

ant obviously could not overcome the effects of that procedural device. Only a few areas of the law, such as workman's compensation, have been settled by legislation.

The basic problem of the law is twofold: determining the proper incidence of an economic burden and formulating the role of the courts and the legislature in accomplishing the desired results. As long as objectives are being attained under varied and contradictory legal theories, results may not be consistent. If public policy demands that those pursuing an activity be absolutely liable, the legislature should act accordingly. If negligence should be the basis of recovery, the courts should not adopt *res ipsa loquitur* and other devices which in effect impose an absolute liability.<sup>70</sup> A settled theory is necessary in order that the various classes of litigants involved in future cases may take adequate safeguards by insurance and cost calculation.<sup>71</sup> If the activity is one particularly adaptable to enterprise liability, the actor should prepare himself to withstand liability when the risks of his activity mature.

## HOW STATES SHOULD RESOLVE CONFLICTS PROBLEMS UNDER THE DIRECT ACTION STATUTE—AN APPROACH

Recent insurance legislation has given rise to many interesting conflict of laws questions. Since their resolution by the courts will materially affect the rights of the injured party, the insured, and the insurer, a critical analysis of these questions seems in order.

To balance more equally the interests of insurance companies, injured and insured parties,<sup>1</sup> states have nullified the "no action" clause<sup>2</sup> which changes the essential nature of the insurance contract from lia-

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70. Failure of the courts to establish a definite standard for liability in the food products cases has been criticized. "In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly." *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 463, 150 P.2d 436, 441 (1944) (concurring opinion).

71. "The entire field of liability is in a phase of adjustment. There is, on the part of the public, an increasing dissatisfaction for the way liability claims are handled. Insurance companies are not satisfied either. Verdicts are unpredictable. The guiding principles of liability are insufficiently clear and a satisfactory distribution of the loss foreseeable is practically an impossible task." Niccolini, *Liability Without Negligence*, 1954 INS. L. J. 527, 554 (1954).

1. It has been contended that in liability insurance, the needs of only two basic groups must be satisfied—the claimant who seeks compensation for his loss and the policyholder who needs protection against financial hardship or ruin. Smithson, *A Philosophy of Liability Insurance*, 1953 INS. L.J. 663.

2. For discussion of trends of modern legislation to circumvent this "no action"

bility to indemnity and bars actions against insurers until a loss is actually sustained by the insured.<sup>3</sup> The usual enactment requires that insurance contracts contain a provision excluding insolvency or bankruptcy of the insured as grounds for exempting the company from liability;<sup>4</sup> in addition, these statutes commonly provide for suit against the insurer on an unpaid judgment against the tortfeasor.<sup>5</sup> A second type statute, enacted only in Louisiana and Wisconsin, permits a direct action against the insurer, thus avoiding the necessity of first establishing the insured's liability by a previous judgment.<sup>6</sup>

The Louisiana type of statute, in addition to avoiding the "no action" clause, extends many advantages to the injured party.<sup>7</sup> With the insurance company as a defendant in the suit, the likelihood of a plain-

provision, see Laube, *The Social Vice of Accident Indemnity*, 80 U. PA. L. REV. 189, 228-31 (1931). The author includes: 1) indemnity bonds for motor carriers; 2) bankruptcy and insolvency statutes; 3) rights of action on policy for injured victim; 4) agreements to cancel policy forbidden. For comparison of methods utilized by the courts to nullify the "no action" clause, see Note, 9 ORE. L. REV. 57 (1929).

3. In the absence of a "no action" clause, the policy is considered to be insurance against the tortfeasor's liability. When the insured's liability is established by a judgment, his insurer is rendered liable for this amount. 5 COUCH, CYCLOPEDIA OF INSURANCE LAW § 1165 (1929). In essence, these clauses negate any action against the company unless it is brought by the insured to reimburse himself for a loss actually sustained and paid by him in satisfaction of a judgment in favor of the injured party. The insolvency of the insured is a complete defense to the insurer since loss by the insured is precluded. 1 RICHARDS, INSURANCE § 169 (5th ed. 1952). See Note, 25 COLUM. L. REV. 661, 661-62 (1925).

4. 1 RICHARDS, INSURANCE § 170 (5th ed. 1952). For representative statutes, see CAL. INS. CODE ANN. § 11580 (1950); NEB. REV. STAT. § 44-508 (1952); N.Y. INS. LAW § 167(1)(a), (b).

For a survey of liability insurance statutes enacted in various states, see Notes, 15 IOWA L. REV. 73 (1929), 9 ORE. L. REV. 57 (1929); Legis. Note, 46 HARV. L. REV. 1325 (1932).

5. *Ibid.*, but for examples of differences in statutory language, see ALA. CODE tit. 28, § 11 (1941); MO. ANN. STAT. § 379.195 (1952). These statutes in essence provide that the liability of the insurance company shall become absolute whenever a loss occurs, and the payment of such loss is not dependent on the satisfaction by the assured of a final judgment against him.

6. LA. STAT. §§ 655, 983E (1951); WIS. STAT. § 261.11, § 85.93 (1953). The Wisconsin statute applies only to the operation of a motor vehicle, whereas the Louisiana statute applies to accidents in general. The Louisiana statute is comprehensively discussed in Comment, 13 LA. L. REV. 495 (1953); Note, 39 VA. L. REV. 655 (1953). Also see Note, 25 TUL. L. REV. 290 (1951). For a comparison of the aspects of this statute with legislation enacted in New York and Massachusetts, see Comment, 11 TUL. L. REV. 443 (1937). It is interesting to note that a statute comparable to that enacted in Louisiana was proposed in the Indiana legislature during the 1955 session as S. 313.

The Wisconsin statute is discussed in Notes, 20 CORNELL L.Q. 110 (1934), 1951 WIS. L. REV. 567.

7. The judiciary indicates, however, that the intention for the passage of the law was to equal the legislative scheme of those states which allowed joinder of insurance companies only after judgment was rendered. See *Elbert v. Lumberman's Mutual Casualty Co.*, 202 F.2d 744, 746 (1953).

tiff securing a favorable verdict on less evidence is enhanced;<sup>8</sup> and since juries often feel that a large company can better afford to make sizeable payments, damages awarded against insurance companies are usually substantial.<sup>9</sup> It is often asserted that the actual presence of the insurance company in the case will make little difference in the outcome,<sup>10</sup> since insurance companies are involved in a large percentage of liability cases,<sup>11</sup> and since the insurer's interest in the suit is often evidenced through the voir dire examination<sup>12</sup> or through the production of evidence during the trial.<sup>13</sup> Nevertheless, many states make a conscientious effort to limit disclosure of this information.<sup>14</sup> The conspicuous absence of direct action statutes also suggests that states may fear prejudicing the insurer.<sup>15</sup>

Because of a desire to preserve domestic tranquility, the majority of states deny interspousal suits.<sup>16</sup> Under the direct action statute in Louisiana, such suits are now permissible on the theory that the insurance company is the real defendant.<sup>17</sup>

8. See Appleman, *Joinder of Policyholder and Insurer as Parties Defendant*, 22 MARQ. L. REV. 75, 81 (1938); Sedgwick, *Accident Litigation: The Insurance Carrier Defends*, 287 ANNALS 75 (1953). See *Miller v. Metropolitan Casualty Ins. Co.*, 50 R.I. 166, 170, 146 Atl. 412, 414 (1930).

9. Lassiter, *Direct Actions Against the Insurer*, 1949 INS. L.J. 411, 415; Marshall, *Direct Action Against the Liability Insurer Under the Rules of Civil Procedure*, 22 DICTA 314, 315 (1954); Note, 6 So. CAR. L.Q. 461, 462 (1954); see, e.g., *Berstein v. Popkin*, 202 Wis. 624, 633, 233 N.W. 572, 575 (1930).

10. Generally, see 1 WIGMORE, EVIDENCE § 282a (3d ed. 1940); McCORMICK, EVIDENCE § 168 (1954).

11. The fact that jurors assume that the defendant is insured is recognized in the cases. See *Brown v. Walter*, 62 F.2d 798, 800 (2d Cir. 1933); *Connelly v. Nolte*, 237 Iowa 114, 132, 21 N.W.2d 311, 320 (1946).

12. See Notes, 20 CORNELL L.Q. 110, 112 (1934), 3 Wyo. L.J. 82 (1948). It has been contended that informing jurors by innuendo through the voir dire examination is insufficient. *Andrews, The Insurer as the Real Party in Interest*, 29 DICTA 145 (1952).

13. See Annot., 4 A.L.R.2d 761, 761-92 (1949).

14. This information is primarily restricted by requiring good faith in questions on the voir dire examination. See Annot., 95 A.L.R. 388, 404-09 (1935). Also see *Rieschmann v. Reasner*, 221 Ind. 628, 51 N.E.2d 10 (1943); *Balle v. Smith*, 81 Utah 179, 17 P.2d 224 (1932); *Marmon Motor Car Co. v. Schafer*, 93 Ind. App. 588, 178 N.E. 863 (1931).

15. Note, 28 ILL. L. REV. 688, 696 (1934).

16. *Farage, Recovery for Torts Between Spouses*, 10 IND. L.J. 290 (1935). See PROSSER, TORTS § 99 (1941). The generalization applies to personal torts, but has not applied for injuries to the personality of husbands and wives. See also *McCurdy, Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1081 (1930).

17. *Edwards v. Royal Indemnity Co.*, 182 La. 171, 161 So. 191 (1935), noted in 10 TUL. L. REV. 312 (1936). But the principle has not been extended to suits between children and parents. See *Ruiz v. Clancy*, 157 So. 737 (La. App. 1934). See Note, 14 TUL. L. REV. 468 (1940).

A direct action statute does not necessarily require a state to permit such actions. In Wisconsin, it has been reasoned that the insurer does not assume liability where there is no such liability, and none exists when a cause of action is disallowed. See *Fehr v. General Accident Fire & Life Assur. Corp.*, 246 Wis. 228, 233, 16 N.W.2d

Opportunities to use the federal courts of the state of the injured party are maximized under the direct action statute since the diversity of citizenship requirement will be satisfied by the participation of an insurance company from another state.<sup>18</sup> Furthermore, service of process is facilitated by the presence of the insurer's special agent in the state for such service.<sup>19</sup> Since there need be only one trial, circuitous litigation is eliminated, thereby reducing trial costs and permitting satisfaction of claims at minimum expense.<sup>20</sup>

While it ostensibly favors the injured party, presence of an insurer has been argued as benefiting the company on the theory that a jury acquainted with the limits of the policy will render a verdict more in accord with it and the insurance attorney may point out the dangers of taking advantage of the company.<sup>21</sup> Such reasoning has apparently failed to convince the insurers who have made concerted efforts to avoid participation in lawsuits.<sup>22</sup> The efforts are not without reason.

Prejudice of the jury toward insurance companies may stimulate the interpretation of evidence and prevent an impartial decision.<sup>23</sup> In addition, defenses available to the insurer, pertaining to the enforceability of the insurance contract and its validity, are presented to the jury along with such issues as negligence and contributory negligence.<sup>24</sup> The burden on the jury in deciding these multiple and complex issues may result in confusion and an improper determination of the case.<sup>25</sup> The insurance company may be further handicapped by the waning interest of the insured in the outcome of the litigation.<sup>26</sup>

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787, 789 (1944). Liability insurance in general does not change the rule denying remedies to either spouse. See PROSSER, TORTS § 99 (1941). For discussion, see Note, 10 TUL. L. REV. 312 (1936).

18. *Lumbermen's Mutual Casualty Co. v. Elbert*, 23 U.S.L. Week 4050 (U.S. Dec. 6, 1954).

19. 2 COUCH, *op. cit. supra* note 3, § 553 (1929). For representative statutes with this requirement, see CAL. INS. CODE § 1600 (1950); GA. CODE ANN. § 603 (1953).

20. See *Lewis v. Manufacturers Casualty Ins. Co.*, 107 F. Supp. 465, 471 n.11 (W.D. La. 1952). Note, 20 CORNELL L.Q. 110, 115-16 (1934).

21. *Lassiter*, *supra* note 9, at 415-16; Note, 20 CORNELL L.Q. 110, 112 (1934).

22. A prime example of this is the insurer's use of the loan receipt, which enables the insurer to hide behind the insured when subrogated to his rights, thereby avoiding possible jury prejudice. See 2 RICHARDS, INSURANCE § 202 (5th ed. 1952); see also Note, 32 CORNELL L.Q. 279 (1946).

23. *Appleman*, *supra* note 8, at 81.

24. See 1 RICHARDS, *op. cit. supra* note 3, § 172 for discussion of these defenses, which include: misrepresentation; breach of warranty of insured; fraud or collusion between injured and insured; injured not in a class protected by the policy; period of limitations in policy bars action by the injured person. See Note, 21 B.U.L. Rev. 749 (1941).

25. *Appleman*, *supra* note 8 at 82.

26. See concurring opinion of Mr. Justice Frankfurter in *Watson v. Employers Liability Assurance Corp.*, 23 U.S.L. Week 4045, 4048 n.1 (U.S. Dec. 6, 1954).

Insurance companies charge premiums in accord with formulae which consider losses and expenses; therefore, the awarding of higher verdicts tends to increase premium rates for policyholders.<sup>27</sup> The threat of excessive verdicts also has an inflationary effect on settlements; this too contributes to higher premiums.<sup>28</sup> Higher rates might cause the policyholder to carry less insurance or even discourage the purchase of insurance.<sup>29</sup> While an excessive verdict may be to an injured party's benefit in a particular case, it would seem that low rates of insurance, making it available to more potential tortfeasors, would be to the advantage of injured parties as a class.<sup>30</sup>

The consequences of a direct action statute are substantial in contrast to other methods of reaching the assets of insurance companies and reflect a definite internal policy of the state in the regulation of accidents and insurance. But application of this statute will not always be limited to internal affairs since accidents and insurance have an interstate character. The automobile in particular has diminished the importance of state-boundaries. A great percentage of cases involving the direct action statute concern automobile accident litigation. Hence clash of multi-state interests is frequently involved and must be resolved by conflict of laws rules.<sup>31</sup>

These rules seek to obtain uniformity in adjudicating disputes.<sup>32</sup> While they must be applied to a variety of situations, the most troublesome involve a multiplicity of factual contacts, coupled with differences

27. Appleman, *supra* note 8, at 81. See Note, 28 ILL. L. REV. 688, 696 (1934).

28. Note, 28 ILL. L. REV. 688, 697 (1934).

29. One author maintains that if rates continue to increase substantially, as they have in the past, there is danger that private auto insurance will be priced out of the market or the private insurance industry will not be able to provide an adequate market to supply the demand for automobile insurance. This will inevitably lead to socialized insurance. Sedgwick, *supra* note 8, at 75.

30. The comparative advantages of these two possibilities must be weighed by the public as one determination of the desirability of the direct action statute. See LASSITER, *supra* note 9, at 416.

31. See Page, *Conflict of Law Problems in Automobile Accidents*, 1943 WIS. L. REV. 145. The increasing number of highway accidents is a serious problem of society. See Marryott, *Automobile Accidents and Financial Responsibility*, 287 ANNALS 83 (1953). For brief expressions of the general problems in conflict of laws caused by statutory efforts to join insurance companies in accident litigation, see HANCOCK, *TORTS IN THE CONFLICT OF LAWS* § 52 (1942); 2 RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 263-65 (1947); STUMBERG, *CONFLICT OF LAWS* 211 (2d ed. 1951).

32. GOODRICH, *CONFLICT OF LAWS* § 4 (3d ed. 1949); 1 RABEL, *op. cit. supra* note 38, at 87-88; Goodrich, *Public Policy in the Law of Conflicts*, 36 W. VA. L. REV. 156, 164 (1930); Heilman, *Judicial Method and Economic Objectives in Conflict of Laws*, 43 YALE 1082, 1108 (1934). Uniformity is not, however, an exclusive goal. For example, see GRAVESON, *THE CONFLICT OF LAWS* 6-8 (2d ed. 1952) who emphasizes goals of convenience and comity in supplementing the striving for justice. See also Neumer, *Policy Considerations in the Conflict of Laws*, 20 CAN. B. REV. 479, 482-86 (1942).

between the laws of the states.<sup>33</sup> The conflict of laws rules usually determine how much each state's statutes will control the decision.<sup>34</sup> When a statute contains stipulated limitations, indicating the extent of its applicability, the conflicts rules are not applied.<sup>35</sup> In determining the scope of the statute, at times a court will examine the fundamental policy of the act; this is frequently indicated by the type of statute enacted or the particular phraseology employed.<sup>36</sup> Generally, statutes are not drafted in terms of multi-state problems,<sup>37</sup> and the courts must then resort to the

33. See Hancock, *Choice of Law Policies in Multiple Contact Cases*, 5 U. TORONTO L.J. 133, 134 (1943); Heilman, *supra* note 32, at 1108.

34. 1 RABEL, *op. cit. supra* note 31, at 95; ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 118 (1940); MORRIS, *The Choice of Law Clause in Statutes*, 62 L.Q. REV. 170 (1946). But see FALCONBRIDGE, CONFLICT OF LAWS 21-23 (2d ed. 1954) who deliberately omits this as a purpose of conflicts rules. Also see Schreiber, *The Doctrine of the Renvoi in Anglo-American Law*, 31 HARV. L. REV. 523, 529-31 (1918) who argues that conflict rules are not supposed to define the limits of spatial operation of the internal rules of states; the function of these rules is not definitive, but selective.

35. For example, the conflict of laws rules may direct the court to an insurance statute of the foreign state. However, if the language of this statute limits its application to interests situated within the state, then it cannot be used to govern any other interests. See NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 70-73 (1943). See also Cheatham and Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 965-69 (1952).

36. See HANCOCK, *op. cit. supra* note 23, § 14; NUSSBAUM, *op. cit. supra* note 35, at 72; McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws*, 78 U. PA. L. REV. 933, 941 (1930); MORRIS, *supra* note 34, at 170.

Assuming of course that the forum is desirous of ascertaining the purpose of the statute in question, it may consider the particular type. Thus, since Wisconsin enacted a direct action statute, but limited it to motor vehicle accidents, this expresses a different policy toward insurance and accidents than does the typical Nebraska statute which gives an action against the insurer only after a judgment against the insured.

Statutes accomplishing functions similar to the direct action have used varying language to convey their intentions. For example, some are written in terms of "every policy written . . ." R. I. GEN. LAWS c. 155, § 1 (1938). Others provide that "no policy . . . shall be issued or delivered in this state. . . ." LA. REV. STAT. § 655 (1950). "Any bond or policy of insurance" is included in some statutes. WIS. STAT. § 85.93 (1953). Still other states regulate "[i]n respect to every contract of insurance made between an insurance company and any person . . ." ALA. CODE tit. 28, § 11 (1941). Another state asserts that contracts must have certain provisions in this state. CAL. INS. CODE ANN. § 11580 (1950). From this diversity of language, perhaps different intentions of the statute may be found. For example, statutory language referring to all contracts embraces more than statutes limited to policies in the state. Also, differences in interpreting the use of the words "issued" and "made" may be perceived.

Some aid in construing the intention of the statute as communicated by these various phrases is derived from other sources. Thus, in New York there is a general regulatory policy designed to regulate all types of insurance and insurance companies "doing an insurance business" in the state. This at least indicates the all inclusiveness of the purpose of supplementary insurance regulations. N.Y. INS. LAW § 40 (1949).

Additional relief in construing vague phraseology is afforded by the enacting state by defining certain terms of the statute. Thus, "[a]ll contracts of insurance, the application for which is taken within the state, shall be deemed to have been made within this state, subject to the laws thereof." ALA. CODE tit. 28, § 10 (1940).

37. The major exception to this generalization is in the field of workmen's compensation. See Roos, *The Problem of Workmen's Compensation in Air Transportation*, 6 J. AIR L. REV. 1 (1935).

conflicts rules, the use of which must be justified practically in terms of desirability of results reached.

In order to reach these results, problems involving direct action statutes must be characterized.<sup>38</sup> The initial stage is to allot the facts to a legal category, which determines the nature of the problem.<sup>39</sup> While actions arising out of liability insurance contracts present aspects of tort and contract,<sup>40</sup> only one category can be selected. States have disagreed, but the contract classification has usually prevailed.<sup>41</sup> In the second stage, the state whose local or internal law should be applied must be designated.<sup>42</sup> This has generally been the place of making the contract.<sup>43</sup> However, states have also applied the law of the jurisdiction

For general discussion of the process and goals of drafting laws in the light of potential conflicts problems, see Morris, *supra* note 34; see also McClintock, *supra* note 36, at 941.

38. Characterization is sometimes used synonymously with "qualification" and "classification."

For general discussions and analysis of characterization, see COOK, *THE LOGICAL AND LEGAL BASIS OF CONFLICT OF LAWS* 211-38 (1942); 1 RABEL, *op. cit. supra* note 31, at 47-60; ROBERTSON, *op. cit. supra* note 34, at 1. Robertson's study is the most comprehensive. Also see Cormack, *Renvoi, Characterization, Localization and Preliminary Questions in the Conflict of Laws*, 14 So. CALIF. L. REV. 221 (1941); Falconbridge, *Characterization in the Conflict of Laws*, 53 L.Q. REV. 235, 537 (1937); Lorenzen, *The Theory of Qualification and the Conflict of Laws*, 20 COLUM. L. REV. 247 (1920).

39. This stage is referred to frequently as "primary characterization" and its function is to put a legal complexion upon the facts. This stage of the process has to be performed in every legal determination, whether involving a problem of conflict of laws or not. Generally, see ROBERTSON, *op. cit. supra* note 34, at 59-91; Cormack, *supra* note 38, at 223-33; FALCONBRIDGE, *op. cit. supra* note 34, at 123.

40. Hancock, *op. cit. supra* note 31, at 240-41.

41. See general discussion in Notes, 3 UTAH L. REV. 490, 493-99 (1953), 39 VA. L. REV. 655, 663-68 (1953).

Most cases in this area automatically refer to the contract. See Fischer v. Home Indemnity Co., 198 F.2d 218 (5th Cir. 1952); Ritterbusch v. Sexmith, 256 Wis. 507, 41 N.W.2d 611 (1950); Riding v. Travelers' Insurance Co., 48 R.I. 433, 138 Atl. 186 (1927).

In Kerston v. Johnson, 185 Minn. 591, 242 N.W. 329 (1932) an injury occurred in Wisconsin, which applied its direct action statute. Although the opinion doesn't indicate the place of contracting, it has been argued that this case gives a basis for suggesting that the place of injury should determine the obligation of the tortfeasor's insurer. See HANCOCK, *op. cit. supra* note 31, § 52; accord, Hidalgo v. Fidelity & Casualty Co. of N.Y., 104 F. Supp. 230 (W.D. La. 1952); Burkett v. Globe Indemnity Co., 182 Miss. 423, 181 So. 316 (1938).

42. This stage is referred to as the "connecting factor" because its function is to establish a connection between the factual situation in dispute and a particular system of law. Generally, see ROBERTSON, *op. cit. supra* note 34, at 92-117; Cormack, *supra* note 38, 234-40; Falconbridge, *supra* note 34, at 124-36.

43. The cases have interpreted "place of making" to mean where the last act necessary to make a valid contract was completed. Delivery of the policy or execution of it has constituted this final act. See Fischer v. Home Indemnity Co., 198 F.2d 218 (5th Cir. 1952); Belanger v. Great American Indemnity Co. of N.Y., 188 F.2d 196 (5th Cir. 1951); Ritterbusch v. Sexmith, 256 Wis. 507, 41 N.W.2d 611 (1950); Coderre v. Travelers' Ins. Co., 48 R.I. 152, 136 Atl. 205 (1927). See Note, 3 UTAH L. REV. 490, 494 (1953). For a general criticism of the "place of contracting" rule, see Cook, *Contracts and the Conflict of Laws*, 31 ILL. L. REV. 143 (1936).

explicitly stipulated in the contract,<sup>44</sup> the place intended by the parties,<sup>45</sup> or the place of performance.<sup>46</sup> If the problem is classified as tort, the law of the place of accident controls.<sup>47</sup> In the final stage, the forum must determine whether the direct action statute is one of substance or procedure;<sup>48</sup> if it is considered to be procedural, the forum will apply its own law.<sup>49</sup> Once again, the states have conflicted.<sup>50</sup> Some have called the statute procedural;<sup>51</sup> others have labeled it substantive.<sup>52</sup> This confusion is compounded by the difficulty of perceiving differences between substance and procedure.<sup>53</sup>

Another complicating factor in the characterization process is the determination of which state's law to apply in deciding each of the three

44. *Duncan v. Ashwander*, 16 F. Supp. 829 (D.C. La. 1936); *accord*, *Sheehan v. Lewis*, 218 Wis. 588, 260 N.W. 633 (1935). For general discussion of the right to stipulate the law of a state to govern a contract, see 1 COUCH, *op. cit. supra* note 3, § 199; Annot., 112 A.L.R. 124 (1938). In some instances, the courts have disregarded express contract stipulations in determining the place of contract. See *Cravens v. New York Life Ins. Co.*, 178 U.S. 389 (1900).

45. Actually, there is only a slight suggestion in some cases that intent has an influence. See *Bayard v. Traders & General Insurance Co.*, 99 F. Supp. 343 (W.D. La. 1941).

46. *Martin v. Zurich General Accident & Liability Ins. Co.*, 84 F.2d 6 (1st Cir. 1936), *vacating*, 13 F. Supp. 162 (D. R.I. 1935), *cert. denied*, 299 U.S. 579 (1936). Here the place of performance governed because of an explicit stipulation in the contract. Generally, however, place of performance has been rejected by the courts, although it has been argued in the cases. See dissenting opinion in *Ritterbusch v. Sexsmith*, 256 Wis. 507, 41 N.W.2d 611 (1950); *Lowery v. Zorn*, 157 So. 826 (La. App. 1934).

47. See *Hidalgo v. Fidelity & Casualty Co.*, 104 F. Supp. 230 (W.D. La. 1952); *Burkett v. Globe Indemnity Co.*, 182 Miss. 423, 181 So. 316 (1938); *Kerston v. Johnson*, 185 Minn. 591, 242 N.W. 329 (1932).

48. This stage is called secondary characterization, and is necessary to determine how much of the foreign and domestic law applies to the case. In addition to substance and procedure determinations, questions of domicile and capacity, etc., when relevant, are decided at this stage. See ROBERTSON, *op. cit. supra* note 34, at 118-34.

49. GOODRICH, *op. cit. supra* note 32, § 80; HANCOCK, *op. cit. supra* note 31, § 13.

50. See Notes, 3 UTAH L. REV. 490, 490-93 (1953); 39 VA. L. REV. 655, 657-63 (1953).

51. Louisiana has generally labeled the statute as procedural. See *Churchman v. Ingram*, 56 So.2d 297 (La. App. 1951); *Robbins v. Short*, 165 So. 512 (La. App. 1936); *Stephenson v. List Laundry & Dry Cleaners, Inc.*, 182 La. 383, 162 So. 19 (1935); *but cf. West v. Monroe Bakery, Inc.*, 217 La. 189, 46 So.2d 122 (1950).

52. Wisconsin has refused to invoke the direct action statute because substantial rights were involved. See *Ritterbusch v. Sexsmith*, 256 Wis. 507, 41 N.W.2d 611 (1950); *Byerly v. Thorpe*, 221 Wis. 28, 265 N.W. 76 (1936). In the federal courts of Louisiana, although at one time conflicting, the statute is now labeled substantive. See *Bayard v. Traders & General Ins. Co.*, 99 F. Supp. 343 (W.D. La. 1951).

53. Cook argues that the distinction between substance and procedure is but an imperceptible degree. COOK, *op. cit. supra* note 38, at 154-93. For general discussion of substance and procedure, see GOODRICH, *op. cit. supra* note 32, §§ 80-91; FALCONBRIDGE, *op. cit. supra* note 34, at 301-15. Ailes, *Substance and procedure in the Conflict of Laws*, 39 MICH. L. REV. 392 (1941) should be compared with Cook's analysis. See also McClintock, *supra* note 36; Note, 47 HARV. L. REV. 315 (1933).



previous stages.<sup>54</sup> Thus, a state may make these determinations under its own internal or conflicts laws, or under the internal or conflicts laws of the foreign state.<sup>55</sup> Generally, characterization is governed by the internal law of the forum,<sup>56</sup> but there is some dispute.<sup>57</sup> The great inconsistency throughout the entire process of characterization indicates the possibility of adjusting and juggling the rules in order to fit the circumstances of the particular situation.<sup>58</sup>

While at times the Supreme Court has indicated a desire to weigh conflicting regulatory policies, it has offered no relief in respect to direct action statutes.<sup>59</sup> There is no national legislative policy, such as that expressed in the anti-trust field, to guide the Court.<sup>60</sup> It is doubtful whether any formula can be conceived which would adequately balance, or decide between, the states' varying policies in compensating injured parties, controlling accidents, and regulating insurance companies.<sup>61</sup>

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54. Robertson discusses these possibilities within each chapter devoted to the particular stage. Thus, see ROBERTSON, *op. cit. supra* note 34, at 66-91 (primary characterization), 95-117 (connecting factor), 130-34 (secondary characterization).

55. In general, see HANCOCK, *op. cit. supra* note 31, § 15; 1 RABEL, *op. cit. supra* note 31, at 47-60; ROBERTSON, *op. cit. supra* note 34, at 25-58.

56. RESTATEMENT, CONFLICT OF LAWS § 7 (1934); GOODRICH, *op. cit. supra* note 32, § 9. There are some exceptions to this generalization. Lorenzen, *supra* note 38, at 235, 537 discusses two primary ones; whenever qualifications affect tangible property, the *lex rei sitae* should govern, and if the forum is interested only as a place of trial, the courts should follow a system of qualification agreed upon by the foreign states concerned.

57. While Robertson favors the internal law of the forum for the primary characterization and connecting factor stages, he is less certain as to what system should be employed for the secondary characterization stage. ROBERTSON, *op. cit. supra* note 34, at 69, 110, 133. See *McArthur v. Maryland Casualty Co.*, 184 Miss. 663, 688-89, 186 So. 305, 310 (1939) which follows the determination of the law of the state enacting a statute when it must be labeled substance or procedure. This decision is criticized in HANCOCK, *op. cit. supra* note 31, § 52.

58. See Leflar, *Choice of Law: Torts: Current Trends*, 6 VAND. L. REV. 447, 450 (1953), who states that except for some constitutional limitation, the courts are free to use the characterization device to avoid standard rules.

59. "In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more apparent."

"[T]he conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interest of each jurisdiction, and turning the scale of decision according to their weight." *Alaska Packers Ass'n v. Industrial Accident Comm'n.*, 294 U.S. 532, 547 (1935). See also *Watson v. Employers Liability Assurance Corp.*, 23 U.S.L. Week 4045, 4047 (U.S. Dec. 6, 1954).

60. For example, federal legislation in the anti-trust field defines a national policy. For an alternative solution to conflicts problems in this area, see Note, 30 IND. L.J. 502 (1955).

61. Jackson, *Full Faith and Credit—the Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 28 (1945). Mr. Justice Jackson presents a brilliant analysis of the theory and current problems of choice-of-law in the Supreme Court.

"There are no judicial standards of valuation of such imponderables."<sup>62</sup>

It is manifest that the application of conflicts rules has not provided consistency among the states in determining when the direct action statute applies.<sup>63</sup> As a consequence, a state following rigid conflicts rules in determining its applicability may have its policies thwarted, while other states interpret the rules to advance their own statutes.<sup>64</sup> To prevent the infusion of these contrary legislative policies of sister states, with the concurrent frustration of its own policies, a state should promote its domestic statutes as far as the Constitution allows.<sup>65</sup> In determining the extent permitted, the cases distinguish between situations in which the forum has no interest in the suit and those in which such an interest exists. The latter situation will be first considered. In determining the outlines of what constitutes a substantial interest or minimum contact to justify a forum's application of its own law, the due process and full faith and credit clauses suggest a similarity in their

62. *Ibid.*

63. Note, 3 UTAH L. REV. 490, 503 (1953). It has been argued that a multi-state situation can seldom be settled by the application of general choice of law rules. HANCOCK, *supra* note 33, at 147.

64. Assume state A has a direct action statute and state B has a conventional statute which requires a judgment first against the tortfeasor. Assume that in one case, the insurance contract is made in state A. A suit on it is brought in state B, which classifies the direct action statute on substantive and, consequently, permits a direct suit against the insurer. But assume the facts are reversed. The contract is made in state B, and the suit is brought in state A. State A perhaps calls its statute procedural, and therefore, is entitled to apply it to the case. Thus, in both situations, the direct action statute may be applied. The converse of this may also result.

There is no reason why states with less rigid standards should apply the rigid law unless uniformity is to be worshipped. Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 30 (1944).

65. While no author seems to go this far, many have suggested modifications on rigid conflict rules. For example, see Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE 1155, 1159 (1947), who feels the basic goal of uniformity must be balanced with the desirability of latitude for states with divergent ideas to establish their own standards of domestic behavior.

An impressive group of authorities emphasizes the significance of social and economic factors in favor of arbitrary conflicts rules. Generally, see COOK, *op. cit. supra* note 38; HANCOCK, *op. cit. supra* note 31; Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Heilman, *supra* note 31; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928). See Comment, 44 YALE L.J. 1233 (1935).

For a concise discussion of the trend of Supreme Court decisions founded on socio-economic considerations, see Beale, *Social Justice and Business Costs—A Study in the Legal History of Today*, 49 HARV. L. REV. 593 (1936).

One author reasons that since states have been left with almost unlimited legislative power, they cannot be expected to dispense with such protection in the face of different legislative policies of sister states. See NUSSBAUM, *op. cit. supra* note 35, at 123.

For expression of varying language which can be used to push this interest, see note 36 *supra*.

underlying requirements.<sup>66</sup> Originally, to secure uniformity in conflicts rules, the Court emphasized the importance of determining where the contract was made or to be performed.<sup>67</sup> More recently, a governmental interest test of reasonableness and fairness, based upon examination of the circumstances of the case, has been adopted.<sup>68</sup> This line of decisions minimizes the conceptualistic approach and recognizes the substantiality of other interests.<sup>69</sup>

Contacts relating to the making and performance of contracts have always been sufficient to justify application of a state's relevant statutory policies, even though it was not the forum and interests of other states were asserted.<sup>70</sup> In workmen's compensation cases the place where the accident occurred has also been considered a sufficient interest.<sup>71</sup> Several theories support choice of law: vested rights, reasonable expectations, governmental consideration of social policy, and naturalness in place of

66. U.S. CONST. art. IV, § 1; U.S. CONST. amend. V; U.S. CONST. amend. XIV. For general discussion of the two clauses and their relation to the conflict of laws, see CARNAHAN, *CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS* §§ 15-20 (1942); Dodd, Jr., *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533 (1926); Hilpert and Cooley, *The Federal Constitution and the Choice of Law*, 25 WASH. U.L.Q. 27 (1939); Moore and Oglebay, *The Supreme Court and Full Faith and Credit*, 29 VA. L. REV. 557 (1943); Overton, *State Decisions in Conflict of Laws and Review by the U.S. Supreme Court under the Due-Process Clause*, 22 ORE. L. REV. 109 (1943).

"It seems apparent that those factors which, by their presence in the case of a foreign statute, impel its application under the full faith and credit clause are similar to those which by their absence in the case of a statute of the forum, prohibit its application as a matter of due process." Hilpert and Cooley, *supra* at 39; also see CARNAHAN, *op. cit. supra*, § 20.

67. Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924); Mutual Life Ins. Co. of N.Y. v. Liebing, 259 U.S. 209 (1922); N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357 (1918); N.Y. Life Ins. Co. v. Head, 234 U.S. 149 (1914); Allgeyer v. Louisiana, 165 U.S. 578 (1897). See Greene, *The Allgeyer Case as a Constitutional Embrasure of Territoriality*, 2 ST. JOHN'S L. REV. 22 (1927).

68. The dissent of J. Brandeis in N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357, 377 (1918) was apparently the first advocacy of the governmental interest test. He attacked the conceptualistic philosophy and maintained that extra-state contracts could be affected if within a reasonable scope of regulation. He applied this test in Home Ins. Co. v. Dick, 281 U.S. 397 (1930), but it was held that the forum state had an insufficient interest in the suit to justify application of its own statute.

For examples of more recent use of the test, see Hoopston Canning Co. v. Cullen, 318 U.S. 313 (1943); Pacific Employers' Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178 (1936); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935); Hartford Accident & Indemnity Co., v. Delta & Pine Land Co., 294 U.S. 143 (1934).

69. See CARNAHAN, *op. cit. supra* note 66, § 20; Cheatham, *supra* note 66, at 594-600; Moore and Oglebay, *supra* note 66.

70. See note 67 *supra*.

71. Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); but cf. Bradford Electric Light Co., Inc. v. Clapper, 286 U.S. 145 (1932). See also STUMBERG, *op. cit. supra* note 31, at 219.

redress for the injury.<sup>72</sup> The place of accident theory was extended recently to insurance regulation when the Supreme Court of the United States upheld Louisiana's direct action statute and permitted suit by a citizen of Louisiana, injured in that state, against an insurance company on a contract made outside the state.<sup>73</sup> Language in the decision emphasized the sociological association with the place of accident in order to justify it as a contact; the Court stressed the fact that Louisiana may be required to care for the injured parties.<sup>74</sup>

As a contact point, place of injury is certainly as justifiable as place of making or performing of the contract, although the exclusive use of the latter contacts might conceivably provide a uniform system for resolving multi-state insurance conflicts.<sup>75</sup> Any scheme for regulating insurance must be examined in view of the competing interests to be protected. One purpose of liability insurance is the protection of injured parties.<sup>76</sup> Frequently, these parties will have no relation to the state in which the contract was made, yet regulations of these states will ultimately affect the injured's rights. Since the state where the accident occurred does have some interest in the injured party, it seems just as reasonable to permit the law of this state to determine the rights of the injured person as the law of the state in which the contract was made.<sup>77</sup>

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72. For general discussion of these theories and the place of tort rule in relation to conflicts cases, see 2 BEALE, *THE CONFLICT OF LAWS* 1287-1304 (1935); GOODRICH, *op. cit. supra* note 32, §§ 92-105; HANCOCK, *op. cit. supra* note 31; 2 RABEL, *op. cit. supra* note 31, at 227-354; STUMBERG, *op. cit. supra* note 31, at 201-12; Lorenzen, *Tort Liability and the Conflict of Laws*, 47 L.Q. REV. 483 (1931); Rheinstein, *supra* note 64.

73. *Watson v. Employers Liability Assurance Corp.*, 23 U.S.L. WEEK 4045 (U.S. Dec. 6, 1954). It is significant to note that the Louisiana statute demands that before insurance companies receive a certificate of authority to do business in the state, they must consent to being sued by the injured person or his heirs in a direct action. LA. REV. STAT. § 983 E (1951). The dissent in the *Watson* case would have based the decision on this consent theory, but the majority decided the case on the constitutional question of the validity of this statute to effect extraterritorially made contracts. While apparently this consent requirement is valid, see discussion raising opposite possibility in Comment, 5 STAN. L. REV. 514 (1953). For general analysis of the limitations of constitutional conditions imposed by states, see Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Merrill, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879 (1929).

74. 23 U.S.L. WEEK 4045, 4047 (U.S. Dec. 6, 1954). The court reasoned that Louisiana had a natural interest in protecting people injured within the state because many of them would be citizens or would have to be cared for in the state. This care must come from hospitals of the state or even from the public.

75. However, for a criticism of the place of tort rule, see STUMBERG, *op. cit. supra* 31, at 201-12.

76. See Leigh, *Direct Actions Against Liability Insurers*, 1949 INS. L.J. 633.

77. It might be contended that a state regulating insurance contracts made within its borders has a stronger relation than does a state protecting the injured. However, people injured within a state are generally its citizens. It is probable that the number of people injured in a state is comprised of as large a percentage of citizens of the state as is the group making contracts within the state. It might be reasoned that when an out of state citizen seeks to capitalize on the regulations of a state in the face of

The objection to place of accident as a contact and to the encouragement of a state to promote its own domestic policy is the opportunity of injured parties to select a forum with a statute favorable to them.<sup>78</sup> Formerly, the insurance company could, by making its contracts in a state with lenient insurance regulations, have a decisive advantage in determining the outcome of litigation. Now the use of place of accident as an equally legitimate contact reverses the advantage.<sup>79</sup> Whether the Court will approve still other types of contacts in the insurance area, as it has tended to do in workmen's compensation, remains to be seen.<sup>80</sup> In any event, whenever it can find a constitutionally substantial contact, the state should openly admit an intention to further its own domestic policy and apply its own statute. The process of characterization should be eliminated under these circumstances.<sup>81</sup>

Whenever the state does not possess a substantial interest, completely different problems arise. Subject to the full faith and credit clause, the forum may refuse to entertain the suit.<sup>82</sup> Or it may accept the case but refuse to recognize a defense based on a foreign statute.<sup>83</sup>

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regulations directly associated with a resident, the latter should prevail. However, the need for generally applicable law would outweigh a desire to detail this limited number of exceptions.

78. It has been asserted that this practice is not objectionable. See Rheinstein, *supra* note 64, at 30. This practice is possible in workmen's compensation litigation. See NUSSBAUM, *op. cit. supra* note 35, at 59-63; STUMBERG, *op. cit. supra* note 31, at 219.

79. This advantage is reversed only when an injured party can utilize the Louisiana direct action statute. Of course, even when no such statute exists, an injured party has some opportunity to seek a forum whose rules favor a statute partial to the plaintiff.

80. There is a practical justification when a state applies its own law in workmen's compensation cases. Workmen's compensation awards are made by a commission empowered to apply only the laws of the state of its creation. However, there is no such restriction on the courts in resolving insurance problems, and the use of a foreign state's law is possible. This difference has not been emphasized by the courts.

To date, workmen's compensation cases have placed emphasis on tort, contract, business localization, and employment location. See STUMBERG, *op. cit. supra* note 31, at 212-23; Wellen, *Workmen's Compensation, Conflict of Laws and the Constitution*, 55 W. VA. L.Q. 131, 137-42 (1952).

The cases in the two areas have given consideration to sociological factors to justify the substantiality of contact. Compare *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 542 (1935), with *Watson v. Employers Liability Assurance Corp.*, 23 U.S.L. Week 4045, 4047 (U.S. Dec. 6, 1954). See Note, 35 COLUM. L. REV. 751 (1935). The Court has accepted the relationship of the state to an individual requiring economic assistance, though not necessarily a citizen. From this, perhaps, may be inferred the possibility of the state recognizing residency, domiciliary status, or place of incorporation as sufficient connection to impose its own statutes in a multi-state suit.

81. The purpose of characterization is merely to provide a system for reaching a fair and adequate result. There is no constitutional or statutory compulsion for its use, however. In view of the consequences of resorting to this process, it seems that better results may be obtained when the court is unrestricted by the demands of characterization.

82. *Griffin v. McCoach*, 313 U.S. 498 (1941).

83. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

The latter alternative is severely limited by the due process clause.<sup>84</sup> A state may be reluctant to apply a foreign statute because of inconvenience to the court<sup>85</sup> or repugnancy to its public policy.<sup>86</sup> However, unless the policy of the forum is violently opposed to such a statute, recent cases indicate that the Supreme Court will require recognition of causes of action based on a foreign state's statute.<sup>87</sup>

In accepting the case, a disinterested forum should retain the process of characterization. Since a substantial interest is necessary before a forum can justify application of its own substantive law, the abandonment of this process would offer no advantages. However, in using this process, a state might attempt to classify the foreign statute as procedural in order to apply its own law. Whether this would be considered to be a discriminating determination and consequently disallowed by the Supreme Court remains unsettled.<sup>88</sup> The Court has upheld a state's right to classify a statute as procedural even to the extent of frustrating the objective of uniformly enforcing foreign causes of action.<sup>89</sup> It has condoned a state's refusal to decide a cause of action when the statute of limitations of the forum was violated even though the statute of limitations

84. One court has stated that ". . . to refuse to give effect to a substantive defense, arising under a contract valid where made and to be performed, would violate the principles of due process, even though the local courts might lawfully refuse to affirmatively enforce the contract." *Holderness v. Hamilton Fire Ins. Co.*, 54 F. Supp. 145, 147 (S.D. Fla. 1944).

85. See *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U.S. 373 (1904); *cf. Gulf Oil Co. v. Gilbert*, 330 U.S. 501 (1946). Generally see Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

86. See discussion in GOODRICH, *op. cit. supra* note 32, § 11; STUMBERG, *op. cit. supra* note 31, at 168-72. For opposition to the extension of this principle, see Goodrich, *supra* note 32, at 156. Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26 (1938); Jackson, *supra* note 61, at 26; Nutting, *Suggested Limitations of the Public Policy Doctrine*, 19 MINN. L. REV. 196 (1934).

87. *First National Bank of Chicago v. United Air Lines*, 342 U.S. 396 (1952). See Leflar, *supra* note 58; Note, 5 VAND. L. REV. 203 (1952). *Hughes v. Fetter*, 341 U.S. 609 (1951). See Comments, 37 CORNELL L.Q. 441 (1952); 51 MICH. L. REV. 267 (1953).

One state court has refused to entertain a suit based on a cause of action arising in a state with a direct action statute but brought in a state where no such statute existed. The refusal was based on public policy reasoning. *Lieberthal v. Glens Falls Indemnity Co.*, 316 Mich. 37, 24 N.W.2d 547 (1946). One reputable writer argues that this attitude in regard to the direct action statute would be embraced by the majority of states in the absence of a direct action statute. The writer concedes that if a policy covering all injuries is issued in a state with a direct action statute, then the statute should be applicable to local injuries even though the forum has no such statute. STUMBERG, *op. cit. supra* note 31, at 211, n.92; *contra*, Note (29 N. DAK. L. REV. 182, 184 (1953)).

88. An assertion by the forum that a particular aspect of a case is procedural is not conclusive. See *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936). See also 27 COLUM. L. REV. 485 (1937).

89. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953). See Comment, 33 B.U.L. REV. 508 (1953); Note, 27 TEMP. L.Q. 216 (1953).

of the state in which the action arose had not yet run. The wisdom of applying this precedent to the direct action statute is questionable. Admittedly, rules determining parties to a suit are generally classified as procedural.<sup>90</sup> But a statute should be thoroughly evaluated before labeled.<sup>91</sup> As has been pointed out, the direct action statute confers on the injured party many benefits which may well make the difference between a favorable and unfavorable verdict, a substantial or average verdict, or even the existence or non-existence of a cause of action.<sup>92</sup> The procedural machinery of the forum is not handicapped in applying this statute.<sup>93</sup> It would seem that the statute should be classified as substantive.<sup>94</sup> Also, there should be consistency in characterization. Suppose the forum classifies an insurance suit as contract and applies the law of the state in which the contract was made, which perhaps has no direct action statute. In a succeeding suit, it ought to classify a comparable fact situation as contract, even if that state does have such a statute.

The direct action statute is but one aspect of complex experimentation in insurance and accident regulation undertaken by the states.<sup>95</sup> While some state plans, such as financial responsibility laws, have been adopted generally, many diverse policies still exist;<sup>96</sup> when competing interests of several states are involved in litigation, a great deal of confusion and inconsistency persists.

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90. GOODRICH, *op. cit. supra* note 32, § 82; RESTATEMENT, CONFLICT OF LAWS § 558 (1934).

91. HANCOCK, *op. cit. supra* note 31, § 13. For general discussion of problems involved in labeling a statute substance or procedure, see authorities cited in note 53 *supra*.

92. If an accident occurred in Louisiana between husband and wife, a suit under the direct action statute would be permissible. See note 17 *supra*. If the identical parties had the accident in a state without such a statute, there would be no cause of action. See discussion of this point in *Burke v. Massachusetts Bonding & Ins. Co.*, 209 La. 495, 24 So.2d 875 (1946). *But see Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936) where accident occurred in state allowing interspousal suits. When suit was brought in a state which prohibited such suits, the case was dismissed.

93. Such a handicap would clearly justify classification of the statute as procedural, for a forum is not required to make over its machinery for the administration of justice. See GOODRICH, *op. cit. supra* note 32, § 80; Cheatham and Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 964-65 (1952).

94. "But it is impossible to see how the Louisiana statute could be classified as a rule of procedure for conflict of laws purposes. Such a classification should only be made where the rule in question cannot be conveniently implemented by the court of the forum. If this element of inconvenience is not present, there is no sufficient justification for disregarding the choice-of-law policies which require that rights vested under a proper law should be enforced, so far as is possible, in all other jurisdictions." HANCOCK, *op. cit. supra* note 31, § 52. See cases cited in note 52 *supra*.

95. In support of state regulation of insurance, see Orfield, *Improving State Regulation of Insurance*, 32 MINN. L. REV. 219 (1948); Patterson, *The Future of State Supervision of Insurance*, 23 TEX. L. REV. 18 (1944).

96. Marryott, *supra* note 31, at 85.

Though federal control would eliminate this inconsistency, it would be discordant with the current policy of avoiding all insurance regulation.<sup>97</sup> The price of entering the field completely, abandoning state experimentation, would be high.<sup>98</sup> It might be suggested that when state interests clash, the Supreme Court should weigh the conflicting policies and select the most desirable one. This procedure, however, would appear to be burdensome. The Court has been content to define general boundaries of extraterritorial application of state statutes.

Since conflicts rules have failed to achieve their purpose of uniformity and consistency of decision in regard to the direct action statute, one state is able to infringe on the sphere of interest of others. A more rational approach would be the abandonment of conflicts rules; and when it has a substantial interest, a state should be encouraged to apply its own law to the extent permitted by the Constitution.

### SECURITY INVENTIONS: COMPENSATION UNDER PATENT AND ATOMIC ENERGY ACTS

Increasing numbers of inventions are being denied patent grants as a result of the conflict between the incompatible concepts of secrecy, a vital factor in national security, and full disclosure, a basic element of the patent system. National defense has increased the interest of Government in the field of research; consequently, the regulation of patent rights affects a considerable part of current technological developments.<sup>1</sup> In an attempt to replace the incentive stultified by this regulation, the Government compensates the affected inventors.<sup>2</sup> From the

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97. For discussions of federal control possibilities, see KULP, *CASUALTY INSURANCE* 655-59 (2d. ed. 1942); Hubbard, *Too Many Governments*, 10 A.B.A.J. 207 (1924).

Of course, an alternative to direct federal regulation of insurance is the enactment of a federal system of conflicts rules. This would permit prediction in interstate cases, and prevent harmful results of state provincialism. Some feel that it may be premature to sacrifice state independence and diversity in the area of conflict of laws. See Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 587-88 (1953).

98. One obvious danger is that congressional legislation would fail to set standards for nationwide operation as high as that currently supported by the individual states. Patterson, *supra* note 95, at 31. A second obvious objection is the possible destruction or diminution of state power, with the consequent weakening of local government.

1. The majority of inventions pertinent to military secrecy problems are subject to government control because of the participation by the government in their development and creation. The following discussion does not attempt to deal with the regulation of inventions in which the Government has an interest. For an analysis of this aspect see Dienner, *Government Policies Relating to Research and Patents*, 13 LAW & CONTEMP. PROB. 320 (1948); Forman, *Government Ownership of Patents and the Administration Thereof*, 28 TEMP. L.Q. 31 (1954).

2. 35 U.S.C. § 183 (1952).