted in a New Jersey court being willing to entertain use of a

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tial activity in other places." *Id.* at 36. In addition, the court found that New Jersey was only one of forty-one states in which the defendant tested thalidomide. "New Jersey testing simply did not give the State an interest in applying its product liability law to these plaintiffs." *Id.* at 37.

[340] *Id.*

[341] *Id.* "We conclude that a New Jersey court, confronted with these facts would deem itself a disinterested forum and apply the law of Quebec to dismiss this suit as timebarred." *Id.* The court of appeals also explicitly concluded that "[a]bsent a finding that New Jersey substantive law applies, *Heavner* requires borrowing of the foreign limitation period." *Id.*

[342] *See* Ross v. Johns-Manville Corp., 766 F.2d 823 (3d Cir. 1985). "One of the major objectives in enacting a limitations statute is to protect defendants and the local courts against the prosecution of stale claims." *Id.* at 827. *See also Henry*, 508 F.2d at 37. "To apply New Jersey's tolling provision here would violate [the principle] that forum shopping should be discouraged by litigants with slender ties to New Jersey." *Id.*

[343] For a discussion of borrowing statutes, see *supra* notes 259-262 and accompanying text.

[344] *Pine*, 201 N.J. Super. at 186, 492 A.2d at 1079.

longer statute of limitations, even though in that case, the longer time period was part of the forum's statute.[345]

C. *The Availability of a Cause of Action*

In many mass tort actions, courts face the question of which state's substantive theories for recovery will govern the action. Often, the plaintiff has worked in one or more states, but is domiciled in another when the injury complained of manifests itself.[346] This issue frequently arises in product liability cases, an area in which many states have developed novel theories of recovery to deal with the prevalent problems of long latency periods and inability to identify the actual manufacturer of the product causing the injury.[347] In addition, several states do not recognize strict products liability actions, but rely instead on theories of negligence.[348]

In *Elmore v. Owens-Illinois, Inc.*,[349] the Missouri state court faced a typical choice of law dilemma in determining whether the plaintiff could bring a strict products liability

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[345] *Id.*, 492 A.2d at 1080. The issue before the court was "whether New Jersey, the forum State, should apply its statute of limitations . . . when the underlying wrongful act occurred in New York, while plaintiff was a New York domiciliary" who moved to New Jersey and filed his complaint after New York's statute of limitations had expired. *Id.* The court held that assuming the plaintiff was a New Jersey domiciliary at the time his action was filed, New Jersey had "a sufficient state governmental interest in the compensation of its domiciliaries to apply its statute of limitations," thereby allowing the action to proceed. *Id.*

[346] *See, e.g.*, Seckular v. Celotex, 209 N.J. Super. 242, 507 A.2d 290 (Super. Ct. App. Div. 1986) (plaintiff was domiciled in Florida when he discovered injuries resulting from asbestos exposure in New York); Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. 1984) (plaintiff lived in Kansas but suffered his injuries from exposure to asbestos primarily when working in Missouri).

[347] For example, courts have recognized the following theories of recovery for DES exposure injuries: concert of action, *see, e.g.*, Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164 (1984); enterprise liability, *see, e.g.*, Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (Super. Ct. Law Div. 1980); and market share liability, *see, e.g.*, Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

[348] *See, e.g.* Smith v. Fiber Controls Corp., 300 N.C. 669, 268 S.E.2d 504 (1980) (North Carolina declined to adopt RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

[349] 673 S.W.2d at 434.

action under *Restatement of Torts (Second)* Section 402A.[350] Such an action is permitted under Missouri law, but not under Kansas law.[351] The plaintiff had worked for many years with asbestos-based products in Missouri and elsewhere.[352] At the time he was diagnosed as having asbestosis, he was domiciled in Kansas.[353] The defendant manufactured and sold asbestos-based products to the plaintiff's employers in Missouri.[354]

The defendant took the position that Kansas law should apply to the plaintiff's cause of action, while the plaintiff believed that Missouri law should be applied.[355] Under Kansas law, the defendant was liable for the plaintiff's injuries only if the defendant knew or should have known that its products were unreasonably dangerous at the time they were sold to the plaintiff's employers.[356] Missouri, on the other hand, had adopted the strict products liability rule of *Restatement (Second) of Torts* Section 402A[357] which permitted recovery on a showing only that the defendant sold a defective product which was unreasonably dangerous to the consumer who was ultimately injured by that product.[358] The plaintiff was not required to show

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[350] *See infra* note 359 for the text of RESTATEMENT (SECOND) OF TORTS § 402A.

[351] *Elmore*, 673 S.W.2d at 437-38.

[352] *Id.* at 437.

[353] *Id.*

[354] *Id.* at 435.

[355] *Id.* Kansas permitted a defendant to plead a state of the art defense in a products liability action based on a failure-to-warn theory. In this case, the plaintiff proceeded under the inherently dangerous product theory of Section 402A of the RESTATEMENT (SECOND) OF TORTS, a theory which apparently would not have been available if Kansas law had been applied to the cause of action.

[356] *Id.* at 436 ("[U]nder Kansas law plaintiffs must prove that at the time defendant sold Kaylo it knew or could have known that the product was unreasonably dangerous, and that an alternative safe design was technically feasible.")

[357] *Id.* at 437 (citing Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969) and making reference to the fact that Missouri Supreme Court had previously adopted RESTATEMENT (SECOND) OF TORTS § 402A for product liability cases).

[358] RESTATEMENT (SECOND) OF TORTS § 402A reads:

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

that the manufacturer knew or should have known at the time of sale that the product was defective.[359]

The court applied the Missouri most significant relationship test to resolve this choice of law problem.[360] The court found that the most significant contact was the place where the relationship between the parties was centered.[361] Since the plaintiff came in contact with defendant's products while working for several employers in Missouri, that state's law was the most appropriate one to apply to the plaintiff's action.[362] Thus, plaintiff was able to proceed under the theory which afforded him the easier standard of proof to meet.[363]

The court in *Baroldy v. Ortho Pharmaceutical Corp.*,[364] also applied the most significant relationship test to a similar problem.[365] Here, the plaintiff was stricken with toxic shock syndrome after use of the defendant's birth control device.[366] The injury occurred while she was living in North Carolina but domiciled in Arizona.[367] The defendant's principal place of business and the location where its corporate decisions were made about the type of warnings to include in the product's accompanying brochure were both in New Jersey.[368] The court grouped the New Jersey

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> of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Id.

[359] *See* RESTATEMENT (SECOND) OF TORTS § 402A (2) (Section 1 of § 402A applies even if "the seller has exercised all possible care in the preparation and sale of his product.").

[360] *Elmore*, 673 S.W.2d at 437.

[361] *Id.* at 437. The court stated that "of the contacts listed under subsection 2 of § 145, 'the place where the relationship, if any, between the parties is centered' has the greatest relative importance with respect to the particular issue." *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS).

[362] *Id.* The court completely discounted the significance of the plaintiff's domicile. "A disease, however, has no significant relationship to the place of one's residence; it goes with the victim wherever he goes." *Id.*

[363] *Id.*

[364] 157 Ariz. 574, 760 P.2d 574 (1988).

[365] *Id.*, 760 P.2d at 579.

[366] *Id.*, 760 P.2d at 577.

[367] *Id.*

[368] *Id.*, 760 P.2d at 479.

and Arizona contacts because the two states' product liability laws were identical and, thus, presented no conflict for the court to resolve.[369] The court held that the place of the plaintiff's domicile was the state with the most significant contact to the injury.[370] It justified its position by first determining that the place where the parties' relationship was centered, North Carolina, was completely fortuitous, in that the plaintiff could have decided to use the defendant's product anywhere.[371] Second, the court determined that Arizona had the greater interest in the well being of its domiciliaries who, if not adequately compensated, could end up as wards of the state.[372]

The court also applied the "choice-influencing" principles of the *Restatement (Second)*'s Section 6 "relevant to choosing the applicable rule of law."[373] The court found that the most important of these factors was Arizona's strong governmental policy of protecting its domiciliaries from the harms associated with defective products.[374] North Carolina's policy of protecting its resident corporate defendants from liability by declining to adopt a strict products liability cause of action did not extend to the defendant, a nonresident defendant.[375] Combining its analyses under both sections of the *Restatement (Second)*, the court held that Arizona's substantive law would be applied to the plaintiff's action.[376] As a result, the plaintiff

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[369] *Id.* The court also relied on RESTATEMENT (SECOND) § 145 comment i, stating that this comment indicated "that, when the law of two states does not conflict, the contacts from those two states should be considered as if they were from the state involved in the choice of law question." *Id.*

[370] *Id.* The court stated that "[i]n § 145 analyses, the domicile of the plaintiff often carries the greatest weight." *Id.*

[371] *Id.*, 760 P.2d at 578-79 ("[A]lthough the 'place of injury' was North Carolina, the location was a mere happenstance.").

[372] *Id.* "Arizona has an interst in insuring that its injured residents do not become wards of the state." *Id.*

[373] *Id.*, 760 P.2d at 579-80.

[374] *Id.*, 760 P.2d at 580 ("Arizona has adopted §§ 402A and 402B [of the RESTATEMENT (SECOND) OF TORTS] to protect its citizens from defective products by compensating resident tort victims and preventing future misconduct.").

[375] *Id.*

[376] *Id.*

was able to rely on the strict products liability theory of *Restatement (Second) of Torts* Section 402A[377] instead of on the traditional negligence theory used in North Carolina which would have required her to prove that the defendant knew or should have known its product was dangerous or defective.[378]

A comparison of *Elmore* and *Baroldy* indicates that even when courts differ on the contact to be considered most significant in a mass tort action, the result of the court's finding is generally that which benefits the plaintiff. This was not, however, the result in *In re Bendectin Litigation*,[379] a multidistrict action. Some of the actions had been voluntarily filed by in state and out of state plaintiffs in the United States District Court for the Southern District of Ohio. Others had been transferred to that court by the Judicial Panel on Multidistrict Litigation. All actions were consolidated for pretrial and trial purposes.[380]

At issue in *Bendectin Litigation* was the question of which party had the burden of proving proximate causation in a products liability action in which the plaintiffs alleged that their mothers' ingestion of the defendant's drug, Bendectin, during pregnancy resulted in severe birth defects to the plaintiffs.[381] Under Ohio law, the burden of proof on the issue of proximate cause was on the plaintiffs.[382] Under the laws of other jurisdictions, the burden of proof, depending on the nature of the plaintiffs' claims, was on the defendant.[383] In the original proceeding, the district court had held that all substantive law issues would be

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[377] *Id.*

[378] *Id.* The North Carolina Supreme Court has refused to recognize any doctrine of strict liability in products liability actions. Byrd Motor Lines, Inc. v. Dunlop Tire and Rubber Corp., 63 N.C. App. 503, 304 S.E.2d 773 (1983).

[379] 857 F.2d 290 (6th Cir. 1988), *cert. denied. sub nom.* Hoffman v. Merrell Dow Pharmaceuticals, Inc., 109 S.Ct. 788 (1989).

[380] 857 F.2d at 294-95.

[381] *Id.* at 293.

[382] *Id.* at 303.

[383] *Id.* at 302-03.

governed by the laws of Ohio.[384]

On appeal, the plaintiffs argued that the burden of proof issue should be resolved according to their respective states of residence.[385] The court of appeals, however, held that determination of the appropriate substantive law should be determined by application of Ohio's most significant relationship test.[386] The court concluded that the plaintiffs' domiciles were not a significant contact since, in each case, the state of domicile at the time the action had little or no relationship to the place where the drug was taken.[387] Rather, the court held that the place with the most significant relationship to the action was Ohio, the state in which the defendant had manufactured and distributed the drug.[388] The court further found that Ohio's relationship was significant because corporate decisions about issuing warnings and instructions for use of the drug had occurred there.[389]

The court acknowledged that the dictates of *Klaxon* required it to apply the choice of law rules of each of the transferor courts.[390] The court apparently determined that this would be an overwhelming task, holding, instead, that it was unnecessary to do so because no true conflict existed "where another state's choice of law rules would have applied the substantive law of Ohio to this case."[391] As a result of the court of appeals' holdings, under Ohio

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[384] *Id.* at 295. A number of plaintiffs opted out of the proceeding after the district court ruled on this issue. *Id.*

[385] *Id.* at 302.

[386] *Id.* at 304 ("Applying *Klaxon* here, it is apparent that it is Ohio's conflict of laws rules that must normally determine which substantive law should govern the rights of the parties.").

[387] *Id.* at 305. "[T]he state of domicile at the time of the suit may bear little or no relation to where a mother may have taken a morning sickness drug years before." She might have taken it "while traveling in many different states." *Id.*

[388] "We, however, see the law of the state of manufacture of the product as being more significant in this type of case . . . . [The defendant] manufactured [in Ohio] a uniform drug internationally." *Id.* In addition, the court found that "[s]tandards against which defendant's wrongful or negligent conduct may have been measured are also set by Ohio and federal law." *Id.*

[389] *Id.*

[390] *Id.* at 305-06.

[391] *Id.* at 306.

substantive law,[392] the plaintiffs had the burden of proof in showing that the defendant's anti-nausea drug was the proximate cause of their birth defects, something no plaintiff was able to show.[393]

IV CONCLUSION

At least five approaches are employed by courts for resolving choice of law problems. In addition, several states combine two or more of these approaches in making decisions on the appropriate law to be applied to a cause of action involving multistate elements. As a result, it is not uncommon to find different conclusions reached about actions involving similar facts.

Use of the traditional *lex loci delicti* rule appears, initially, to achieve the most predictable results. A court applying this rule need only determine the state in which the plaintiff's injury occurred and, then, apply the law of that state to the plaintiff's claim. Among jurisdictions using the traditional rule, however, differing results are reached depending on the factors used for ascertaining the place of injury. For example, in asbestos-related cases, some courts have determined that the plaintiff's last place of exposure to asbestos was the place where his injury occurred. Others, relying to some extent on the discovery rule statute of limitations, have concluded that the place of injury was the state in which the plaintiff's injury manifested itself and was diagnosed. Still other courts have held that the place of injury was that in which the injury came to light, was diagnosed, and was linked to exposure to asbestos-based products.

The governmental-interest analysis provides a seemingly more flexible and modern method for resolving choice of law problems. The approach allows the forum court to apply the law of the state having the greatest interest in the action and the consequences of its outcome.

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[392] *Id.* at 311 (even under a strict liability action for a defective product, under Ohio law plaintiff has the burden of proving proximate causation).

[393] *Id.*

Use of the analysis as originally formulated, however, would result in application of the forum's law in almost every instance. As long as the forum has some interest, however incidental, in having one of its policies recognized, the interest of another state, no matter how strong, may be ignored. Additionally, the analysis relies on the notion that each state's interest is readily discernible when, in fact, the forum often relies on its own perceptions of the interests behind the conflicting laws under consideration.

When it was first devised, the center of gravity test was heralded as a revolutionary approach for resolving choice of law issues. The courts in New York, however, have been unable to agree on a consistent method for applying the test. Originally, the New York courts considered all the contacts of each potentially involved state on both a qualitative and a quantitative basis. Today, the courts have reduced the test to one of simply counting up the number of contacts each state has with the action. The state with the greatest number of contacts, regardless of the relative importance of those contacts, is selected as the center of gravity whose substantive law will be applied to the plaintiff's claim.

The choice-influencing factors approach is the broadest policy-based choice of law solution. In tort actions, application of this approach is similar to that of the governmental-interest analysis in that the forum court focuses on the relative interests of each state to the issue involved. The court then considers the importance of these interests to the action itself and, when appropriate, selects what it considers to be the better rule of law for application to the plaintiff's action. The ability of the court to make this type of decision gives it a stronger, more active role in making choice of law decisions. On the other hand, it may be viewed as a judicial encroachment on an essentially legislative function.

Many courts have adopted the most significant relationship test of the *Restatement (Second) Conflict of Laws* for

resolving choice of law problems. This test is intended to provide a court with flexibility and alternatives in making choice of law decisions. The court is instructed to determine the contacts each state may have with the parties and the action and the relative significance of those contacts to the issues. Then the court is to evaluate the significance of the contacts in light of several overriding principles, such as the relative importance of the policies of the forum and other interested states to the action.

From a review of the decisions employing the most significant relationship test, two major problems become apparent. First, different courts favor the importance of different contacts in making choice of law decisions in actions involving very similar facts. Some courts stress the importance of the plaintiff's state of domicile in insuring that its resident plaintiffs are adequately compensated for their injuries. Other courts emphasize the significance of the state in which the injurious product was manufactured. Still others stress the place of injury as the state with the most significant relationship to the action. Such varying standards inevitably lead to different, inconsistent results in similar mass tort actions.

Second, courts often ignore the importance of applying the overriding principles. Rather, the analysis ends after the court decides which contact it considers the most important based on specified criteria. It remains unclear whether such an incomplete analysis has impacted the outcome of decisions employing the most significant relationship test.

Finally, regardless of which approach is used for analyzing choice of law issues, the decisions indicate that many courts fail to apply the appropriate test accurately. Often, in multidistrict litigation, the forum court considers only its own approach, neglecting to apply the transferring forums' choice of law tests to those actions originally filed in those forums. In other cases, most notably those applying New York's center of gravity test, the courts have apparently concluded that the place of injury is the center of

gravity, rather than considering the importance of other contacts, such as the place the product or drug was manufactured or the state of the plaintiff's domicile. Inaccuracy is a particular problem in the federal courts which often do not fully investigate the choice of law approaches of the states in which they sit.

The issues presented in this Comment will continue to be important in mass tort litigation. Daily, new actions are filed as more toxic substances are found to have contaminated ground water supplies. Air crash disasters will surely involve complex litigation for many years to come. Finally, manufacturers will continue to produce products that, in future years, will be determined to be unreasonably dangerous. The courts, particularly those at the federal level, will need to be versed in the use of choice of law approaches, not only their own, but also those employed in other jurisdictions in order to avoid reaching anomalous results in mass tort litigation actions.