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Bridging the Gap between Rules and Approaches in Tort Choice of Law in the United States: A Survey of Current Case Law

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I. The Perceived Gap Between Rules and Approaches

It is a natural consequence of economic interdependence and increased cross-border claims that legal systems seek to provide local plaintiffs with a local forum for the litigation of their claims against foreign defendants. Both U.S. and European courts, therefore, assert far-reaching judicial jurisdiction.[1] This may be an inconvenience for the foreign defendant, but represents the reasonable—and probably not unexpected—price of doing business interstate or internationally. The matter may be quite different, however, and fairness may indeed be implicated, when the place of suit also means a change in, or is determinative of, the applicable substantive law.

Classical conflicts law, represented in U.S. law by the first *Restatement*,[2] provided fixed rules—some statutory in nature in Europe, decisional law in the United States—so that the selection of the place of suit was indeed mainly for reasons of trial convenience and not for a substantive law advantage.

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1. There are differences concerning the respective reach of specific (claim-related) and general jurisdiction. With respect to most matters relevant to the present survey—torts, including of course products liability claims—the difference will generally be unimportant: local (specific) jurisdiction exists because the injury arose locally; there is therefore no need to determine the existence of general jurisdiction. For comparative discussion, see Peter Hay, *Flexibility versus Predictability and Uniformity in Choice of Law*, 226 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL (COLLECTED COURSES) 281, 311-33 (Hague Academy of International Law, 1991-I).

2. RESTATEMENT OF CONFLICT OF LAWS (1934). For brief comment and further references, see EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS §§ 2.5, 17.2-.7 (2d ed. 1992).

Fixed rules were decried in the United States as mechanical and as insufficiently suited to take account of particular party or societal interests, particularly those of the forum. The ensuing conflicts revolution[3] in the United States—the change from fixed rules to approaches for the selection of the applicable law (for example, interest analysis, identification of the place of the most significant relationship, the search for the better rule of law)[4]—was decried in Europe as too result-selective. U.S. conflicts decisions seemed to be free-wheeling and ad hoc, and often appeared to be inward looking, that is, to favor the application of local law. Predictability (legal certainty) seemed to be a secondary goal.

European conflicts law subsequently also became more flexible. Statutory reform or new codifications focus on the law most closely connected with the transaction[5] rather than on mechanical connecting factors. At first glance, the difference between contemporary European conflicts law and the U.S. approaches appears to be that European law introduced flexibility into the choice-of-law process while providing defined limits—through an a priori identification of the value goals to be achieved—while U.S. decisional law continues to proceed ad hoc, with flexibility unchecked and certainty impaired. In one state, New York, a seminal decision (*Neumeier*)[6] sought to extrapolate values and goals from prior decisions and to cast them into the form of rules. Moreover, Louisiana codified its conflicts law in 1991[7] and thereby also gave its courts direction in the use of the new flexibility. The case law in other U.S. jurisdictions has not yet articulated rules.

The basic issues involved in litigation (and the focus of the present inquiry is on tort litigation) are more or less the same on both sides of the Atlantic. Rules (with exceptions for the sake of flexibility) can be articulated in advance, as both the *Neumeier* decision and the European statutory solutions demonstrate. When rules have not been articulated, as is the case in most U.S. jurisdictions, questions arise about the possibility of discerning decisional patterns that, in a manner similar to articulated rules, give definition to, and provide limitations upon the modern flexible choice-of-law process in the interest of predictability and certainty.

The survey that follows traces the success of the *Neumeier* rules in New York and thereafter examines, and tests against the *Neumeier* rules, the case law in a selected number of other American states. The purpose is to determine, however tentatively and perhaps even intuitively, whether U.S. decisions display enough of a pattern to permit the conclusion that the gap between European and U.S. practice is no longer so great as often supposed and feared.

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3. *See* Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966).

4. *See* SCOLES & HAY, *supra* note 2, §§ 2.6 *et seq.*

5. For discussion and further references, see Hay, *supra* note 1, at 311-33.

6. Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972).

7. *See* LA. CIV. CODE ANN. art. 3515 *et seq.* (West 1992).

II. The Rules States: New York and Louisiana

A. New York and the *Neumeier* Rules

1. *New York Choice of Law in Tort Before* Neumeier

New York departed from territorially oriented rules for the choice of the applicable law in tort in the well-known decision of *Babcock v. Jackson.*[8] In *Babcock*, the New York court regarded the place of the accident as too fortuitous to justify the application of its law to the question of a New York driver's immunity from liability to his New York host. *Babcock* was factually a simple case, and the rule that it furnished therefore proved inadequate for cases of greater complexity. Ensuing New York decisions attempted to fit different fact patterns into the general "center of gravity" idea, providing lower courts and the bar with little or no guidance.[9] When *Tooker v. Lopez*[10] reached the New York Court of Appeals in 1969, the court was ready to abandon contact counting, analysis of the center of gravity of the host/guest relationship, and the like. The *Tooker* court embraced interest analysis,[11] holding that New York had an interest in affording recovery to a New York domiciliary killed elsewhere as the result of the alleged negligence of another New Yorker. The concurring judges were troubled by the uncertainty that inheres in such an open-ended approach. For instance, what should the applicable law be if the non-New York third party, also injured in the *Tooker* accident, were to sue the driver? The chance to limit the open-endedness came with *Neumeier*.

2. *The* Neumeier *Rules*

The facts of *Neumeier v. Kuehner*[12] were simple. Kuehner, a resident of Buffalo, New York, drove his car to Ontario, Canada, to pick up his friend Neumeier who lived there. They planned a day's trip to another part of Ontario where, apparently, they were to prepare cottages Kuehner owned for the coming rental season.[13] On the way, both were killed when a train hit their car as it crossed railroad tracks in Ontario. Neumeier's wife brought a wrongful death action against Kuehner's estate and the railroad company. At issue was the applicability of the Ontario guest statute, which prevented guests in an automobile from bringing negligence actions against their host drivers. New York did not have such a statute.

8. 191 N.E.2d 279 (N.Y. 1963).

9. For a review of New York case law, and further references, see Scoles & Hay, *supra* note 2, §§ 17.26 *et seq.*

10. 249 N.E.2d 394 (N.Y. 1969).

11. Actually, Miller v. Miller, 237 N.E.2d 877 (N.Y. 1968), had adopted the interest-analysis choice-of-law model even earlier. However, it was an easier case than *Tooker* because no third party interests were involved, to be considered or, as in *Tooker*, to be ignored.

12. 286 N.E.2d 454 (N.Y. 1972).

13. *See* Harold L. Korn, *The Choice of Law Revolution: A Critique*, 83 Colum. L. Rev. 772, 886 (1983).

The court first distinguished its previous holding in *Tooker v. Lopez*. There, both the guest passenger and host driver were New York domiciliaries, and it was on that basis that New York law controlled.[14] The court noted that *Tooker* had expressly left open the question whether New York law would apply in the present situation stating:

> What significantly and effectively differentiates the present case is the fact that, although the host was a domiciliary of New York, the guest, for whose death recover is sought, was domiciled in Ontario, the place of accident and the very jurisdiction which had enacted the statute designed to protect the host from liability for ordinary negligence. It is clear that although New York has a deep interest in protecting its own residents, injured in a foreign state, against unfair or anachronistic statutes of that state, it has no legitimate interest in ignoring the public policy of a foreign jurisdiction—such as Ontario—and in protecting the plaintiff guest domiciled and injured there from legislation obviously addressed, at the very least, to a resident riding in a vehicle traveling within its borders.[15]

This passage was the basis for the rules that were announced. Referring to his own concurring opinion in *Tooker*, Chief Judge Fuld, writing for the majority in *Neumeier*, declared that the time had come to "minimize what some have characterized as an *ad hoc* case-by-case approach by laying down guidelines, as well as we can, for the solution of guest-host conflicts problems."[16] The guidelines took the form of three rules:

1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.
3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will

14. *Neumeier*, 286 N.E.2d at 455.

15. *Id.*

16. *Id.* at 457 (internal quotation omitted). In contemporary times, this criticism was echoed by the English and Scottish Law Commissions when they proposed a return, by statute, to the place-of-tort rule as against adherence to the "proper law" as the principal choice-of-law rule in tort: "the proper law of the tort has been criticized for the uncertainty which has obtained in certain United States jurisdictions. . . . [I]t is unacceptable as a general rule. . . ." LAW COMMISSION AND SCOTTISH LAW COMMISSION, PRIVATE INTERNATIONAL LAW: CHOICE OF LAW IN TORT AND DELICT 11 (Law Comm'n. No. 193, Scot. Law Comm'n. No. 129, 1990).

> advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants.[17]

Neumeier itself presented a rule 3 situation. The court applied the law of the place of injury; it did not utilize the proviso of the second sentence because displacing the otherwise applicable law would not advance the substantive law purposes of New York without impairing the smooth workings of the multistate system.[18]

In some ways the *Neumeier* rules resemble both interest analysis and the *Restatement (Second)*. The rules can be seen as a "particularization of *Restatement (Second)* principles . . . establishing priorities of the kind the *Restatement's* drafters were unwilling to do."[19] The rules are also similar to interest analysis—New York's methodological orientation by the time *Tooker* was decided[20]—in that they weigh interests. They do so, however, in advance of the actual case, thus facilitating predictable results while retaining the flexibility that a weighing of interests can give.[21] And while the interests weighed in advance were not specifically delineated in the *Neumeier* opinion, they can be easily ascertained.

The *Neumeier* rules date to the recognition in *Babcock v. Jackson*[21a] that mechanical application of the lex loci rule can produce unsatisfactory results. Both parties in *Babcock* shared New York as their domicile. The fact that the accident occurred in another state was "purely adventitious."[22] Thus, out of *Babcock*, *Neumeier* rule 1 was created, calling for the application of the law of the parties' common domicile in order to protect them from the "unfair or anachronistic" laws of another state.[23] But the purpose of *Neumeier* rule 1 goes beyond this. It is designed to protect the expectations of the parties, to the extent that expectations exist in tort. Furthermore, as the court of appeals subsequently recognized in *Boy Scouts of America, Inc. v. Schultz*,[24] application of the law of the parties' common domicile serves to reduce forum shopping, rebuts charges that the forum-locus decides in favor of its own laws or laws favoring recovery, and, perhaps most important, it "brings a modicum of predictability and certainty to an area of law needing both."[25]

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17. *Neumeier*, 286 N.E.2d at 457–58. The *Neumeier* rules drew much comment, most of it critical. *See, e.g., Symposium,* Neumeier v. Kuehner*: A Conflicts Conflict,* 1 HOFSTRA L. REV. 94 (1973); Robert A. Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975 (1977); *see also Korn, supra* note 13.

18. *Neumeier*, 286 N.E.2d at 458.

19. Hay, *supra* note 1, at 386.

20. *See supra* note 11 and accompanying text.

21. Hay, *supra* note 1, at 386–94.

21a. Babcock v. Jackson, 191 N.E.2d 279, 284 (N.Y. 1963).

22. *Id.* at 284.

23. *See* Neumeier v. Kuehner, 286 N.E.2d 454, 456 (N.Y. 1972).

24. 480 N.E.2d 679 (N.Y. 1985); *infra* notes 35–39 and accompanying text.

25. Hay, *supra* note 1, at 366–67 (describing common domicile rule in Germany); SCOLES & HAY, *supra* note 2, § 17.26, at 613 n.13 (describing common domicile rule for Swiss, French, and English law); Symeon C. Symeonides, *Problems and Dilemmas in Codifying Choice of Law for Torts:*

Neumeier rule 2 is an offshoot of rule 1. It also protects party expectations by guarding against an unfair result in situations where the place of injury is fortuitous.[26] The first sentence of *Neumeier* rule 2 applies the law of the defendant's domicile when the tort occurred there and that state's law would not hold the defendant liable. This rule has two discernable purposes. It discourages forum shopping by consistently applying the law of the place of the defendant's conduct (when that law is more favorable to the defendant), no matter where the plaintiff's domicile is or where the plaintiff brings suit. The rule also protects party expectations in the sense that it gives defendants the ability to predict the consequence of their actions within their home state and plan their conduct accordingly.[27]

Rule 2, second sentence, also protects party expectations; this time the plaintiff's. In a rule 2, second sentence, fact pattern, application of the plaintiff's protective home state law will further that state's interest. At the same time, the defendant's home state will not have been disfavored, presumably because it does not have an interest in the application of its protective law to actions that occur outside its borders.

Finally, *Neumeier* rule 3 embodies what remains of the traditional lex loci approach; it is the default rule, which applies when party expectations or the protection of domiciliaries from "unfair or anachronistic" laws of a foreign state are not a concern. That facts of *Neumeier* itself fell into the rule 3 category: A Canadian domiciliary died in an accident in Canada as the result of the alleged negligence of a New York resident. The court applied Canada's guest statute, holding that:

> It is clear that although New York has a deep interest in protecting its own residents, injured in a foreign state, against unfair or anachronistic statutes of that state, it has no

The Louisiana Experience in Comparative Perspective, 38 AM. J. COMP. L. 431, 450 n.68 (1990) listing other countries, including Austria, Hungary, Poland, Portugal, and the former East Germany, that have adopted some form of common domicile rule.

26. The *Neumeier* rule 2 choices select one law, using party expectations as a starting point. So does the English proposal, starting from a somewhat different basis. *See supra* note 16. However, choice-of-law in tort could also emphasize plaintiff-interests. The German "*Ubiquitäts*" rule, for instance, selects the law of the place of conduct or injury on the basis of which is more favorable to the plaintiff. This rule favors the plaintiff substantively; it does not necessarily favor the lex fori. Critics note that such alternative references are not available to the plaintiff in a domestic tort case. *See* Hay, *supra* note 1, at 366. With respect to American law, it has recently been argued that "choice-of-law methods that prefer local litigants, local law, or better law are unconstitutional." Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 336 (1992). For American plaintiff-favoring decisions (in cases in which courts count contacts and weigh individual interests), see *infra* notes 45 (with respect to conduct regulating and loss allocating rules), 50–54. When combined with rules of judicial jurisdiction permitting suit in several fora (which is true, for practical purposes, both in Europe and the United States, *see* Hay, *supra* note 1, at 306–09), built-in alternative references or unprincipled approaches for the determination of the applicable law facilitate forum shopping.

27. *See* Feldman v. Acapulco Princess Hotel, 520 N.Y.S.2d 477, 486 (Sup. Ct. 1987) (purpose behind *Neumeier* rule 2, first sentence, is to protect "the reasonable . . . expectations of [defendant] within its borders from the severe uncertainty of financial liability arising out of suits [outside the defendant's domicile]").

> legitimate interest in ignoring the public policy of a foreign jurisdiction—such as Ontario—and in protecting the plaintiff guest domiciled and injured there from legislation obviously addressed, at the very least, to a resident riding in a vehicle traveling within its borders.[28]

Neumeier rule 3's proviso gives it flexibility in situations where displacing the lex loci will advance relevant substantive law purposes without impairing the smooth workings of the interstate system.[29] However, in order to maintain the rule's predictability, the rule 3 proviso should be used sparingly; resort to it should serve the purpose of discouraging forum shopping or protecting any existing party expectations.[30]

By identifying the relevant values and interests in advance of an actual case, the *Neumeier* rules (and perhaps most New York decisions whether or not they follow the rules specifically) have created predictable results while avoiding, to a large extent, the inflexible results to which the lex loci may lead. Choice-of-law approaches, such as California's comparative impairment approach, and the *Restatement (Second)*'s "most significant relationship" test, may also contain a priori value judgments. As approaches, rather than rules, however, they are designed as tools for the decisions of individual cases and, absent a body of case law with precedential force, may therefore provide far less predictability of result.

The sections that follow examine post-*Neumeier* choice-of-law decisions in New York and survey the decisional law of selected states in order to explore whether decisions based on approaches display a pattern giving them some of the rules certainty of New York's *Neumeier* rules.

3. *The New York Cases After* Neumeier

Prior to the New York Court of Appeals' decision in *Boy Scouts of America, Inc. v. Schultz*, New York courts did not apply the *Neumeier* rules consistently. Several courts simply ignored them. Instead they applied interest analysis,[31] a center of

28. Neumeier v. Kuehner, 286 N.E.2d 454, 456 (N.Y. 1972).

29. *Id.* at 458. *Neumeier* rule 2, second sentence, also provides a (somewhat unspecific) level of flexibility in providing for the application of the law of the plaintiff's domicile "in the absence of special circumstances." *See supra* text accompanying note 17. *Neumeier* rule 3, including its proviso, resembles the choice-of-law rule now proposed for *all* situations by the English and Scottish Law Commissions, *see supra* note 16, in that both lack the plaintiff-bias of the German rule, *see supra* note 26. The strict formulation of the English proposal, however, may invite frequent recourse to the proviso, i.e., displacement of the rule by an interest-weighing approach.

30. *See infra* note 47.

31. *See, e.g.*, Beasock v. Dioguradi Enter., Inc., 472 N.Y.S.2d 798 (App. Div. 1984). The court applied the three-step interest analysis approach adopted in *Tooker v. Lopez* to a wrongful death claim brought by the wife of a New York truck driver against an Ohio tire manufacturer, a Washington, D.C., tire manufacturers' association, and an Ohio tire rim manufacturers' association after the truck driver was killed at a New York gas station when the truck tire exploded as it was being inflated. The court never resolved competing interests between the states, however, holding instead that a postoccurrence change in New York law removed an interest New York had in the application of its law. *Id.* at 801. Decisions in approach-oriented states also have applied this "postoccurrence change in law" rationale as the basis for applying another state's law. *See, e.g.*, Hill v. Hill, 238 Cal. Rptr. 745 (Ct. App. 1987) (discussed *infra* note 99).

gravity or grouping of contacts approach drawn from such early New York cases as *Babcock*,[32] or a most significant contacts approach[33] perhaps in acceptance of an early view that the *Neumeier* rules applied only to guest statute cases.[34]

The New York Court of Appeals revisited the *Neumeier* rules in 1985, this time in a case that did not involve a guest statute. In *Schultz v. Boy Scouts of America, Inc.*[35] the court removed any remaining uncertainty regarding the applicability of the *Neumeier* rules to cases other than those involving a guest statute. It declared that there was "no logical basis for distinguishing guest statutes from other loss-distributing rules."[36] The court traced New York choice-of-law-decisions in

32. *See, e.g.*, Nevader v. Deyo, 489 N.Y.S.2d 420 (App. Div. 1985); Blais v. Deyo, 461 N.Y.S.2d 471 (App. Div. 1983).

33. *See, e.g.*, Croft v. Nat'l Car Rental, 439 N.E.2d 346 (N.Y. 1982). The New York Court of Appeals itself failed to apply its *Neumeier* rules in a case between British plaintiffs and a Minnesota rental car company doing business in New York arising from an accident that occurred in Vermont (Vermont's law did not provide recovery under vicarious liability but New York's did). In a one-page opinion the court of appeals appeared to take a "most significant contacts" approach, never mentioning the *Neumeier* rules. The court found only minimal New York contacts and therefore applied Vermont law, finding no significant interests of New York in applying its law when neither the injured party, the place of accident, nor the automobile had any connection with the state. *Id.* at 347. Perhaps the court gave the case such cursory treatment because forum shopping seemed so obvious. Nonetheless, it missed an opportunity to apply *Neumeier* rule 3 to a case involving a rule of law other than a guest statute.

34. *See* O'Rourke v. Eastern Air Lines, Inc. 730 F.2d 842, 848 (2d Cir. 1984) (holding that lex loci remains the general rule in New York tort law unless "extraordinary circumstances" displaced that law); Rosenthal v. Warren, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973) (refusing to adopt domicile-based approach in nonguest statute case, instead applying more general interest analysis); Chance v. E.I. Du Pont De Nemours & Co., Inc., 371 F. Supp. 439, 444–45 (E.D.N.Y. 1974) (cautioning against unwarranted extension of the *Neumeier* rules). If so, that view would change with *Schultz*. *See infra* notes 35–39 and accompanying text.

35. 480 N.E.2d 679 (N.Y. 1985). New Jersey parents sued two charitable organizations for negligence in assigning a teacher to a New York day camp where the teacher sexually abused their children. New Jersey, the domicile of the plaintiffs and one of the defendants (the other was domiciled in Ohio) provided for charitable immunity that would have prevented the suit. New York, the place of conduct, did not.

36. *Id.* at 686. Because the *Neumeier* rules were originally designed for guest statute cases, *Schultz*'s clarification that they apply to all tort cases may ultimately require a clarification of the rules.

Because certain torts, such as those in product liability actions, may involve conduct in one state that causes injury in another, a factual situation may arise where both rule 2, first sentence, and rule 2, second sentence, appear to be applicable. This might occur, for example, in a product liability action in which the defective product is manufactured in the defendant's home state (and that state's law favors the defendant) but caused injury in the plaintiff's home state (and that state's law favors the plaintiff). In these situations perhaps the language of rule 2, second sentence, stating that the law of the plaintiff's home state will apply "in the absence of special circumstances" implies that rule 2, first sentence, takes precedence. One recent federal court decision applying New York law, *In re* DES Cases, 789 F. Supp. 552, 567 (E.D.N.Y. 1992), solved this problem by determining that the locus of the tort in a group of New York DES product liability cases was the place where the "last event" creating liability occurred. In that case, the court held that the "last event" was the ingestion of the drug, which, for purposes of the New York action, the court assumed was in New York. *Id.* For purposes of this survey, the broadest reading of *Neumeier* rule 2 will be used. *Neumeier* rule 2, first sentence, applies when tortious conduct occurring in the defendant's home state caused injury there or elsewhere and the law of the defendant's home state would not hold the defendant liable or

tort from *Babcock* to *Tooker* to *Neumeier*. It derived from these early cases an important, yet difficult, distinction between rules of law that regulate conduct and those that allocate loss. *Schultz* observed that "the relative interests of the domicile and locus jurisdictions in having their laws apply will depend on the particular tort issue in conflict in the case."[37] If the conflicting rules address the appropriate standards of conduct, for instance, "rules of the road," then the law of the place of tort will have "a predominant, if not exclusive concern."[38] If, on the other hand, the rule's purpose is to allocate losses that result from tortious conduct, the locus jurisdiction will have only a "minimal interest in determining the right of recovery or the extent of the remedy in an action by a foreign domiciliary for injuries resulting from the conduct of a codomiciliary. . . ."[39]

In the wake of *Schultz*, many New York courts accepted *Neumeier* and its rules as the applicable choice-of-law method in all tort cases involving conflicting postoccurrence loss allocation rules.[40] Even when they failed to apply the rules

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would be more favorable in some way than the laws of the other states at issue. Similarly, *Neumeier* rule 2, second sentence, applies when injury in the plaintiff's home state was caused by conduct there and the law of that state would hold the defendant liable or is in any way more favorable to the plaintiff than the laws of the other states at issue. (*Neumeier* rules 1 and 3 require no clarification. Rule 1 applies whenever parties share a common domicile and rule 3 continues to apply as the default rule.)

Professor Weintraub has also proposed a rule to govern products liability cases. He would select the law of the plaintiff's habitual residence if the harm was caused there or the products were there available through commercial channels and their availability was foreseeable to the defendant. The defendant could also elect that law. Also, failing that, the plaintiff, and thereafter the defendant, could select the defendant's principal place of business, the place of acquisition or manufacture of or harm caused by the product. Additional proposed rules would apply to the availability of punitive damages. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 74–75 (3d ed. 1986 & Supp. 1991). He also recommends that the rule previously proposed for all torts be modified to apply to torts not involving enterprise liability, and he suggests that all enterprise liability torts be governed by a rule similar to the one proposed for products liability. *Id.* at 75. *See also* Russell J. Weintraub, *Methods for Resolving Conflict of Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129. It should be noted that Professor Weintraub's proposals, while far more differentiated than the *Neumeier* rules or other current methods, do not encompass a general plaintiff bias, as does the German rule. *See supra* note 26.

37. Schultz v. Boy Scouts of America, Inc., 480 N.E.2d 679, 684 (N.Y. 1985).

38. *Id.*

39. *Id.* at 685. Loss allocating rules are seen as those that govern such issues as damage limitations, vicarious liability, and immunity from suit. *Id.* In contrast, rules governing the availability of punitive damages have been characterized as conduct regulating rules. *See* Symeonides, *supra* note 25, at 451.

40. *See, e.g.*, Feldman v. Acapulco Princess Hotel, 520 N.Y.S.2d 477 (Sup. Ct. 1987) (*Neumeier* rule 2(a) applied to a claim arising from swimming pool accident at Mexican resort hotel involving a New York plaintiff and a Mexican defendant, the owner of the hotel. Mexican law limited damages to "moral damages" and would not allow damages for pain and suffering. New York had no such damage limitation. The court characterized the damage limitation rules as loss-allocating and applied Mexican law under *Neumeier* rule 2(a)). *See also* Whisenhut v. Sylvania Corp., 671 F. Supp. 214 (W.D.N.Y. 1987) (rule 3); Murphy v. Acme Markets, Inc., 650 F. Supp. 51 (E.D.N.Y. 1986) (rule 3); Stevens v. Shields, 499 N.Y.S.2d 351 (Sup. Ct. 1986) (rule 3); Weisberg v. Layne-New York Co., 517 N.Y.S.2d 304 (Sup. Ct. 1987) (rule 3); Reale v. Herco, Inc., 589 N.Y.S.2d 502 (App. Div. 1992) (rule 3). For recent surveys discussing New York decisions, see P. John Kozyris & Symeon C. Symeonides, *Choice of Law in the American Courts in 1989: An Overview*, 38 AM. J. COMP. L. 601, 616–17 (1990); P. John Kozyris, *Choice of Law in the American Courts in 1987: An Overview*, 36 AM. J. COMP. L. 547, 554–55 (1988) (discussing *Whisenhut* and other federal cases applying New

directly (ostensibly invoking another choice-of-law approach), the courts often employed reasoning similar to that underlying the *Neumeier* rules. Not surprisingly, New York courts often applied this *Neumeier*-like reasoning in the context of interest analysis.[41]

In *Cain v. Boy Scouts of America*,[42] for example, the court applied interest analysis in a case brought against a New York domiciliary by a New York boy scout for injuries that occurred at a camp in New Jersey. While not expressly applying *Neumeier* rule 1, the court's interest analysis focused on the parties' common domicile and reached a result consistent with rule 1.[43] More recently, in *DeRose v. New Jersey Transit Rail Oper.*,[44] a New York court applied *Neumeier*-like reasoning in the context of interest analysis to a wrongful death action brought by the father of a New York resident who was killed in New York when struck by a train operated by a New Jersey municipal corporation.[45]

York choice-of-law principles). *See also* Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1105–16 (1985) (discussing application of New York choice-of-law principles).

The courts, however, did not always succeed in applying the rules correctly. *See, e.g.*, Bader v. Purdom, 841 F.2d 38 (2d Cir. 1988) (*Neumeier* rule 3 applied to Canadian dog bite accident involving New York plaintiff and Canadian defendant where Canadian law allowed the dog owner to file a claim for contribution against the parents of the injured child for their negligent supervision of the child while New York's doctrine of intrafamily tort immunity did not; court incorrectly applied *Neumeier* rule 3, but concurring opinion recognized that rule 2, first sentence, was applicable rule). *See also* LaForge v. Normandin, 551 N.Y.S.2d 142 (App. Div. 1990) (*Neumeier* rule 3 incorrectly applied to New York auto accident case involving a Canadian plaintiff and Canadian and New York defendants; *Neumeier* rule 1 should have applied to the Canadian defendant).

41. Thomas v. Hanamer, 489 N.Y.S.2d 802 (App. Div. 1985), a case decided only a few months after *Schultz*, was the only case surveyed that applied *Neumeier*-like reasoning in a context other than interest analysis. *Thomas* involved a Canadian automobile accident between a New York plaintiff and a New York defendant. At issue was a Canadian law that restricted recovery to economic loss. *Id.* at 804. New York's law would allow recovery of damages for pain and suffering as well as economic loss. The court applied a "grouping of contacts" approach and held that New York had the most significant contacts because it was the place of domicile of the parties, the place where the car was registered, and the place where both parties began their trips and intended to return. *Id.* at 805. Most revealing is the court's focus on the parties' common domicile. Furthermore, the court held that this case was similar to *Schultz* because it involved a loss allocation rule and parties with a common domicile. *Id.* However, while the court recognized that the result reached was consistent with "the unanimous line of decisions applying common-domicile rather than locus law in cases exhibiting the basic *Babcock v. Jackson* affiliation pattern," it never explicitly applied *Neumier* rule 1. *Id.* at 806.

42. 519 N.Y.S.2d 43 (App. Div. 1987).

43. As in *Schultz* the issue in *Cain* was whether New Jersey's charitable immunity statute applied. The court characterized the charitable immunity statute as loss-allocating and held that New Jersey had a minimal interest in having its law apply because neither party was a New Jersey domiciliary. *Id.* at 44. New York, for its part, was said to have an important interest "in protecting the resident plaintiffs, whose relationship with the defendant arose because of the latter's presence in this state." *Id.* This reference to the protection of resident plaintiffs is consistent with *Neumeier* rule 1's protective purpose in situations where the occurrence of the accident in another state was "purely adventitious." *See* Neumier v. Kuehner, 286 N.E.2d 454, 456 (N.Y. 1972). *See also supra* notes 22–25 and accompanying text (discussing purpose of *Neumier* rule 1).

44. 565 N.Y.S.2d 305 (App. Div. 1991).

45. New York law, for the most part, favored the plaintiff. On the basis of an implicit loss-allocation characterization the court concluded that New York had a stronger interest in determining the allocation of losses at issue than New Jersey, the defendant's home state, because the plaintiff

While New York choice-of-law decisions after *Schultz* moved toward more predictable results (either through the direct application of the rules or through consistent *Neumeier*-like reasoning), some aspects of the rules and of the case law may again reduce certainty. One area of uncertainty results from *Neumeier* rule 3's proviso that allows for the displacement of the law of the place of injury if doing so "will advance the relevant substantive law purposes without impairing the smooth workings of the multistate system or producing great uncertainty for litigants."[46] The proviso potentially provides an avenue for the disregard of the

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was a New York resident, the tortious conduct and injury took place in New York and New York had a "deep and abiding interest in protecting its resident injured as a result of a nonresident defendant's presence in [the] state." *Id.* at 306. The *DeRose* court's focus on New York's interest is strikingly similar to one of the purposes behind *Neumeier* rule 2, second sentence. *See supra* note 27 and accompanying text (discussing *Neumeier* rule 2). For other New York decisions that also used interest analysis and reached the same result as the *Neumeier* rules, see Crossland Sav. FSB v. Rockwood Ins. Co., 692 F. Supp. 1510 (S.D.N.Y. 1988) (interest analysis consistent with *Neumeier* rule 3); O'Donnell v. NPS Corp., 518 N.Y.S.2d 418 (App. Div. 1987) (interest analysis consistent with *Neumeier* rule 1); Awes v. Cross, 575 N.Y.S.2d 991 (App. Div. 1991) (interest analysis consistent with *Neumeier* rule 1); Coouey v. Osgood Mach., Inc., 582 N.Y.S.2d 873 (App. Div. 1992) (interest analysis consistent with *Neumeier* rule 3).

Some decisions, however, applied interest analysis and achieved results inconsistent with the *Neumeier* rules. *See* Roach v. McGuire & Bennett, 539 N.Y.S.2d 138 (App. Div. 1989) (Pennsylvania law barring recovery from a general contractor when worker received workman's compensation from subcontractor applied in an action against a New York general contractor by a New York construction worker for injury in Pennsylvania). Had the *Neumeier* rules been used in *Roach*, New York law would have applied at least with respect to the New York defendant. The *Roach* court's failure to apply the *Neumeier* rules was due to the presence of a Pennsylvania subcontractor who was the plaintiff's employer. *See also* First Interstate Credit v. Arthur Andersen & Co., 541 N.Y.S.2d 433 (App. Div. 1989) (reversing lower court decision that applied interest analysis in a manner *consistent* with *Neumeier* rule 2, first sentence). For a discussion of other recent New York decisions applying interest analysis, see George B. Reese, *Conflict of Laws*, 42 SYRACUSE L. REV. 457. 483-86 (1991).

46. *See Neumeier*, 286 N.E.2d at 458. In Stevens v. Shields, 499 N.Y.S.2d 351 (Sup. Ct. 1986), the court used the *Neumeier* rule 3 proviso to apply Florida law to a claim arising from a New York accident between a New York plaintiff and a Florida defendant. Florida law would have called for the application of vicarious liability principles to the minor defendant's parent because she signed the defendant's driver's license application. New York would not hold the parent vicariously liable. The court held that Florida had a significant interest in the application of its law to its domiciliaries, and resort to Florida law would not harm New York's interest in protecting its residents from liability because no New York defendant was involved in the case. *Id.* at 353. Florida law, the court concluded, would also further the smooth workings of the multistate system because "[the parent's] only reasonable expectation would have been that the law of her domicile would apply to her liability for her son's negligent operation of a motor vehicle wherever he may drive. . . ." *Id*; *see also* Murphy v. Acme Markets, 650 F. Supp. 51 (E.D.N.Y. 1986) (plaintiff favoring New York law applied under the proviso to claim brought by New York plaintiff injured in New Jersey, at job site owned by Pennsylvania defendant, while working for New York employer; New York had interest in protecting New York domiciliaries injured in foreign jurisdictions, while New Jersey had no interest in applying its loss-allocation rules when no party was New Jersey domiciliary). For New York decisions declining to apply the proviso where it may have been applicable, see Weisberg v. Layne-New York Co., 517 N.Y.S.2d 304 (Sup. Ct. 1987) (in wrongful death case between New York plaintiff and New Jersey defendants over a New Hampshire accident, the court applied New Hampshire law allowing for greater recovery under *Neumeier* rule 3). *See also* Whisenhut v. Sylvania Corp., 671 F. Supp. 214 (W.D.N.Y. 1987) (wrongful death action between Arkansas plaintiff and New York, New Jersey, and Pennsylvania defendants; New York's shorter statute of limitations applied to all defendants). In both cases the court failed to consider party expectations before declining to apply the rule 3 proviso.

basic rules and the use of a preferred (or better) rule of law, perhaps the lex fori.[47] All rule-based approaches to choice of law do, of course, need an ultimate escape (corrective) device, as the European experience in contracts choice-of-law unification also teaches.[48] There, however, the tradition has been more rule-oriented. The question, therefore, is to what extent U.S. courts can resist the temptation to start the analysis with the broadly phrased exception rather than with the narrowly drawn rule? The same question may arise in England if the proposal for a statutory choice-of-law rule in tort should become law.[49]

Another area of uncertainty stems from the distinction the case law draws between conduct-regulating and loss-allocating rules. Several New York cases interpreting the same New York statute demonstrate the problem that inheres in the distinction. In *Calla v. Schulsky*[50] a New York plaintiff was injured at a job site in New Jersey when a ladder on which he was working fell. He sued the mall owner and the store owner, both of whom were New York domiciliaries. A New

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In *Weisberg*, if both New Jersey and New York law provided for less recovery, application of either state's law would be more consistent with party expectations than application of the New Hampshire law. Similarly, in *Whisenhut* after characterizing the statute of limitations as substantive (for a discussion of limitations, *see* SCOLES & HAY, *supra* note 2, at 59), the court did not examine whether Pennsylvania and New Jersey had similar statutes of limitations as Arkansas. If they had, party expectations might be better served by applying those states' longer statutes. In these situations, the so-called "false common domicile" cases, application of a modified *Neumeier* rule 1, applying the law common to the parties' different domiciles, would accomplish goals similar to *Neumeier* rule 1 and avoid problems with application of the rule 3 proviso. *See* Hay, *supra* note 1, at 387. Louisiana's recent codification of its choice-of-law principles creates precisely this rule. *See infra* note 70.

47. New York courts do not have specific standards for the determination of whether the *Neumeier* rule 3 proviso applies. *Neumeier* itself lends little guidance in this respect. In refusing to apply the proviso, the court in *Neumeier* had merely noted that:

> ignoring Ontario's policy requiring proof of gross negligence in a case which involves an Ontario-domiciled guest at the expense of a New Yorker does not further the substantive law purposes of New York. In point of fact, application of New York law would result in the exposure of this State's domiciliaries to a greater liability than that imposed upon resident users of Ontario's highways. Conversely, the failure to apply Ontario's law would "impair" . . . "the smooth working of the multistate system [and] produce great uncertainty for litigants" by sanctioning forum shopping and thereby allowing a party to select a forum which could give him a larger recovery than the court of his own domicile.

Neumeier, 286 N.E.2d at 458. The *Schultz* court, for its part, stated that *Neumeier* rule 3's purpose was, in part, to discourage forum shopping. *See* Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 687 (N.Y. 1985) (application of New Jersey law would enhance the smooth working of the multistate system by reducing the incentive for forum shopping). It also indicated that the proviso would be used to protect party expectations, holding that application of New Jersey law in that case would "provide certainty for the litigants whose only reasonable expectation surely would have been that the law of [New Jersey] . . . would apply." *Id.*

Neumeier rule 3's proviso should be used sparingly so as to preserve the certainty that the rules were meant to provide. *Neumeier* and *Schultz* teach that when displacing the law of the state where the injury occurred would not frustrate that state's policy, then use of the proviso will discourage forum shopping and protect party expectations. An expanded use, however, would allow courts to substitute an ad hoc interest approach in situations where the first two *Neumeier* rules do not apply.

48. For a discussion of the European Contracts Choice of Law Convention and of Swiss law, see Hay, *supra* note 1, at 359.

49. *See id.* at 364; *supra* notes 16, 29 (the English and Scottish Law Commissioners' proposal for a (statutory) return to the lex loci subject to a proviso.)

50. 543 N.Y.S.2d 666 (App. Div. 1989).

York statute, Labor Law section 240, provided for absolute liability of the owner of property for injuries due to unsafe ladders or scaffolding.[51]

The court recognized, at the outset, that the statute has both conduct-regulating and loss-allocating elements. The statute regulates conduct in that it "imposes a duty on the owner (and contractor) to exercise oversight to ensure that scaffolding and ladders used by workers are safe."[52] However, by placing the primary duty on the owner, who has no control or supervision over the work, it makes the owner vicariously liable for the negligence of the subcontractor or even the worker himself.[53] Vicarious liability, the court said, "merely represents a policy determination to effect a deliberate allocation of risk."[54]

Observing that "a particular statute may defy classification and render unavailing the criteria governing choice of law suggested in *Schultz v. Boy Scouts of America*," the court reframed the issue as a conflict between the law of the place of tort (New Jersey) and the law of the place of contracting (New York) and applied New York law.[55] In so doing, the court appears to have followed *Neumeier* rule 1, holding that "application of the law of the common domicile is favored because of 'its interest in enforcing the decisions of both parties to accept both the benefits and the burdens of identifying with that jurisdiction.' "[56]

In *Salsman v. Barden*,[57] also involving Labor Law section 240, another court declined to apply the *Neumeier* rules because it classified the statute as a conduct-regulating rule. The statute, the court pointed out, requires those persons subject to it to follow specific safeguards or safety measures; failure to do so results in absolute liability. Because no liability can be found absent a failure to follow the safety requirements, the court concluded that the statute was "first and foremost" a conduct-regulating rule.[58] Recognizing that its characterization was contrary to *Calla v. Schulsky*, the court explained that following *Calla* would mean the application of New York law to a construction site outside New York when the parties shared New York as their common domicile.[59] This fear, of course, was

51. *Id.* at 667. Liability under the statute was imposed even in the absence of an employer-employee relationship and contributory negligence was not a factor. *Id.* New Jersey did not have a similar statute.

52. *Id.* at 669.

53. *Id.*

54. *Id.* The court noted, however, that "the classification of statutes . . . may be regarded as somewhat artificial in that the act of shifting financial responsibility often serves to regulate conduct by providing an inducement to exercise oversight. . . ." *Id.*

55. *Id.*

56. *Id.* at 670.

57. 564 N.Y.S.2d 546 (Div. 1990).

58. *Id.* at 548.

59. *Id.* at 549. Relying on reasoning similar to that in *Salsman*, a New York federal court also characterized Labor Law § 240 as a conduct-regulating rule. *See* Zangiacomi v. Saunders, 714 F. Supp. 658, 664 (S.D.N.Y. 1989). There, a New York construction worker was injured when working on a New York defendant's property in Connecticut. Connecticut law did not impose the same strict liability principles as New York's Labor Law § 240. In the court's view, characterizing Labor Law § 240 as loss-allocating would lead to an unfair result because property owners who hire workmen

unfounded. If Labor Law section 240 were characterized as loss-allocating, the *Neumeier* rules would apply under *Schultz*. In a case involving two New York parties injured out-of-state, as in *Zangiacomi v. Saunders*,[60] New York's law, as the law of the parties' common domicile, would apply under *Neumeier* rule 1, a result arguably consistent with party expectations. In cases involving a New York defendant and plaintiffs from other states, however, *Neumeier* rule 3 would apply and, absent application of the proviso, would refer to the law of the place of injury and not to the law of each plaintiff's domicile.

All this is to say that the *Schultz* distinction between rules of conduct regulation and rules of loss allocation creates more trouble than it is worth.[61] The reasoning (and even the results of cases applying the distinction) can generally be seen as both confusing and inconsistent, thereby taking away from the certainty and predictability that the *Neumeier* rules seek to provide.[62] The distinction should be abandoned in favor of the application of the *Neumeier* rules to all tort cases, no matter what the nature of the rule. Those who favor the distinction consider the

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from different states to perform work in one state would be subject to the laws of each worker's home state. It therefore applied Connecticut law. *See also* Fiske v. Church of St. Mary of the Angels, 802 F. Supp. 872 (W.D.N.Y. 1992) (characterizing Labor Law § 240 as conduct regulating and applying New York law to New York construction accident involving Pennsylvania plaintiff).

60. *See supra* note 59.

61. For two other New York cases illustrating the difficult distinction between loss-allocating and conduct-regulating rules, see Jones V. Munson Transp., Inc., 685 F. Supp. 879 (E.D.N.Y. 1988). A Wisconsin truck driver was killed in New York in an accident with an Illinois resident and the truck driver's widow, also a Wisconsin domiciliary, sued. The Illinois resident, in turn, brought a contribution action against the decedent's employer. At issue was the applicability of Wisconsin's worker's compensation law that precluded the action for contribution. *Id.* at 880. The court characterized New York's rule allowing contribution against the employer as "conduct-regulating" since the purpose of the rule is "to deter tortious activity by creating a deterrent." *Id.* at 882. It did not explain the type of deterrent the rule created and whom it was designed to deter. The court also did not address Wisconsin's rule that, because it precludes actions for contribution, could be seen as loss-allocating. *See also* Arochem Int'l, Inc. v. Buirkle, 968 F.2d 266 (2d Cir. 1992) (federal court, applying New York law, characterized a California "judicial-proceeding privilege" as conduct-regulating).

62. *See, e.g.*, Stevens v. Shields, 499 N.Y.S.2d at 353; *see also* discussion *supra* notes 40, 46. The court characterized a vicarious liability rule as loss-allocating. *Stevens*, 499 N.Y.S.2d at 353. One of the purposes of the rule, however, was to impose a "supervisory responsibility upon the parent or guardian signing a minor's application for a driver's license" which would "cause parents . . . to endorse only those minors whom they felt to be mature enough to accept and appreciate the obligations of driving an automobile." *Id.* This goal seems to regulate conduct and not to allocate loss. As a result the Florida rule appears to have a dual purpose, in that it both regulates conduct and allocates loss. The *Calla v. Schulsky* court faced the same problem, but instead of recognizing the dual purpose of the statute, it simply applied the law of the parties' common domicile.

Even in *Schultz* it was less than clear how charitable immunity should be characterized. The majority considered the New Jersey statute as loss-allocating. Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 685 (N.Y. 1985). The dissent pointed out, however, that New York's rule of noncharitable immunity could very well be seen as conduct-regulating. *Id.* 699. The conflict between the majority and dissent in *Schultz* will be a common one in cases where one state has a loss-allocating statute and another state, by failing to adopt such a statute, has expressed its interest (or at least permits the inference of an interest) in deterring conduct. *See also* Kozyris & Symeonides, *supra* note 40, at 616–17 (discussing the difficulty that New York courts have with the distinction).

difficulty in applying it a satisfactory price for "more rational solutions."[63] Equally fair (if not fairer) results, however, can be achieved by eliminating the distinction and applying the *Neumeier* rules directly.[64]

B. Louisiana: A New Rules State

With the recent codification of its conflicts law, Louisiana joined New York as a state following specific rules rather than a generalized approach.[65] Although phrased in terms of California's "comparative impairment" approach,[66] the Louisiana Code's (Code) broad policy objectives remind of the *Restatement (Second)*. They focus on the contacts of the state to the parties and the events in light of policies similar to those listed in section 6 of the *Restatement (Second)*.[67] The Code goes beyond the *Restatement (Second)*, however, by setting forth a priori

63. *See* Symeonides, *supra* note 25, at 444.

64. For example: A plaintiff from state *A* sues a state *B* defendant in state *B* for an injury caused in that state by the defendant's negligent act there. If state *B* law would not hold the defendant liable (or were more favorable to the defendant) then *Neumeier* rule 2, first sentence, refers to the law of state *B*; this is the same result that would be achieved by characterizing the law at issue as conduct-regulating. If state *A* law were more favorable to the defendant, then rule 3 would again call for the application of state *B* law, the same as characterizing the law as one of conduct regulation would do, absent application of the proviso. If the defendant acted in state *A* causing injury there, and state *A* would hold the defendant liable (or were less favorable to defendant than state *B*'s law), then state A law would apply under *Neumeier* rule 2; again, the court would reach the same result if it applied the law of the place of tort after characterizing the rule as one of conduct regulation. Similarly, if state *A*'s rule were more favorable to defendant, then *Neumeier* rule 3 would again apply state *A* law absent application of the rule 3 proviso. *See* Hay, *supra* note 1, at 390; *see also Fiske*, 802 F. Supp. at 882 (recognizing that same result would be reached if Labor Law section 240 were characterized as loss-allocating). *Jones*, 685 F. Supp. at 882 (applying *Neumeier* rule 3 but recognizing that same result would be reached if the law at issue were characterized as conduct-regulating); *In re DES Cases*, 789 F. Supp. at 567–68 (applying New York law characterized as "conduct-regulating" to products liability action brought by New York plaintiffs for injuries in New York caused by a drug manufactured outside the state, but recognizing that same result would be reached if law were seen as loss-allocating).

Only some *Neumeier* rule 1 cases would be affected by abandoning the distinction between loss-allocating and conduct-regulating rules. In cases involving parties who share a common domicile, *Neumeier* rule 1 would always apply the law of the parties' domicile; however, a court that characterized a rule as conduct-regulating would almost always apply the law of the place of a tort. Arguably, abandoning the distinction here produces a fairer result because the parties' expectations, to the extent that they had any, are protected more by application of the law of their common domicile than by application of the law of the place of tort even if the issue is the standard of conduct governing the defendant's actions. While it is true that the locus jurisdiction has an interest in regulating conduct within its borders, this interest is considerably less when the state regulates conduct by a nonresident that affects only another nonresident. Therefore, in situations involving two parties with the same domicile, the law of their common domicile should apply over the law of the place of tort regardless of the rule involved. This suggestion is hardly novel. *See supra* note 46.

65. *See* La. Civ. Code Ann. arts. 3515–3549 (West Supp. 1992). For a thorough discussion of the new Louisiana Code, see Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 Tul. L. Rev. 677 (1992).

66. For a brief discussion of the comparative impairment approach, see *infra* notes 92–93 and accompanying text.

67. *See* La. Civ. Code Ann. art. 3515 and revision comments. *See also* Scoles & Hay, *supra* note 2, at 599.

legislative determinations, in the form of specific rules, of the general policy goals listed in article 15.[68] These rules, with respect to tort, as well as the reasoning behind them, resemble the *Neumeier* rules as modified in *Schultz*.

The Code adopts the *Schultz* distinction between conduct-regulating and loss-allocating rules providing for the application of the lex loci in cases involving issues of conduct regulation when conduct and injury occur in the same state.[69] For cases involving loss-allocating rules, the Louisiana Code adopts *Neumeier* rule 1.[70] Also, as a result of the focus of article 44 on the parties' domiciles and their expectation that they will be subject to their own laws,[71] the Code will reach results consistent with *Neumeier* rule 2.[72] Louisiana's Code also creates an approach governing situations where conduct and injury occur in different states.[73]

As significant as the similarity of the new codification to the *Neumeier* rules is its similarity to the reasoning displayed by Louisiana case law prior to the Code's enactment. The general approach of article 15—which calls for the identification of the various state policies implicated and an evaluation of the "strength and pertinence" of those policies in light of "the relationship of each state to the parties and the dispute" and "the policies and needs of the interstate and international systems"[74]—parallels the approach, first taken in *Jagers v. Royal*

68. *See, e.g.*, LA. CIV. CODE ANN. art. 3542 (West Supp. 1992) (describing arts. 3543-3546 as the a priori rules governing "delictual and quasi-delictual obligations" (torts)).

69. *See id.* art. 3543. Louisiana's Code goes further than the *Schultz* court, however, in creating a separate set of rules governing cases where conduct and injury occur in different states. *See id.* (law of state of injury applies provided that injury was foreseeable in that state; but if Louisiana domiciliary acted in Louisiana and Louisiana law provides for lower standard, then Louisiana law applies). *See also* Symeonides, *supra* note 65, at 699-705.

70. *See* LA. CIV. CODE ANN. art. 3544(1) (West Supp. 1992) and revision comments (art. 3544 chooses domicile as primary connecting factor for cases involving rules of loss allocation; "the application of the law of the common domicile has become routine in all states that have abandoned the traditional lex loci delicti rule"). For a recent case applying the Code consistent with *Neumeier* rule 1, see Levy v. Jackson, 1993 WL 5561 (La. Ct. App. Jan. 15, 1993) (applying Alabama guest statute to action involving Alabama plaintiff and defendant over accident in Louisiana). *See also* Symeonides, *supra* note 25, at 449-51 (Louisiana Code adopts the "common domicile rule" accepted in both American and foreign jurisdictions). The Code also extends *Neumeier* rule 1, by including parties with different domiciles when those states have the same standard for allocating loss. *See* LA. CIV. CODE ANN. art. 3544(1). *See also* Symeonides, *supra* note 65, at 723-25 (describing these so-called "fictitious common domicile" cases). Under the *Neumeier* rules as they exist now, this result could be reached only by means of the proviso to rule 3. *See supra* note 46 and accompanying text. The New York courts generally have not taken this route; yet it seems preferable to effectuate an identifiable policy objective through an express rule than to leave its achievement to an escape device.

71. *See* LA. CIV. CODE ANN. art. 3544 (West Supp. 1992) revision comments.

72. *See id.* art. 3544(2).

73. *Id.* art. 3544(2)(b) (applying the law of the state of injury if the injured person is domiciled in that state, injury in that state was foreseeable, and that the state's law provided a higher standard of financial protection for the injured person than the state of conduct; otherwise the court is to resort to the general principles of art. 3542). While the *Neumeier* rules leave unresolved the case where conduct and injury occur in different states, the portion of *Neumeier* rule 2, second sentence, providing for its applicability absent "special circumstances" might indicate a different result under New York's rules. *See also* Symeonides, *supra* note 65, at 725-31 (describing the new Code's application to split-domicile cases).

74. *See* LA. CIV. CODE ANN. art. 3515 (West Supp. 1992).

Indemnity Co.[75] and later followed by other Louisiana courts,[76] that combined interest analysis and the *Restatement (Second)* approach. Several pre-Code Louisiana decisions, for example, represent an implicit application of a common domicile rule prior to its codification.[77] The court in *Jagers* had applied the law of the parties' common domicile.[78] Other cases similarly foreshadowed the new Code. In *Brown v. DSI Transports*,[79] a Louisiana court applied the lex fori, which, however, was also the law common to the parties' different domiciles, to the exclusion of the lex loci delicti because the state of injury was said to have a lesser interest.[80] The court's rationale comports with the reasoning underlying article 44(1).[81] And in *Lee v. Ford Motor Co.*,[82] the court reached a result consistent with article 45(1), governing product liability cases: Louisiana law prohibits the

75. 276 So. 2d 309 (La. 1973).

76. *See, e.g.*, Brinkley & West, Inc. v. Foremost Ins. Co., 499 F.2d 928 (5th Cir. 1974). For a survey of Louisiana cases following the approach set forth in *Jagers* and *Brinkley*, see James J. Hautot, Comment, *Choice of Law in Louisiana: Torts*, 47 LA. L. REV. 1109 (1987); *see also* Smith, *supra* note 40, at 1078–80.

77. See, e.g., Hanzo v. Liberty Mut. Ins. Co., 508 So. 2d 928 (La. Ct. App. 1987) (Louisiana law applied where two Louisiana plaintiffs were injured in Hawaii when a car driven by a Louisiana defendant left the road and crashed into an embankment); Richard v. Beacon Nat'l Ins. Co., 442 So. 2d 875 (La. Ct. App. 1983) (applying law of parties' common domicile); Powell v. Warner, 398 So. 2d 22 (La. Ct. App. 1981) (Mississippi law to a case involving Mississippi parties).

78. *See Jagers*, 276 So. 2d at 313; *see also* Symeonides, *supra* note 25, at 451 n.74 (recognizing similarity between *Jagers* and the facts of New York's *Babcock v. Jackson*, which led to New York's adoption of the common domicile rule in *Neumeier*); Symeonides, *supra* note 65, at 701 (indicating that *Jagers* may have also implicitly adopted the distinction between loss-allocating and conduct-regulating rules).

79. 496 So. 2d 478 (La. Ct. App.), *writ denied*, 498 So. 2d 18 (La. 1986).

80. *Id.* The court pointed out that because the plaintiff was domiciled in Louisiana, the economic impact of a decision to apply Alabama's contributory negligence rule would be felt in Louisiana. *Id.* at 482. The court also noted that its decision would be different if the conflicting laws concerned standards of negligence. *Id.* at 483 n.5. This possibly suggests that Louisiana's pre-Code approach adopted the distinction between conduct-regulating and loss-allocating rules.

81. *See* LA. CIV. CODE ANN. art. 3544(1) (West Supp. 1992). This result is also consonant with the application of a modified *Neumeier* rule 1. *See* Hay, *supra* note 1, at 387. For other cases with results consistent with the new Louisiana Code and the *Neumeier* rules, see Willett v. National Fire & Marine Ins. Co., 594 So. 2d 966 (La. Ct. App.), *writ denied*, 598 So. 2d 355 (La. 1992) (Louisiana law resulting in increased recovery for New Hampshire plaintiffs applied to case involving Louisiana accident and Louisiana defendant; result consistent with art. 3544(2)(a) and *Neumeier* rule 3); Piper v. Alamo Rent-A-Car, Inc., 567 So. 2d 175 (La. Ct. App. 1990) (Louisiana law applied where Louisiana plaintiff injured in Louisiana by car rented from Florida rental company and driven by Washington defendant; for vicarious liability issue, LA. CIV. CODE ANN. art. 3542, as "guided" by art. 3544(2)(a) would provide same result); Smith v. Xerox Corp., 718 F. Supp. 494 (E.D. La. 1989) (Louisiana law applied in case involving Louisiana plaintiff, California defendant and injury in Louisiana consistent with art. 3544(2)(a) and *Neumeier* rule 2, second sentence); *In re* Air Crash Disaster Near New Orleans, 789 F.2d 1092 (5th Cir. 1986) (Louisiana law providing greater recovery than Uruguayan law applied between Uruguayan plaintiffs and non-Louisiana defendant involving Louisiana air crash litigation; result same under art. 3544(b)(1)); Karavokiros v. Indiana Motor Bus Co., 524 F. Supp. 385 (E.D. La. 1981) (applying Louisiana law prohibiting punitive damages; consistent with art. 3546); Burns v. Holiday Travels, Inc., 459 So. 2d 666 (La. Ct. App. 1984) (Florida law applied in an action by Louisiana plaintiffs against a Florida defendant to recover for emotional distress suffered while on vacation in Florida; result consistent with art. 3544(2)(a) and *Neumeier* rule 2, first sentence). For a discussion of earlier pre-Code Louisiana decisions, see also Hautot, *supra* note 76, at 1109–52.

82. 457 So. 2d 193 (La. Ct. App. 1984).

recovery of punitive damages applied in an action arising from the death of a Louisiana resident killed as a result of an alleged defect in an automobile purchased from a Louisiana dealer and manufactured in Georgia.[83]

These pre-Code decisions suggest, however tentatively, that Louisiana may have simply codified a priori value judgments that existed implicitly in Louisiana case law. Four of the pre-Code Louisiana cases appear to have adopted a common domicile rule.[84] *Brown*, moreover, followed Louisiana's "fictitious common domicile" rule and applied the law common to both parties' different domiciles.[85]

States following other approaches have yet to convert decisional law into statutory choice-of-law rules. The following sections, however, illustrate that several "approach" states may also have created *Neumeier*-like decisional patterns that display certain predetermined value choices.

III. Approach-Oriented States

The *Neumeier* rules were born of a synthesis of case law that sought an alternative to the classic lex loci rule in tort conflicts law. The pre-*Neumeier* case law had adopted an approach to the choice-of-law problem, namely, to determine the center of gravity or some similar focal element of the particular case. As noted earlier, such an approach may leave the resolution of concrete cases very much in the eye of the beholder; *Neumeier* returned to rules precisely to guard against that kind of uncertainty."[86] The difference between the rules of traditional conflicts law and those of the *Neumeier* decision is that the latter proceed on the basis of predetermined interests and values: they do not envision ad hoc determinations, they are "principled rules."[87]

"Interest analysis," in the form proposed by Currie (and not pursued further in this survey),[88] does not weigh interests, either in an a priori fashion or case by case. In the main, it applies the lex fori whenever the case presents a "true conflict."[89] A variation of interest analysis, Currie-style, developed and took hold in California: the "comparative impairment" approach does undertake to weigh

83. *See also* Ramsey v. Bell Helicopter Textron, Inc., 704 F. Supp. 1381 (E.D. La. 1989) (Louisiana law prohibiting punitive damages applied in case between Louisiana plaintiff and Texas defendant involving allegedly defective helicopter; result consistent with art. 3545(1) and *Neumeier* rule 3); Pittman v. Kaiser Aluminum & Chem. Corp. 559 So. 2d 879 (La. Ct. App.), *writ denied*, 563 So. 2d 885 (La. 1990) (Louisiana law prohibiting punitive damages applied in product liability suit brought by Louisiana plaintiff against California defendant; same result under art. 3545(1) and *Neumeier* rule 3).

84. Hanzo v. Liberty Mut. Ins. Co., 508 So. 2d 928 (La. Ct. App. 1987); Richard v. Beacon Nat'l Ins. Co., 442 So. 2d 875 (La. Ct. App. 1983); Powell v. Warner, 398 So. 2d 22 (La. Ct. App. 1981); Jagers v. Royal Indem. Co., 276 So. 2d 309 (La. 1973).

85. *See* Brown v. DSI Transp., Inc., 496 So. 2d 478 (La. Ct. App.), *writ denied*, 498 So. 2d 18 (La. 1986); discussion *supra* notes 79–81.

86. *See supra* notes 1–7 and accompanying text.

87. *See* SCOLES & HAY, *supra* note 2, § 2.17, at 43–44.

88. For a discussion of Currie's approach, see SCOLES & HAY, *supra* note 2, § 2.6.

89. *Id.* § 2.6.

"interests," as does the *Restatement (Second)* when it calls for the application of the law of the place of "the most significant relationship" to the issues and to the parties.[90] Both approaches are relatively open-ended,[91] and therefore raise the question whether subsequent judicial practice displays any kind of a pattern with predictive value. The sections that follow explore this question and take the *Neumeier* rules as the benchmark.

A. California: The Comparative Impairment Approach

One variant of interest analysis undertakes to compare and weigh the competing policy interests of the states involved. The approach adopted several years ago by California[92] seeks to determine the state whose policies would be more impaired than those of another state by not having its law applied. The state that would be disadvantaged in this way, and whose law therefore should be applied, may well be a state other than the forum.[93] California's application of its comparative impairment approach reveals only slight, and perhaps somewhat sporadic, decisional patterns that parallel the *Neumeier* rules.

In *Nicolet, Inc. v. Superior Court*,[94] for example, a California appeals court did not apply the common domicile rule to a bad faith insurance claim brought by an insured Pennsylvanian against a Pennsylvania insurance company.[95] Other California decisions, however, applied the comparative impairment approach in a manner consistent with both the reasoning and results of *Neumeier* rule 2. In *Denham v. Farmers Ins. Co.*[96] the court applied Nevada law, consistent with

90. For torts, see Restatement (Second) of Conflict of Laws § 145 (1971).

91. *See* Scoles & Hay, *supra* note 2, § 2.15, at 37 n.1.

92. *Id.* § 2.6, at n.21.

93. *See* Offshore Rental Co. v. Continental Oil Co., 583 P.2d 721 (Cal. 1978) (an early example).

94. 188 Cal. App. 3d 28, 224 Cal. Rptr. 408 (Ct. App. 1986), *dismissed as moot*, 736 P.2d 319 (Cal. 1987).

95. In *Nicolet*, asbestos manufacturers had brought suit against their insurance companies claiming bad faith denial of coverage when the insurance companies changed coverage requirements in order to lessen their exposure to asbestos claims. Several of those asbestos claims were pending against the insureds in California. Punitive damages were available under California law but not in Pennsylvania. 224 Cal. Rptr. at 416. Ignoring the parties' contacts with Pennsylvania (and, perhaps, the parties' expectations that Pennsylvania law would apply) the court focused on the fact that several of the claims against the insured, for which it was seeking coverage, were pending in California courts. *Id.* at 417–18. It held that application of Pennsylvania's law prohibiting punitive damages would assist Pennsylvania "in sheltering against the world a corporation whose blatant misconduct, if proved, might wreak immense damage outside the confines of its home state." *Id.* at 418. This, the court concluded, would create "an archaic result in the context of the modern realities of [the insurance company's] role as a multi-state corporation." *Id.*

Another California decision, Rivera v. Southern Pac. Transp. Co., 217 Cal. App. 3d 294, 266 Cal. Rptr. 11 (Ct. App. 1990), presented the opportunity to apply a modified *Neumeier* rule 1 (that of applying the law common to the parties' different domiciles) to a case where a California plaintiff was injured while attempting to "hop" a Los Angeles-bound train in Arizona. *See supra* note 46 and accompanying text. Instead of focusing on the law of the train owners' domicile, the court considered only Arizona and California law, finding a false conflict. 266 Cal. Rptr. at 13.

96. 213 Cal. App. 3d 1061, 262 Cal. Rptr. 146 (Ct. App. 1989).

Neumeier rule 2, first sentence, to a bad faith insurance case that arose out of a Nevada accident between California plaintiffs and a Nevada driver insured by the defendant insurance company.[97] A similar conclusion was reached in *Zimmerman v. Allstate Ins. Co.* as well as in other cases.[98] *Neumeier* rule 3 is also represented in several California decisions.[99]

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97. Nevada law did not allow for third-party bad faith claims but, at the time of the accident, California law did. 262 Cal. Rptr. at 147–48. Nevada's interest in protecting its insurers (and, through it, its insureds) against third-party bad faith claims would, in the court's view, be most seriously impaired if not applied. *Id.* at 149.

98. 179 Cal. App. 3d 840, 224 Cal. Rptr. 917 (Ct. App. 1986) (Oklahoma law prohibiting third-party bad faith insurance claims applied when Illinois resident was injured in Oklahoma by Oklahoma resident; Oklahoma law protecting Oklahoma insurers from third-party bad faith claims, and their insureds who would be forced to pay for claims through higher premiums, would be more impaired if not applied). While the courts did not discuss the insurers' state of incorporation or principal place of business in either case, they appear to have treated the insurance companies as "domiciliaries" of the state in which the insured resided and where the insurance policy was issued, perhaps in recognition of 28 U.S.C. § 1332(c)(1) (1988) which, for jurisdictional purposes, treats an insurance company as a resident of the state in which the insured resides in all direct action cases the insured is not joined as a party. For a discussion of the difficulty of the concept of "corporate domicile," see SCOLES & HAY, *supra* note 2, § 4.46, at 213–14.

Other cases applying comparative impairment in a manner consistent with the *Neumeier* rules include Engel v. CBS Inc., 981 F.2d 1076 (9th Cir. 1992) (New York law, which would be less favorable to plaintiff's claim for malicious prosecution applied to claims involving California plaintiff and New York defendant over malicious prosecution occurring in New York; result consistent with *Neumeier* rule 2, first sentence); Nelson v. International Paint Co., 716 F.2d 640 (9th Cir. 1983) (California's one-year statute of limitations, as opposed to the two-year statutes in Texas and Alaska, applied to a claim by a Texas plaintiff against a California defendant for injuries sustained in Alaska caused by negligent conduct in California; result consistent with *Neumeier* rule 2, first sentence); North Am. Asbestos Corp. v. Superior Court, 180 Cal. App. 3d 902, 225 Cal. Rptr. 877 (Ct. App. 1986) (California law placing no time limit on actions against dissolved corporations applied in a case involving California domiciliaries with outstanding tort claims that arose in California against a dissolved Illinois corporation; Illinois law placed two-year time limit on such actions; result consistent with *Neumeier* rule 2, second sentence). *See also* Smith, *supra* note 40, at 1055–58 (survey of California decisions); Kozyris, *supra* note 40, at 556–57 (discussing various California choice-of-law decisions).

99. *See, e.g.*, Paulo v. Bepex Corp., 792 F.2d 894 (9th Cir. 1986) (Ontario law applied to products liability claim brought by injured Ontario domiciliary against California machinery manufacturer who installed the allegedly defective machine at the Ontario employer's plant in Ontario; court reasoned that the defendant's expectations would be that Ontario law applied and that it would not be unfair to subject the plaintiff, who invoked the protection of Ontario workers' compensation law, to the burdens of that law). Other cases applying the comparative impairment approach consistent with *Neumeier* rule 3 include: Ledesma v. Jack Stewart Produce, Inc., 816 F.2d 482 (9th Cir. 1987) (Arizona law applied to action by California plaintiffs injured in Arizona by a truck driven by Arkansas driver and owned by Oklahoma employer); *In re* Matter of Yagman, 796 F.2d 1165 (9th Cir. 1986) (California law, which was less favorable to plaintiffs, applied to defamation claim brought by California plaintiffs against New York defendants for injury to reputation suffered in California); Fleury v. Harper & Row, Publishers, Inc., 698 F.2d 1022 (9th Cir. 1983) (California's shorter statute of limitations applied to defamation claim brought by California plaintiffs against New York defendants for damage to reputation felt in California); Gallagher v. Koppers Co., 142 Cal. App. 3d 713, 191 Cal. Rptr. 241 (Ct. App. 1983) (Oregon law applied to product liability claim against Pennsylvania paint manufacturer by decedents of an Oregon domiciliary, who later moved to California, for fatal injuries received while using the product in Oregon). *But see* Hill v. Hill, 193 Cal. App. 3d 1118, 238 Cal. Rptr. 745 (Ct. App. 1987) (California law, which did not provide for interspousal immunity, applied to negligence suit brought by British Columbia plaintiff against his spouse who

This brief survey of California's experience with the comparative impairment approach suggests, perhaps, an implicit adoption of predetermined values similar to those underlying New York's *Neumeier* rules. Of the cases surveyed, only three would have come out differently under the *Neumeier* rules.[100] No cases explicitly applied principled rules, but several decisions did reach results consistent with the *Neumeier* rules, engaging in *Neumeier*-like reasoning.[101]

Nicolet (the only California case surveyed that involved parties from the same state), however, failed to adopt the common domicile rule—the rule most accepted both by rules states as well as other approach states.[102] *Hill v. Hill*, furthermore, failed to apply the law of the place of injury in a *Neumeier* rule 3 situation, using instead the law most favorable to the plaintiff.[103] These decisions disagree with the *Neumeier* rules perhaps not so much because the comparative impairment approach and the *Neumeier* rules are basically incompatible, but because the California approach may not have been properly applied. *Nicolet* favored California law because the application of Pennsylvania law would have produced an "archaic result in the context of . . . modern realities."[104] *Hill v. Hill* also adopts a "better law" orientation at the expense of predictable, albeit implicit a priori value choices.[105] California decisions that direct their focus on party expectations, on the other hand, have displayed a pattern more similar to New York decisions applying the *Neumeier* rules.[106]

B. *Restatement (Second)* States

For some areas, for example, those related to property, the *Restatement (Second)* retains the traditional rules. For many others, including tort and contract,

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lived in California for accident occurring in British Columbia because British Columbia had since dropped its interspousal immunity law; under *Neumeier* rule 3, British Columbia law would have applied); Marsh v. Burrell, 850 F. Supp. 1493 (N.D. Cal. 1992) (California law which, unlike the law of the Netherlands, did not limit plaintiff's damages, held to apply to assault, battery, and negligent hiring claims brought against California defendants by plaintiffs hiring in the Netherlands and the United Kingdom for a tort that occurred in the Netherlands; under *Neumeier* rule 3, the law of the Netherlands would apply).

100. *See* Nicolet, Inc. v. Superior Court, 188 Cal. App. 3d 28, 244 Cal. Rptr. 408 (Ct. App. 1986), *dismissed as moot*, 736 P.2d 319 (Cal. 1987) (discussed *supra* notes 94–95); *Hill*, 238 Cal. Rptr. at 745.

101. Denham v. Farmers Ins. Co., 213 Cal. App. 3d 1067, 262 Cal. Rptr. 146 (Ct. App. 1989) (discussed *supra* notes 96–97 and accompanying text); *Zimmerman*, 224 Cal. Rptr. at 917; *Paulo*, 792 F.2d at 894.

102. *See supra* notes 75–77 and accompanying text (Louisiana); *infra* notes 111–13 (Illinois), 114 (Colorado), 116 (Florida & Texas).

103. *See Hill*, 238 Cal. Rptr. at 745 (discussed *supra* note 99).

104. *Nicolet*, 224 Cal. Rptr. at 408 (discussed *supra* notes 94–95 and accompanying text).

105. *See* Hill, 238 Cal. Rptr. at 745 (discussed *supra* note 99). *See also* Scoles & Hay, *supra* note 2, § 17.17, at 598–99 (discussing *Offshore Rental Co.*, another California decision with reasoning suggestive of the better law approach); Hay, *supra* note 1, at 355–56 (discussing intersection of the comparative impairment and better law approaches).

106. *See Denham*, 262 Cal. Rptr. at 146 (discussed *supra* notes 96–97); *Zimmerman*, 224 Cal. Rptr. at 917 (discussed *supra* note 98); *Paulo*, 792 F.2d at 894 (discussed *supra* note 99).

it introduces an approach for the determination of the applicable law.[107] The court should identify "the place of the most significant relationship" to the issue and the parties and then apply its law. For torts, section 145 lists a number of nonexclusive factors (for example, place of the tort, domicile of the parties, and so forth) that should be considered in making the decision and refers to the pervasive general principles of section 6, on the basis of which these factors should be evaluated.

The general principles are broadly phrased[108] and can accommodate virtually all points of view.[109] Moreover, neither they nor the specific connecting factors assign priorities: They are co-equal. In addition, they are designed to apply to particular issues and not necessarily to the whole case. The first aspect—co-equal factors and considerations—means that no a priori judgments have been made; the courts are encouraged to weigh these considerations on a case-by-case basis. The second aspect, issue splitting (*dépecage*), could mean that law-fact patterns will multiply rather than be reduced to a few basic archetypal situations, such as in the *Neumeier* rules. The case law must thus develop decisional patterns that reduce the risk that, while opinions pay lip service to systemic values and policies, the decisional process in fact is so flexible as to be ad hoc and, thus, unprincipled.[110] Case law in several *Restatement (Second)* states appears, to some extent, to adhere to discernible decisional patterns.

Illinois, in *Estate of Barnes*,[111] explicitly adopted the common domicile rule embodied in *Neumeier* rule 1 and other Illinois courts have followed.[112] However,

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107. Professor Reese, the Reporter for the *Restatement (Second)*, thought that "[T]he American Law Institute is clearly in favour of rules." Willis Reese, *The Present State of Choice of Law in the United States, in* THE PRESENT STATE OF INTERNATIONAL LAW 361, 366 (Maarten Bos ed., 1973). At the same time, he acknowledged that the *Restatement (Second)* gives the courts "no guidance other than that they should consider a number of factors in arriving at their decisions. . . . The uncertainty or ambiguity of *Babcock* (*see supra* notes 8–9 and accompanying text) is reflected in the *Restatement*. . . ." *Id.* at 364–65.

108. *E.g.*, the relevant policies of the forum and other interested states, the needs of the interstate and international legal systems, the objectives of uniformity, certainty, and predictability, and the ease of determining and applying a law so identified. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1973).

109. Hay, *supra* note 1, at 373–74.

110. *See id.* at 392–400.

111. 478 N.E.2d 1046 (Ill. App. Ct. 1985). This case arose out of a dispute over the distribution of proceeds obtained through settlement of a wrongful death claim, originally brought in Michigan under a Michigan wrongful death statute by the widow of an employee killed on the job in Michigan. *Id.* at 1048. Ordinarily, the court held, "[t]he simple fact of domicile will be indicative of the jurisdiction's superior interest in having its laws applied in order to give effect to [its] tort policies" because "a jurisdiction will normally formulate tort policies with reference to the competing interests of compensating its domiciliaries for injury and of limiting tort recoveries against its domiciliaries." *Id.* at 1051. The court applied Michigan law, however, because the original wrongful death claim was filed, and ultimately settled, under Michigan's wrongful death statute. The court was unwilling to have one state's law govern liability and another state's law govern distribution because the amount of recovery allowed under the Michigan statute took into account the method by which it would be distributed.

112. *See, e.g.*, Nelson v. Hix, 522 N.E.2d 1214, 1217 (Ill. 1988) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 169 (1971)) (Canadian law, which, unlike Illinois', did not provide for interspousal immunity, applied when a Canadian couple was injured in Illinois; court held that "[t]he

one Illinois court declined to apply the common domiciliary law when it analyzed the case on the basis of the distinction between conduct-regulating and loss-allocating rules.[113]

Colorado has embraced *Neumeier* rule 1's common domicile rule (as well as *Neumeier* rule 2),[114] although few, if any, Colorado courts subsequently followed the specific rules.[115] Florida and Texas, while not adopting it specifically, also appear to follow a common domicile rule.[116] Indeed, of the sixteen *Restatement*

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applicable law will usually be the local law of the state of the parties' domicile"); Pinorsky v. Pinorsky, 576 N.E.2d 1123 (Ill. App. Ct. 1991) (Florida law applied to action involving two Florida domiciliaries); Edwardsville Nat'l Bank & Trust Co. v. Marion Lab. Inc., 808 F.2d 648 (7th Cir. 1987) (recognizing the rule in *Barnes*; the case, however, presented a *Neumeier* rule 2 situation). In addition, some Illinois cases reached results consistent with the common domicile rule without discussing the significance of the parties' domicile. *See* Harkcom v. East Texas Motor Freight Lines, Inc., 433 N.E.2d 291 (Ill. App. Ct. 1982) (Illinois law applied to Iowa accident involving Illinois parties); Schrier v. Indiana Harbor Belt R.R. Co., 402 N.E.2d 872 (Ill. App. Ct. 1980) (Indiana law applied to Indiana accident between two Indiana residents when only Illinois contacts were that it was the forum state, defendant's railroad lines ran into Illinois, and defendant had an office in Illinois).

113. *See* Rosett v. Schatzman, 510 N.E.2d 968 (Ill. App. Ct. 1987) (Florida law applied in a case between two Illinois residents arising out of an accident in Florida). In that case, the court held that Florida law applied because, for issues involving standards of conduct, the place of injury and the place of tort are the most significant contacts; they were in Florida. *Id.* at 970–71. It was the parties' common domicile, in the court's view, that was the "fortuitous" contact. *Id.* at 971. The *Restatement (Second)* supports this result. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. e (1971). A focus on party expectations, however, may also support a contrary result, as would *Neumeier* rule 1 before its modification in Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679 (N.Y. 1985). *See supra* notes 50–64 and accompanying text. For another Illinois case recognizing the distinction between loss-allocating rules and those that regulate conduct, see Schulze v. Illinois Highway Transp. Co., 423 N.E.2d 278 (Ill. App. Ct. 1981) (characterizing law at issue as one of loss allocation and applying the common domicile rule to a case between Illinois domiciliaries arising out of a Michigan accident).

114. *See* First Nat'l Bank v. Rostek, 514 P.2d 314 (Colo. 1973) (Colorado couple killed in a plane crash in South Dakota; the guardian of the wife's children brought a wrongful death action against the husband's estate). *Rostek*, as had *Neumeier*, involved the applicability of a state's guest statute. The court voiced concern over the ad hoc nature of modern approaches and, therefore, adopted *Neumeier* rules 1 and 2 to add an element of predictability to the *Restatement (Second)* approach (the court envisioned the *Restatement (Second)* as a starting point for the development of more specific rules). *Id.* at 320. Because the parties shared a common domicile, the court applied Colorado law under the first rule. The decision was the subject of much comment. *See* Ved P. Nanda, *A Positive but Uncertain Step Forward for Choice of Law Problems in Colorado: The* Rostek *Decision*, 51 DENV. L.J. 557 (1974); Maryann Walsh, *Heads: Lex Loci Delicti; Tails: Lex Loci Domicile—The Conflict of Laws Coin on Edge*, 51 DENV. L.J. 567 (1974); Case Note, *"Rules" v. "Approaches": Choosing a Choice-of-Law Principle for Colorado*, 46 U. COLO. L. REV. 107 (1974); *see also* SCOLES & HAY, *supra* note 2, § 17.25, at 611.

115. *See infra* note 117.

116. *Florida: See, e.g.*, Harris v. Berkowitz, 433 So. 2d 613 (Fla. Dist. Ct. App. 1983) (Florida law applied in a wrongful death action involving a Florida plaintiff and a Florida defendant). The court placed substantial significance on section 178, comment *b* of the *Restatement (Second)*: "In a situation where one state is the state of domicile of the defendant, the decedent and the beneficiaries, it would seem that, ordinarily at least, the wrongful death statute of this state should be applied to determine the measure of damages." *Id.* at 614 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 175 cmt. b (1971). *See also* Pennington v. Dye, 456 So. 2d 507 (Fla. Dist. Ct. App. 1984) (Ohio law applied in negligence action by an Ohio resident who was injured by Ohio defendant); Stallworth v. Hospitality Rentals, Inc., 515 So. 2d 413 (Fla. Dist. Ct. App. 1987) (Florida law applied

(Second) decisions involving common domicile fact patterns surveyed, only one failed to apply the law of the parties' common domicile.

Decisions in several *Restatement (Second)* states reveal patterns that may also suggest implicit value choices similar to those underlying *Neumeier* rules 2 and 3.[117] Illinois decisions, for instance, have used "*Neumeier*-like" reasoning in cases involving *Neumeier* rule 2 fact patterns,[118] but many Illinois decisions may not expressly address the policy decisions underlying *Neumeier* rule 2, instead

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when Florida plaintiff sued Florida rental car company under theory of vicarious liability for injuries received in Louisiana); Andrews v. Continental Ins. Co., 444 So. 2d 479 (Fla. Dist. Ct. App. 1984) (in dispute between injured Maine insurance policy holder and Maine insurance company, Maine law governed whether Florida's collateral source rule, which would decrease uninsured motorist recovery for benefits received for other sources, applied); Krasnosky v. Meredith, 447 So. 2d 232 (Fla. Dist. Ct. App. 1983) (Florida law applied in action by Florida guest against Florida host-driver; court refused to apply Georgia guest statute because it was "mere happenstance" that accident occurred in Georgia); Proprietors Ins. Co. v. Valsecchi, 435 So. 2d 290 (Fla. Dist. Ct. App. 1983) (Florida law applied in wrongful death action by parents of Florida college students who died when plane rented from Florida defendants crashed in North Carolina; court reached this result by calling the Florida college students Florida domiciliaries even though their parents lived in Massachusetts and New York).

Texas: Robertson v. Mcknight, 609 S.W.2d 534 (Tex. 1980) (New Mexico law applied favoring plaintiff in a wrongful death claim involving New Mexico couple killed in Texas plane crash); Osborn v. Kinnington, 787 S.W.2d 417 (Tex. App.—El Paso 1990, *writ denied*) (Alabama law applied in action by one Alabama employee against another for accident in Texas); Total Oilfield Servs., Inc. v. Garcia, 711 S.W.2d 237 (Tex. 1986) (Texas law applied in wrongful death claim against Texas corporation by estate of Texas worker killed on the job in Oklahoma); *see also* Smith, *supra* note 40, at 1147 (discussing *Robertson* and *Garcia* as well as other Texas cases).

117. As noted above, one Colorado court has expressly adopted *Neumeier* rule 2, although later Colorado decisions have ignored the *Rostek* decision, perhaps out of an implicit determination that the rules adopted in *Rostek* apply only to guest statute cases. Some of these later Colorado cases, which focus more on a "contact counting" approach to the *Restatement (Second)*, reach results inconsistent with *Neumeier* rule 2. *See, e.g.*, Lewis-DeBoer v. Mooney Aircraft Corp., 728 F. Supp. 642 (D. Colo. 1990) (Texas law favoring plaintiff applied to products liability claim by Colorado plaintiff against Texas aircraft manufacturer for Colorado plane crash; result inconsistent with *Neumeier* rule 2, first sentence); Dorr v. Briggs, 709 F. Supp. 1005 (D. Colo. 1989); Kozoway v. Massey-Ferguson, Inc., 722 F. Supp. 641 (D. Colo. 1989) (Iowa law favoring plaintiff applied in product liability action against Iowa defendant for injury suffered by Canadian resident in Canada; result inconsistent with *Neumeier* rule 2, first sentence); Kinnett v. Sky's West Parachute Ctr., Inc., 596 F. Supp. 1039 (D. Colo. 1984) (Wyoming law, again favoring plaintiff, applied in action by Wyoming domiciliaries against Colorado defendant for claims arising from midair collision in Colorado; result inconsistent with *Neumeier* rule 2, first sentence). *See also* Kozyris & Symeonides, *supra* note 40, at 612 (discussing *Lewis-DeBoer* and *Dorr* in a survey of choice-of-law decisions in 1989); Smith, *supra* note 40, at 1058–59 (discussing pre-1980 choice-of-law decisions in Colorado state courts and Colorado district court decisions that applied a straight *Restatement (Second)* approach without resort to specific rules).

118. *See, e.g.*, Edwardsville Nat'l Bank v. Marion Labs., Inc., 808 F.2d 648 (7th Cir. 1987) (Indiana law applied to a claim of medical malpractice that allegedly occurred in Indiana between Indiana doctors and an Indiana medical center and an Illinois plaintiff). Of interest is the fact that a majority of the *Restatement (Second)* decisions surveyed that confronted *Neumeier* rule 2 fact situations yielded results consistent with the rules. It is also noteworthy that the cases inconsistent with rule 2 did not focus on party expectations, as the *Neumeier* court arguably did, *see supra* notes 26–30 and accompanying text, but instead on contact counting or some other ad hoc approach to the *Restatement (Second)*.

applying the *Restatement (Second)* in a contact counting manner.[119] Florida and Texas decisions have also applied the *Restatment (Second)* with results consistent with *Neumeier* rules 2 and 3. However, again, few cases apply a predetermined set of policy choices similar to those underlying *Neumeier* rules 2 and 3, instead focusing on contact counting.[120]

119. *See, e.g.*, Ferguson v. Kasbohm, 475 N.E.2d 984 (Ill. App. Ct. 1985) (Michigan recreational use statute applied in an action by Illinois plaintiff against Michigan defendant for injuries suffered in Michigan; court's reasoning focused on contact counting instead of reasoning similar to *Neumeier* rule 2). For other Illinois decisions that reached results consistent with *Neumeier* rule 2 while applying the *Restatement (Second)* in a contact-counting manner, see Mech v. Pullman Standard Corp., 484 N.E.2d 776 (Ill. App. Ct. 1984) (Indiana law applied to contribution claim by the general contractor of Indiana construction site against its Illinois subcontractor, whose injured employee had sued the general contractor); Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055 (7th Cir. 1987) (consistent with *Neumeier* rule 2, first sentence, Indiana law applied to portion of case involving Indiana defendant for injuries suffered in Indiana accident).

Illinois decisions consistent with *Neumeier* rule 3 also engaged primarily in a contact-counting approach to the *Restatement (Second)*. *See, e.g.*, Board of Trade v. Dow Jones & Co., 439 N.E.2d 526 (Ill. App. Ct. 1982) (New York law applied to a New Yorker's claim of misappropriation, which occurred in New York, against an Illinois defendant); French v. Beatrice Foods Co., 854 F.2d 964 (7th Cir. 1988) (Alabama law applied to retaliatory discharge claim by Alabama resident against Illinois defendant); Pittway Corp. v. Lockheed Aircraft Corp., 641 F.2d 524 (7th Cir. 1981) (Georgia law applied to action by Illinois plaintiff against Georgia defendant for a defect in aircraft apparently created in Georgia but discovered in Wisconsin). *But see* Vantassell-Matin v. Nelson, 741 F. Supp. 698 (N.D. Ill. 1990) (*Restatement (Second)* approach treated like interest analysis; result consistent with *Neumeier* rule 3). For a discussion of the *Nelson* case, along with another Illinois decision applying the *Restatement (Second)* as interest analysis, *In re* Air Crash Disaster at Sioux City, 734 F. Supp. 1425 (N.D. Ill. 1990), see Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 488–89 (1991).

120. *Florida: See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Oslen, 406 So. 2d 1109 (Fla. 1981) (Illinois law applied to action against an insurance company (domicile unknown) for a claim arising from Illinois accident between a Florida plaintiff and Illinois uninsured motorist; court focused mainly on fact that Illinois was place of injury); AIU Ins. Co. v. Reese, 498 So. 2d 966 (Fla. Dist. Ct. App. 1986) (Alabama law applied to action by Florida plaintiff against Alabama defendant for injuries received in an Alabama automobile accident; court characterized the rule as regulating conduct but result consistent with *Neumeier* rule 2, first sentence); Adams v. Brannan, 500 So. 2d 236 (Fla. Dist. Ct. App. 1986) (North Carolina law allowing punitive damages applied to action by Illinois plaintiffs against North Carolina insurance company arising out of Florida accident with an uninsured motorist; plaintiff-favoring result was inconsistent with *Neumeier* rule 3); Wal-Mart Stores, Inc. v. Budget Rent-A-Car Sys., 567 So. 2d 918 (Fla. Dist. Ct. App. 1990) (Georgia law, which did not provide for vicarious liability, applied to contribution action brought by Arkansas company against a Florida rental car company under theory of vicarious liability after renter was involved in a Georgia accident with plaintiff's truck; result inconsistent with *Neumeier* rule 3).

Texas: See, e.g., Perry v. Aggregate Plant Prods. Co., 786 S.W.2d 21 (Tex. App.—San Antonio 1990, *writ denied*) (Texas law applied in product liability action by Indiana resident injured while in Texas by product manufactured by a Texas company); Trailways Inc. v. Clark, 794 S.W.2d 479 (Tex. App.—Corpus Christi 1990, *writ denied*) (result consistent with *Neumeier* rule 3). *Cf.* Crisman v. Cooper Indus., 748 S.W.2d 273 (Tex. App.—Dallas 1988, *writ denied*) (applied Florida law to product liability suit brought by Tennessee resident against a Texas corporation that designed allegedly defective product in Illinois and sold it in Florida; focusing on party expectations, court held Texas manufacturer would expect to defend a product liability suit in Florida for injuries caused there by a product manufactured outside Texas and sold in Florida). One Texas decision inconsistent with a *Neumeier*-like approach applied the *Restatement (Second)* in a plaintiff-favoring manner: *See* Wall v. Noble, 705 S.W.2d 727 (Tex. App.—Texarkana 1986, *writ ref'd n.r.e.*) (Texas law applied to medical malpractice action by Texas plaintiff against Louisiana doctor for injuries suffered as a result

IV. Conclusions: Bridging the Gap Between Rules and Approaches

If one only looks at numbers, this brief survey reveals a striking similarity between the results reached in particular cases by states applying free-wheeling approaches and the results that would be reached under the *Neumeier* rules. Of the cases surveyed few (approximately twelve) would have come out differently under the *Neumeier* rules; and four of those decisions were New York cases failing to apply *Neumeier*.

However, numbers are only part of the story. The reasoning supporting the decisions reveals the *Neumeier*-like flexibility and predictability that principled analysis can achieve. Most approach states, for example, have followed the common-domicile rule articulated in *Neumeier* rule 1 and adopted in several countries abroad.[121] Louisiana has codified the common-domicile rule,[122] and Illinois and Colorado have explicitly recognized the application of the law of the parties' common domicile through decisional law.[123] In addition, the decisional law of Florida and Texas has almost invariably applied an unarticulated common-domicile rule for reasons similar to those underlying *Neumeier* rule 1. Decisions refusing to apply common domiciliary law have done so by giving preference to a "better law" approach that has produced a plaintiff-favoring result.[124]

The most notable common element in approach state decisions that reach results consistent with the *Neumeier* rules is their focus on party expectations. This should not surprise. The *Neumeier* rules focus on party expectations: *Neumeier* rule 1 focuses on the expectations of both parties; rules 2 and 3 focus on the expectation of one party and the concomitant conclusion that it would not be unfair to subject the other party to the law expected by the first. By focusing on the same value goals (for example, party expectations) in recurrent fact patterns, approach states can achieve a level of predictability similar to that of jurisdictions with articulated principled rules and, at the same time, retain some of the flexibility that choice-of-law approaches were meant to provide.

The perception of a gap, of something irreconcilable, between legal systems

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of surgery performed in Louisiana; result inconsistent with *Neumeier* rule 2, first sentence). Federal courts applying Texas choice-of-law principles have also reached results consistent with *Neumeier* rule 3, but have done so mainly as a result of contact counting. *See* Smith, *supra* note 40, at 1147–48 n.614 (listing cases). Once again, it is interesting to note that, as with the *Neumeier* rule 2 cases, a majority of the cases surveyed with *Neumeier* rule 3 fact patterns would have come out the same under *Neumeier* rule 3.

121. *See* Hay, *supra* note 1, at 366–69.

122. *See supra* note 70 and accompanying text.

123. *See supra* notes 111–13 and accompanying text (Illinois); *supra* note 114 and accompanying text (Colorado).

124. *See* Rosett v. Schatzman, 510 N.E.2d 968 (Ill. App. Ct. 1987) (discussed *supra* note 113 and accompanying text) (Illinois decision refusing to apply law of parties' common domicile with result favoring recovery by plaintiff); Nicolet, Inc. v. Superior Court, 188 Cal. App. 3d 28, 244 Cal. Rptr. 408 (Ct. App. 1986), *dismissed as moot*, 736 P.2d 319 (Cal. 1987) (discussed *supra* notes 94–95 and accompanying text) (California decisions favoring plaintiff and declining to apply common domicile rule).

with rules and those following approaches for the determination of the applicable law is itself dated. Its articulated[125] or intuitive basis is, on the one hand, that rules are rigid, (therefore bad on principle or, at best, of limited utility in a world of differentiated fact patterns and various constellations of interests) and, on the other hand, that approaches will result in, and indeed invite, ad hoc decision making, "Khadi-justice."[126] Both views misstate today's situation, if indeed they were ever entirely correct. "Rules" may of course be rigid. But this is so because they are drawn too sweepingly, not because they are value-neutral. All rules, as do even ad hoc decisions, express value judgments. The lesson of the new European codifications (principally the Rome Convention on choice of law in contract) is that rules can be fashioned more narrowly with more regard to the variety of interests to be addressed. The Louisiana codification, with its roots in the comparative impairment approach, goes in the same direction, as do New York's *Neumeier* rules for tort choice of law.[127]

Similarly, approaches may lead to free-wheeling, ad hoc decision making. Undeniably, they have done so in a large number of cases since U.S. conflicts law began to undergo its revolution. The U.S. approaches gave courts little or no guidance, and the course of decision making became unpredictable.[128]

As rule formulation can become more differentiated, decision making on the basis of approaches can become more principled. A priori identification of values and interests, basic to rule-based systems, whether statutory or decisional, is not part of most U.S. choice-of-law methodologies. Decisional patterns may emerge, however, simply because there is agreement on certain basic propositions. These decisional patterns then can furnish insights and have predictive value. Discerning decisional patterns is not as easy as when value goals are predetermined by rule. But approach-based systems have a degree of certainty, just as rule-based systems have a measure of flexibility.[129]

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125. *See, e.g.*, Friedrich K. Juenger, *American and European Conflicts Law*, 30 AM. J. COMP. L. 117, 127 (1982) ("[c]ertainty requires rigid rules, and flexibility is the antithesis of rigidity").

126. Paul H. Neuhaus, *Legal Certainty versus Equity in the Conflict of Laws*, 28 L. & CONTEMP. PROBS. 795, 802 (1963). *See also* Laycock, *supra* note 26.

127. Incidentally, it should not make much difference whether rules are statute-based, as in civilian systems, or are established by decisional law, common-law style. Since all rules, the European rules as well as *Neumeier* rule 3, will have a final proviso for the displacement of the rule in exceptional cases, the ultimate question, and danger, in both the civilian and common law systems will always be whether decisional practice in administering the exception will, in the end, swallow up the rule. *See supra* notes 16, 29. *See also supra* notes 46–47, 70.

128. *See* SCOLES & HAY, *supra* note 2, § 2.17.

129. At the margin, then, the question always reduces to *when* is it appropriate to depart from the rule or decisional *pattern*? This question, with which the American conflicts revolution began, now gains increasing importance in Europe as rules are intended to be more interest-specific. *See* Werner F. Ebke, *Erste Erfahrungen mit dem EG-Schuldvertragsübereinkommen*, *in* EUROPÄISCHES GEMEINSCHAFTSRECHT UND INTERNATIONALES PRIVATRECHT 77, 104 (v. Bar ed., 1990); *see also id.* at 100–02; Taupitz, *Kaffeefahrten deutscher Urlauber auf Gran Canaria: Deutscher Verbraucherschutz im Urlausgepäck*, 1990 BETRIEBS-BERATER 642.