

# Codifying Interest Analysis in the Torts Chapter of a New Conflicts Restatement

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## I. NUMEROUS JURISDICTIONS ENGRAFT ONTO THE TORTS CHAPTER OF RESTATEMENT SECOND THE FALSE CONFLICT CONCEPT OF INTEREST ANALYSIS

Many courts that purport to have adopted the *Second Restatement's* choice-of-law methodology read into it—at least in the torts chapter—an analytical step that is inconsistent with the center-of-gravity foundation of that treatise. These courts engraft onto the *Second Restatement* recognition of a key element of the competing interest analysis theory fashioned by Brainerd Currie and his followers: the false conflict. That is, if the issue in tort relates to loss distribution rather than conduct regulation, the court will apply the law of the common domicile of the plaintiff and defendant (or of the domicile of one of them if they are from different states having the same rule of tort law for the problem at issue) rather than the law of the place of injury.

Some of these decisions quote the *Second Restatement's* section 6(2)(c), listing as a factor in choice of law “the relevant policies of other<sup>[1]</sup> interested states and the relative interests of those states in the determination of the particular issue.”<sup>2</sup> The

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I. “Other” here refers to the state of the forum, whose “relevant policies” are declared to be pertinent factors in the choice-of-law analysis by the preceding subsection of section 6, subsection (2)(b). RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b) (1971) [hereinafter SECOND RESTATEMENT]. Thus section 6 assumes that the forum will always have some connection to the litigation that makes its substantive law constitutionally eligible for application. Yet the only connection of the forum could be that the defendant recently moved there and became subject to personal jurisdiction. *Cf.* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (holding that party’s post-accident move to forum was basis for supplying forum substantive law only when aggregated with two other contacts).

2. SECOND RESTATEMENT, *supra* note 1, § 6(2)(c) (emphasis added); *see, e.g.*, Travelers Indem. Co. v. Lake, 594 A.2d 38 (Del. 1991) (holding that common domicile of tort victim and his insurer displaces place of injury on issue of damage cap for harm caused by uninsured motorist); Mezroub v. Capella, 702 So. 2d 562 (Fla. Dist. Ct. App. 1997) (holding that common domicile displaces place of injury); Crowell v. Clay Hyder Trucking Lines, Inc., 700 So. 2d 120 (Fla. Dist. Ct. App. 1997) (same, issue of vicarious liability); Wagner v. Hughes Wood Prods., Inc., 979 S.W.2d 84 (Tex. Ct. App. 1998) (holding that common domicile overrides presumption favoring place of injury where issue was whether workers compensation statute provided exclusive remedy), *review granted*, No. 09-96-259-CV (Tex. Aug. 26, 1999); *see also* Melville v. American Home Assurance Co., 443 F. Supp. 1064, 1084 (E.D. Pa. 1977) (“§§ 6(b) and (c) . . . counsel evaluating contacts through the ‘relevant policies of the forum and other interested states,’ in a manner virtually indistinguishable from Professor Currie’s interest analysis.”), *rev’d on other grounds*, 584 F.2d 1306 (3d Cir. 1978); William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645, 665

Connecticut Supreme Court, in holding that the law of plaintiff and defendant's domicile would determine if a common law cause of action in tort arose out of an accident in another jurisdiction, said that the "choices of policy emphasized in [section] 6(2)(b), (c), and (e) were "[o]f greatest importance"<sup>33</sup> to it in rejecting the law of the place of injury under its *Second Restatement* analysis.

But "interested" in section 6 has a different meaning than it has under Currie's interest analysis, under which a state has no interest in the resolution of a loss-distribution issue unless one of its domiciliaries is a party to the litigation (or directly affected by the outcome) and its law is favorable to that party. Rather, the word means "connected" or "involved," since the *Second Restatement* declares that "the place of injury has an obvious interest in . . . providing redress for injuries that occur there."<sup>34</sup>

Some of the decisions that find Currie's false conflict theory in the *Second Restatement* rely, in addition to the wording of section 6, on a part of section 145, the basic section on torts (and the *Second Restatement's* starting place for analysis when no narrowly drafted section of the torts chapter provides a presumptive center of gravity for a type of tort or specific issue in tort). Subsection (2)(c) of section 145 states that a relevant contact in the analysis in tort cases is "the *domicil*, residence, nationality, place of incorporation and place of business of the parties."<sup>35</sup> But section

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nn.102-03 (1983); Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475, 486 (2000) (stating that section 6 factors allow judges using *Second Restatement* "to identify and eliminate false conflicts").

3. O'Connor v. O'Connor, 519 A.2d 13, 22 (Conn. 1986). Subsection (e) declares to be a relevant factor "the basic policies underlying the particular field of law." *Id.* The court's section 6 analysis lead it to conclude that "[t]he state of the place of the wrong has little or no interest in . . . compensation [issues] when none of the parties reside there." *Id.* at 24.

4. SECOND RESTATEMENT, *supra* note 1, § 145 cmt. d. Comment f to this section gives as an example of a situation where the state of injury is the jurisdiction whose "interests are most deeply affected," one where "a husband injures his wife in a state other than that of their domicile," *id.* § 6 cmt. f, and the dispute concerns the loss-distribution issues of duty of care and contributory negligence. Additionally, the very first comment addressed to section 6(2) itself declares that the factors listed there are those applied by the drafters of the *Second Restatement* in writing the specific sections, such as section 146's presumption that the law of the place of injury governs if the tort action seeks recovery for personal injuries. *See id.* § 6 cmt. c. Comment d to section 146 says that if the injury and tortious conduct occur in the same state, it will "usually be the state of dominant interest." *Id.* § 146 cmt. d. Comment d to section 175 says that a section 6 analysis will reveal "whether some other state has a *greater interest* in the determination of the particular issue than the state where the injury occurred." *Id.* § 175 cmt. d (emphasis added).

5. SECOND RESTATEMENT, *supra* note 1, § 145(2)(c) (emphasis added). Many cases have found a Currie-style false conflict while quoting or paraphrasing section 145(2)(c). *See, e.g.*, Gordon v. Kramer, 604 P.2d 1153, 1154-55 (Ariz. Ct. App. 1979) (holding that common domicile law, not that of place of injury, governed whether plaintiff's "guest" status precluded recovery); Partman v. Budget Rent-a-Car, 649 A.2d 275, 277-78 (Conn. Super. Ct. 1994) (stating that whether failure to wear a seat belt can be proved to mitigate recoverable damages in auto negligence case is "loss allocation" issue and governed by common domicile law rather than that of place of injury); Harris v. Berkowitz, 433 So. 2d 613, 614 (Fla. Dist. Ct. App. 1983) (holding that with respect to limitation on damages on wrongful death suit law of

145 is immediately followed by a section applicable to “personal injury” torts (surely a large majority of litigated cases) creating a presumption in favor of applying the “law of the state where the injury occurred [to] determine[] the rights and liabilities of the parties . . . .”<sup>6</sup>

While some courts applying the *Second Restatement* are aware that the fact of common domicile of the plaintiff and defendant in a tort suit is not by itself intended to rebut the section 146 presumption,<sup>7</sup> the prevailing judicial view as to the role of false conflicts analysis under the *Second Restatement* is captured in this passage from an opinion of the Florida Court of Appeals:

All parties to this action are permanent residents of Florida. It is therefore impossible to ascertain any policy Maine [the state of injury] might have in the application of its limitation on damages insofar as recovery by Florida residents for the death of a Florida decedent resulting from the negligence of another Florida decedent is concerned.<sup>8</sup>

I thus propose that the torts provisions of a new restatement in dealing with loss-distribution issues shift from the present heavy emphasis on territorialism<sup>9</sup> to interest

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common domicile governs rather than that of place of injury); *Esser v. McIntyre*, 661 N.E.2d 1138, 1141-43 (Ill. 1996) (holding that on issue whether facts create cause of action for negligence common domicile law applied instead of law of place of injury); *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071, 1073-74 (Ind. 1987) (stating that elements of a wrongful death claim based on products liability are determined by common domicile law applied over law of place of injury); *Myers v. Langlois*, 721 A.2d 129, 130-33 (Vt. 1998) (holding that law of place of injury recognizing common law tort cause of action yields to law of common domicile which provides only an administrative remedy); *Miller v. White*, 702 A.2d 392, 393-97 (Vt. 1997) (holding that law of place of injury granting administrative remedy instead of common law tort action yields to law of common domicile that provides common law action); *see also Harkcom v. East Tex. Motor Freight Lines, Inc.*, 433 N.E.2d 291, 293 (Ill. App. Ct. 1982) (holding that whether damages for emotional distress are recoverable in absence of physical injury determined by law of parties’ common domicile, not place of injury, citing prior Illinois precedents).

*Erwin v. Thomas*, 506 P.2d 494 (Or. 1973), involved not a false conflict arising from common domicile of the parties but a zero-interest case. After quoting sections 6 and 145 of the *Second Restatement* in full, the court declared it would resolve the case under interest analysis. “Where such policies and interests can be identified with a fair degree of assurance and there appears to be no substantial conflict, we do not believe it is necessary to have recourse in the ‘contacts’ of section 145(2) of Restatement (Second) . . . .” *Id.* at 497-98.

6. SECOND RESTATEMENT, *supra* note 1, § 146.

7. *See Ellis v. Barto*, 918 P.2d 540, 543 (Wash. Ct. App. 1996) (holding that place of injury supplied law of contributory negligence and limitations of action although both parties were domiciled in forum state).

8. *Harris v. Berkowitz*, 433 So. 2d 613, 615 (Fla. Dist. Ct. App. 1983). The broad presumption of section 146 was not applicable here because the *Second Restatement* in section 171 provides that the state supplying the measure of damages is to be determined under section 145.

9. Even when the issue is family immunity in tort, the *Second Restatement* is unwilling to squarely accept that no state other than the domicile of the parties should be considered as eligible to have its law applied. Section 169(2) says that “usually” the domicile law will be

analysis. While that approach is more methodological than rule-based,<sup>10</sup> the new restatement can readily offer black letter sections on how to use interest analysis to make a choice of law in tort cases. I do not agree that formulation of “rules” to solve conflicts that arise under particular fact-law patterns is a necessary objective of the legal field of conflicts of law.<sup>11</sup> A restatement that lays out a series of “steps” for the court to take to solve a choice-of-law problem, supported by commentary illustrating correct as well as incorrect application of these principles, would provide the guidance so badly needed by the bench and bar.

## II. GUIDANCE IS NEEDED TO ASSIST COURTS IN SORTING OUT ISSUES OF CONDUCT REGULATION VERSUS ISSUES OF LOSS DISTRIBUTION IN TORT

The crucial step in analysis that distinguishes conduct-regulating from loss-distributive issues (not discussed directly<sup>12</sup> in the *Second Restatement*) is reached after three preliminary questions are disposed of. First, does a statute of the forum state direct the court how to proceed on the choice-of-law issue before it?<sup>13</sup> Secondly, is the issue one of procedure rather than substance, so that forum law necessarily applies?<sup>14</sup> Thirdly—and this will surprise some adherents of interest analysis, since Brainerd Currie insisted that his method eliminated the need to classify the cause of action<sup>15</sup>—is the cause of action one in tort or some other general body of law such

chosen when section 145 factors are applied. SECOND RESTATEMENT, *supra* note 1, § 169(2).

10. See Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 318 (1972) (discussing the use of interest analysis in *Babcock v. Jackson*, as an “approach” rather than application of choice-of-law rules); see also Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 409-10 (2000). A “rule” of choice of law contains an answer to the conflicts question at hand, such as, that the interpretation of a contract of liability insurance is governed by the law of the state where the risk is located. See SECOND RESTATEMENT, *supra* note 1, § 193.

11. See Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 444 (2000) (citing Willis L.M. Reese, *General Course on Private International Law*, 150 RECUEIL DES COURS 1, 61 (1976)).

12. See SECOND RESTATEMENT, *supra* note 1, § 145 cmt. e (stating that the place of conduct “has peculiar significance” when the purpose of the tort rule at issue is to deter misconduct).

13. See *id.* § 6(1).

14. See *id.* §§ 122-144.

15. See Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178. Currie states:

A probable by-product of such a method [interest analysis] is the elimination of certain classical problems which are wholly artificial, being raised merely by the form of choice-of-law rules. The problem of characterization is ubiquitous in the law and can never be wholly avoided. Without choice-of-law rules, however, there would be no occasion for the specialized function of characterization as the mode of discriminating among the available prefabricated solutions of a problem; juridical gymnastics of the sort displayed in *Levy v. Daniels' U-Drive Auto Renting Co.* would be beside the point.

*Id.*

as contract, domestic relations, etc.? If the cause of action is not in tort, it is unlikely any issue arising in the choice-of-law process will be conduct-regulating so as to shift the focus away from domiciliary states.<sup>16</sup> The section addressing the need for classification must stress that it is the mode of pleading that supplies the answer, not the court's subjective "feeling" about the case. Thus, if *D*'s dog snatches *P*'s chicken in South Carolina and takes it to *D*—at his home just over the border in North Carolina—who cooks and eats it, *P* has a choice in pleading (and it will affect not just choice of law but also the type of damages recoverable and the applicable statute of limitations) between the tort of conversion or a quasi-contract.<sup>17</sup> If *P* chooses the latter, it is irrelevant that the court views the case as more "torty."

Much attention must be given to that section of the proposed restatement dealing with classifying an allegedly applicable rule of tort law as conduct-regulating, and thus to be governed by the law of the place of conduct rather than by the law of the state of domicile of one (or more) of the parties, or loss-distributive, since existing case law offers numerous erroneous decisions.<sup>18</sup>

For example, in *Hurtado v. Superior Court*,<sup>19</sup> the California Supreme Court declared that a rule of tort law declining to cap damages that the plaintiff could recover was a safety measure—a motorist who knew that such a local law applied rather than the rare law limiting damages would conduct himself with greater

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16. In contract cases, New York does recognize a dichotomy similar to the dichotomy in the torts field between conduct-regulating and loss-distributive issues. See *In re Allstate Ins. Co.*, 613 N.E.2d 936, 938-40 (1993). Center of gravity is said to be the appropriate method for most contract issues, which apparently are expected to be related to performance and controlled by the law of the place of performance. But interest analysis is used for other issues that raise matters of public policy. See *id.* at 938-39. I assume these would include capacity to contract, whether the contract is contra good morals, whether there has been duress, etc.

17. Many cases describe *P*'s choice as waiving the tort and suing in assumpsit. See 18 AM. JUR. 2D *Conversion* § 146 (1964); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 94, at 672-73 (5th ed. 1984). Note that in the casebook favorite, *Alabama G.S.R. v. Carroll*, 11 So. 803 (Ala. 1892), where plaintiff tried to recover for personal injuries suffered on the job first in tort and alternatively for breach of employment contract, the court did not bar the plaintiff from asserting a contract theory of recovery but consulted the contract law of the place of making of his employment contract. See *id.* at 807-09. The court concluded that, contrary to what the plaintiff argued, that law did not incorporate into the contract a certain statute existing when it was made that would have placed an additional contractual obligation on the employer. See *id.* And, in another casebook classic, *Levy v. Daniels' U-Drive Auto Renting Co.*, 143 A. 163 (Conn. 1928), the court that permitted the victim of an auto accident to style his cause of action in contract surely would have permitted the plaintiff there to plead a second, alternative count in tort and to try to convince the forum that the law of the place of injury imposed a duty in tort on renters of autos in favor of persons struck by their lessees. See *id.* at 164-65.

18. See *Bryant v. Silverman*, 703 P.2d 1190, 1194 (Ariz. 1985) (holding that plaintiff's domicile, rather than the place where tortious acts occurred, had a "strong interest" in determination of conduct issues in a wrongful death action); see also *supra* text accompanying notes 2-8.

19. 522 P.2d 666 (Cal. 1974).

caution.<sup>20</sup> In *Ledesma v. Jack Stewart Produce, Inc.*,<sup>21</sup> an accident had occurred in Arizona involving California plaintiffs and defendants from Arkansas and Oklahoma.<sup>22</sup> Treating the applicable statute of limitations as substantive, the Ninth Circuit panel held the two-year Arizona statute prevailed over California's one-year statute because dismissal under the latter as opposed to proceeding to trial under Arizona law "would impede the legitimate interest of the state of Arizona in promoting highway safety."<sup>23</sup>

If these decisions are correct, the category of loss-distributive tort issues does not exist. Every rule of law that requires the tort defendant to pay anything at all to the plaintiffs or even just suffer through a trial is conduct-regulating.<sup>24</sup> Undeniably there are rules of tort law that can be reasonably viewed as simultaneously conduct-regulating and loss-distributive. A state's policy of retaining contributory negligence rather than adopting the modernly popular comparative negligence doctrine could be based in part on the notion that potential plaintiffs will take more care if they are aware that any contributory negligence on their part will bar all recovery.<sup>25</sup> The New York Court of Appeals, dealing with a statute that imposed strict liability for jobsite injuries caused by scaffolding that did not meet certain specifications, correctly held that where the rule of law was fashioned by a court or legislature to further both the purpose of increasing safety and of creating a just loss-distribution system, proper classification turns on what "primarily" is the purpose of the rule.<sup>26</sup> Under this

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20. *See id.* at 672 (alternative holding). I have elsewhere offered a long list of reasons why this conclusion is untenable. *See* Reppy, *supra* note 2, at 669 n.117.

21. 816 F.2d 482 (9th Cir. 1987).

22. *See id.* at 483. In defense of the court, it is to be noted that under the *Erie* doctrine it had to apply California choice-of-law methodology, but surely the alternative holding of *Hurtado* regarding unlimited damages could have been distinguished.

23. *Id.* at 486. Even assuming the out-of-state driver was aware of the two-year rule of Arizona and the possibility he might injure someone from a state with a one-year limitations period, surely the potential defendant would assume that any victim would not let an applicable prescriptive period pass without filing suit. *See* Whisenhunt v. Sylvania Corp., 671 F. Supp. 214, 218 (W.D.N.Y. 1987) (stating that statutes of limitations "cannot be characterized as conduct regulating").

24. *See, e.g.,* Lee v. Bankers Trust Co., 166 F.3d 540, 545 (2d Cir. 1999) (holding rule of law imposing liability on party who defames another is conduct-regulating for choice-of-law purposes).

25. *See, e.g.,* District of Columbia v. Coleman, 667 A.2d 811, 819 (D.C. 1995). Surely, however, it would be a very rare situation where a potential tortfeasor acts more safely because of awareness that the misconduct of his potential victim will not be a complete defense.

26. *Padula v. Lilarn Properties Corp.*, 644 N.E.2d 1001, 1002-03 (N.Y. 1994) (holding the statutes involved were primarily conduct-regulating even though the imposition of strict liability constituted a loss-distributive aspect of the statutory scheme). Under this primary-purpose test, the court erred in its attempt to apply New York choice-of-law methodology in *Curley v. AMR Corp.*, 153 F.3d 5 (2d Cir. 1998). There, the court held that the definition of duty of care under negligence law and the duty not to falsely imprison were conduct-regulating issues, *id.* at 13-15, as was the Mexican (place of conduct) definition of duty of care, "acting . . . against good customs and habits." *Id.* at 14. I submit that duty of care is primarily a loss-distribution issue if that category is not to be swallowed up by classifying all tort law as conduct-regulating.

approach, few tort rules broader than a “rule of the road”<sup>27</sup> will qualify as conduct-regulating, the major exception being a rule that imposes punitive damages, what Dean Symeonides and his co-authors call the “*par excellence* . . . conduct regulating rule.”<sup>28</sup> I propose the new restatement express either in black letter or a comment that if a court is unable to determine whether a tort rule of law is primarily conduct-regulating or primarily loss-distributive, the latter is the default classification. That is, turning to the law of the place of conduct to apply a conduct-regulating rule is an exception to the normal use under interest analysis of domicile law to resolve conflicts.

Again, it will be necessary in the comments to the new restatement section on what constitutes a conduct-regulating rule to caution that it is the pleadings of the parties, not the subjective reaction of judges to the facts, that determine the location of the pertinent conduct. Thus, in *Schultz v. Boy Scouts of America, Inc.*,<sup>29</sup> a priest sexually abused two boys in New York. But in suing the priest’s employer, the Boy Scouts, the plaintiffs complained of negligent hiring and negligent supervision—conduct which occurred in New Jersey.<sup>30</sup> The dissenting judge’s theory that New York’s tort rule abolishing the defense of charitable immunity gave New York “a paramount interest in preventing and protecting against injurious misconduct within its borders”<sup>31</sup> was legally unsound in the suit against the Boy Scouts (as opposed to a suit against the priest himself).<sup>32</sup>

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27. *Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963); *see also Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 684 (N.Y. 1985) (discussing “rules of the road” as conduct-regulating). *But see* SECOND RESTATEMENT, *supra* note 1, §145 cmt. c (classifying laws allowing recovery for alienation of affection or criminal conversation as conduct-regulating).

28. SYMEON C. SYMEONIDES, WENDY COLLINS PERDUE & ARTHUR T. VON MEHREN, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* 282 (1998); *see also Wilson v. Chevron Chem. Co.*, No. 83 Civ. 762, 1986 WL 14925, at \*3 (S.D.N.Y. Dec. 17, 1986) (“The issue of punitive damages is clearly conduct regulating.”). A jurisdiction’s decision *not* to impose punitive damages in a specific fact situation results in a loss-distributive rather than conduct-regulating rule. If *P* and *D* are from state *X* that forbids punitive damages on the facts of the case but parties acted in state *Y* which imposes them, under interest analysis both rules are supposed to apply. It would seem that the conduct-regulating rule here trumps the contrary loss-distributive rule. If negligence *per se* is considered conduct-regulating, this same problem arises where that doctrine is recognized on the facts in the place of the tort, but not under law of the states of domicile of *P* and *D*.

29. 480 N.E.2d 679 (N.Y. 1985).

30. *See id.* at 681. The reports of *Schultz* do not suggest that the negligent supervision complained of was a failure by a possible superior of Brother Coakeley’s in the Boy Scout hierarchy who may have accompanied him and the boys on outings from New Jersey to New York to keep an eye on Coakeley so he could not molest the boys.

31. *Id.* at 691 (Jasen, J., dissenting).

32. *See id.* The reason the plaintiffs did not seek to hold the Boy Scouts liable for Coakeley’s acts under a respondeat superior theory is clear: buggery was not within the scope of his duties as a scout leader but was a “frolic” or “detour.” *See Schultz v. Boy Scouts of Am., Inc.*, 476 N.Y.S.2d 309, 315 (N.Y. App. Div. 1984) (Murphy, P.J., dissenting).

### III. LOCATING THE PARTIES: THE PROBLEM RAISED BY A PARTY OPERATING OUT OF A BRANCH OFFICE

#### *A. Domicile or Residence or Place of Business?*

The *Second Restatement* says that among the contacts to consider in determining the state which has the most significant relationship to an issue of tort law are “the domicile, residence, nationality, place of incorporation and place of business of the parties.”<sup>33</sup> In the case of a party<sup>34</sup> who is a human being and not involved in the litigation through his or her conducting an unincorporated business, the choices are domicile, residence, or nationality. The latter has almost no support in the case law, and it is hard to conceive of a fact-law pattern in which the location of a party is determined by greater national ties than domicile-based or residential contacts.

Brainerd Currie once stated that in choosing between domicile and residence as the test for locating a party in order to conduct an interest analysis, residence was the appropriate connecting factor.<sup>35</sup> I am more persuaded by the resolution of this issue by the high court of New York in *Tooker v. Lopez*.<sup>36</sup> In this wrongful death case, the court had to locate for interest analysis purposes a young woman, who was a domiciliary of New York attending college at Michigan State University.<sup>37</sup> The court held that even if the woman was residing in Michigan “for a full college education,”<sup>38</sup> New York’s connection with her was legally more significant for conflict-of-laws purposes than Michigan’s. This result makes sense because probably the overwhelming number of people domiciled in state *A* but residing in state *B* intend to return their domicile state relatively soon. It is true that a person can have a domicile in state *A* from which he has removed with a firm intention never to return, because he has yet to attain the state of mind that the place where he now resides shall be his home indefinitely.<sup>39</sup> The new restatement can handle such a situation by stating

33. SECOND RESTATEMENT, *supra* note 1, § 145(2)(c).

34. This discussion extends to locating a nonparty protected by a law that does not extend protection to a party, but which a party has standing to invoke to protect the nonparty. *See infra* text accompanying notes 48-52.

35. *See* Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 248 (1958) (stating that “domicile is an intolerably elusive factor in commercial transactions”).

36. 249 N.E.2d 394 (N.Y. 1969). The *Second Restatement* also apparently considers domicile a stronger connecting factor than residence although it does not directly face the question. A comment to section 145(2)(c) says that usually domicile—but occasionally place of business—is the state most connected to a plaintiff suing for defamation. SECOND RESTATEMENT, *supra* note 1, § 145 cmt. e. Two of the four illustrations to section 145 locate parties in their domicile; none of the four locates a party in his or her residence. *See id.* § 145 cmts. e, f, i & illus. 1-4.

37. *See Tooker*, 249 N.E.2d at 395. The woman, plaintiff’s decedent, had died in an accident, and the court hypothetically located the actual plaintiff, the administrator of her estate suing for the benefit of her heirs, with her. *See infra* text accompanying notes 46-47.

38. *Tooker*, 249 N.E.2d at 399. I assume “a full college education” refers to four years of undergraduate study without additional years in graduate school.

39. *See* SECOND RESTATEMENT, *supra* note 1, § 15 cmt. c (“Although the requisite facts for acquiring a domicil of choice have ceased to exist, the domicil is retained until a new



a strong presumption in favor of domicile as the connecting factor with commentary alluding to this unusual situation as one in which the presumption is overcome and the person should be located for choice-of-law purposes in his residence.

For a corporation the choices for locating a party offered by section 145 are place of incorporation or "place of business." The *Second Restatement* implies that the state of incorporation is the appropriate connecting factor only with respect to corporations law issues.<sup>40</sup>

The phrase "place of business" is vague when applied to the numerous cases that have arisen where a corporate party to litigation has its principal place of business in state *A* and a branch office in state *B* and is involved in the litigation because of activities centered in the branch office. The new restatement must squarely deal with this difficult problem. If the corporation is a plaintiff and would apply any damages recovered to bolster the branch office, locating it in state *B* makes sense. On the other hand, if the corporate plaintiff would apply the damages to an operation not in state *B*, locating it for interest analysis purposes in its principal place of business is logical. If the corporate plaintiff got involved in the litigation by activity in state *B*, that is likely to be where most of the damage to it was suffered, and it is likely the corporation would want to apply recovery in tort to improve the branch office that was harmed. I therefore propose that the new restatement express a presumption that a corporate plaintiff be located at the branch office through which it primarily became embroiled in the litigation. If a court cannot determine which of several operations that is, the party should be located at its principal place of business.

In the leading case dealing with this issue, *Offshore Rental Co. v. Continental Oil Co.*,<sup>41</sup> the California Supreme Court located for interest analysis purposes defendant Continental Oil in its Louisiana branch rather than in New York, its principal place of business, or Delaware, its state of incorporation.<sup>42</sup> The plaintiff's executive officer had been injured on premises owned by Continental Oil in Louisiana.<sup>43</sup> While I do not

domicil is acquired elsewhere.").

40. *Id.* § 145 cmt. e. ("At least with respect to most issues, a corporation's principal place of business is a more important contact than the place of incorporation . . .").

41. 583 P.2d 721 (Cal. 1978).

42. *See id.* at 723. In *Offshore Rental* the plaintiff was a California corporation with its principal place of business in California, but its injured officer worked out of a Texas branch office. *See id.* Although Continental Oil was located at its Louisiana branch, the plaintiff corporation was not. *See id.* at 723 n.2. This apparent inconsistency is discussed in Reppy, *supra* note 2, at 672 n.133.

43. *See Offshore Rental*, 583 P.2d at 723. In *Eger v. E.I. du Pont DeNemours Co.*, 539 A.2d 1213 (N.J. 1988), the court located du Pont for choice-of-law purposes at its plant in South Carolina, where the plaintiff was exposed to radiation. *See id.* at 1214-15. Du Pont's principal place of business is Delaware. *See* 1 WARD'S BUSINESS DIRECTORY OF U.S. PRIVATE AND PUBLIC COMPANIES 953 (1999); *see also In re Air Crash Disaster Near Chicago*, 644 F.2d 594, 614 (7th Cir. 1981) (locating defendant McDonnell Douglas Corporation for the purpose of California-style interest analysis at its California branch plant, where its tortious conduct allegedly occurred, rather than at its principal place of business in Missouri); *Jackson v. Travelers Ins. Co.*, 26 F. Supp. 2d 1153, 1155-57 (S.D. Iowa 1998) (locating Travelers at its West Des Moines branch instead of Connecticut, its principal place of business); *UARCO Inc. v. Lam*, 18 F. Supp. 2d 1116, 1123 (D. Haw. 1998) (locating plaintiff at Hawaii branch of operations rather than California principal place of business). *But see Kaiser-Georgetown*

think it is as likely that a corporation forced to pay a substantial judgment would draw on funds associated with its branch rather than its principal place of business as it is that a plaintiff corporation would transmit a recovery to its damaged branch, the benefits of having one rule to resolve the issue lead me to argue for applying the same presumption. That is, the corporate defendant should be located in the state of the involved branch office. What is appropriate for a corporate plaintiff should likewise be applied to a corporate defendant.<sup>44</sup>

Although I have not found a case on point, it makes sense to apply the same rules to a human being who is involved in litigation because of actions or inactions involving his or her unincorporated business. Thus, if the plaintiff is Mary Smith, domiciliary of state *A*, who runs an unincorporated business with headquarters in state *B* but which has a branch office in state *C* that the defendant has damaged, Ms. Smith is properly located in state *C* for purposes of interest analysis.

In some respects, the plaintiff can control by its pleadings where it will be located for interest analysis. Suppose a plaintiff corporation has suffered substantial damages—due to one act of allegedly tortious conduct by the defendant of state *A*—at plaintiff's principal place of business in state *B* and lesser damage at its branch plant in state *C*. The laws of *A* and *B* provide a defense not recognized in state *C*. Plaintiff should plead only the damages it suffered in *C* to get it located in *C* to avoid a false conflict requiring application of pro-defendant law. As the case is pleaded, the conflict is true and will be broken by application of *C*'s law because it is better or because *C* is the center of gravity (or there is no such center and place of injury is employed as the fallback break device).<sup>45</sup>

#### *B. The Special Problem of Locating the Heirs in Wrongful Death and Kindred Cases*

Most wrongful death statutes empower the deceased tort victim's heirs to style themselves as the plaintiff, while under other wrongful death statutes the decedent's executor is the proper party plaintiff, suing to recover money that will be distributed

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Community Health Plan, Inc. v. Stutsman, 491 A.2d 502, 508 (D.C. 1985) (locating the corporate defendant in its principal place of business in the District of Columbia, although the plaintiff complained she suffered injuries at its facility in Virginia).

44. If it is shown that the corporate defendant has adequate liability insurance to pay a judgment and the insurance policy was negotiated for and obtained for the corporation at its principal place of business, is the presumption favoring locating the corporation at the involved branch office overcome? I think not, upon the theory that the insurance policy—although physically in state *A*—can be viewed as providing multiple coverage for each operation of the corporation. So if the liability is created at a branch operation in state *B*, for purposes of ensuing litigation, the insurance coverage can be located in state *B*. Cf. Gilbert Spruance Co. v. Pennsylvania Mfrs. Ass'n Ins., 629 A.2d 885, 889-93 (N.J. 1993) (finding that single liability insurance policy can be interpreted to have different scopes of coverage at operations of the corporation in various states).

45. See *infra* text accompanying notes 89-91, 98-105. The defendant should not be allowed to claim that its action caused more damage in state *B* than in state *C* when the plaintiff seeks recovery only for the latter.

to the heirs.<sup>46</sup> Surely, the domiciliary state of the personal representative should not be involved in an interest analysis. The choice is to locate each heir in his or her actual domicile or hypothetically locate all the heirs in the domicile of the decedent. The same problem is faced in cases involving administration of a decedent's estate. The persons who benefitted or were burdened by the construction of the will are the legatees, who unlike the decedent, may be domiciled in a number of jurisdictions. Currie stated his preference for the approach that locates the heirs hypothetically in the domicile of the decedent, stating that it "would be a cumbersome business"<sup>47</sup> to locate each heir in his own domicile.

Consider the facts of a 1974 Missouri case.<sup>48</sup> Plaintiffs' decedent was a Missouri domiciliary killed in an accident in Texas.<sup>49</sup> The heirs seeking a wrongful death recovery were his widow, also a Missouri domiciliary, a daughter from California, another daughter from Illinois, and the decedent's mother from Tennessee.<sup>50</sup> The defendant, a railroad corporation, had its principal place of business in Texas.<sup>51</sup> Does the case present a potential Missouri versus Texas conflict, California versus Texas, Illinois versus Texas, and a Tennessee versus Texas, or just one Missouri versus Texas conflict with the daughters and the mother hypothetically located in Missouri? Such hypothetical locating assures uniform treatment of the heirs, but there is a sense of unreality in asserting that Missouri has an interest in the amount of recovery obtained by the daughters and mother.<sup>52</sup>

The New York Court of Appeals's language in explaining New York's interest in *Tooker v. Lopez*<sup>53</sup> hints at a willingness to hypothetically locate heirs in a wrongful death case in the decedent's domicile.<sup>54</sup> Even more suggestive of such a theory is a passage by the California Supreme Court in *Bernkrant v. Fowler*,<sup>55</sup> involving the issue of the validity of an oral promise to write a will forgiving a debt: "We have no doubt that California's interest in protecting estates being probated here from false claims based on alleged oral contracts to make wills is constitutionally sufficient to

46. See 22A AM. JUR. 2D *Death* §§ 89-90 (1988).

47. Brainerd Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 46 (1959); accord John B. Austin, *A General Framework for Analyzing Choice-of-Law Problems in Air Crash Litigation*, 58 J. AIR L. & COM. 909, 966-67 (1993) (locating all heirs in domicile of decedent "will avoid the necessity of applying a variety of different compensatory damages standards"); Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 973 (1983).

48. See *State ex rel. Broglin v. Nangle*, 510 S.W.2d 699 (Mo. 1974).

49. See *id.* at 700.

50. See *id.*

51. See *id.* at 702.

52. Is it fair to say Missouri's interest was in sending its domiciliary decedent to the grave with the comforting knowledge that Missouri would look out for his survivors?

53. 249 N.E.2d 394 (N.Y. 1969).

54. *Id.* at 398. We are not specifically told that all of the heirs were from New York in *Tooker*, although that fact can be inferred. Thus, if one reads into the court's comment a willingness to hypothetically locate heirs, it is likely dictum. The court said: "New York's 'grave concern' in affording recovery for the injuries suffered by Catharina Tooker, a New York domiciliary, and the loss suffered by her family as a result of her wrongful death, is evident . . ." *Id.*

55. 360 P.2d 906 (Cal. 1961).

justify the Legislature's making our statute of frauds applicable to all such contracts sought to be enforced against such estates."<sup>56</sup>

I could find no case locating each heir or legatee in his own domicile for purposes of interest analysis.<sup>57</sup> The new restatement can fairly endorse as existing law, then, the device of locating heirs and legatees of a decedent, who are making claims through him, in decedent's domicile.

#### IV. DETERMINING THE SCOPE OF THE COMPETING LAWS WITH RESPECT TO EXTENT OF EXTRATERRITORIAL APPLICATION AND STANDING OF PARTIES TO INVOKE IT

##### *A. Standing of a Party to the Litigation Not Protected by the Law To Invoke It for the Benefit of a Nonparty*

In the well-known guest statute cases beginning with *Babcock v. Jackson*,<sup>58</sup> courts sometimes encountered the problem of whether the defendant host, although not the intended beneficiary of the guest statute, could invoke it for the benefit of his liability insurer.<sup>59</sup> (Note that construction of the statute to determine whom it is intended to protect is not an exercise in choice of law, but deciding whether to allow the defendant to invoke it on behalf of the insurer is.) This is an issue to which a new restatement can recommend some fine tuning. If only the insurer is the protected

56. *Id.* at 909.

57. *But see* SECOND RESTATEMENT, *supra* note 1, § 178 cmt. b ("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.") (emphasis added).

58. 191 N.E.2d 279 (N.Y. 1963).

59. *Id.* at 284 (stating that Ontario guest statute intends to protect host's liability insurer from collusive admission of negligence by insured to benefit his supposed friend, the injured guest); *see also* *Neumeier v. Kuehner*, 286 N.E.2d 454, 455 (N.Y. 1972) (finding that new research showed Ontario's guest statute intended to protect host-driver and owner of automobile from ungrateful victim-guest); *Tooker*, 249 N.E.2d at 398 n.1 (finding that Michigan guest statute was intended to protect host driver from ingratitude on part of injured guest); *Dym v. Gordon*, 209 N.E.2d 792 (N.Y. 1965) (finding that one purpose of Colorado statute was to preserve assets of tortfeasor for nonguest victims of accident), *overruled in part by Tooker*, 249 N.E.2d at 398-99 n.1.

It appears to me that in every guest statute case, the driver's insurer has been located for interest analysis purposes in the same state the insured is located in without regard to whether it is the principal place of business of the insurer. Query where the insurer should be located when the defendant obtained a policy from the insurer's branch in state *A* while living there, but recently moved to state *B*, where the insurance company also has an office. Could the insurer—to avoid complications—be hypothetically located for interest analysis in state *B* as the domicile of the insured even if the company did *not* have an office in state *B*?

*Urlic v. Insurance Co. of Pa.*, 696 N.Y.S.2d 126 (App. Div. 1999), was a direct action against the tortfeasor's insurer, and the defendant was located for interest analysis purpose on tort issues at the *insurer's* domicile. If this was the same as the domicile of the tortfeasor insured, the error was harmless; if not, a state having no connection to tort liability was interpreted into the analysis due to the fortuity of the availability of a direct action.

party, should not the victim-guest be permitted to recover from his host his full amount of damages *less policy limits*?

Other situations in which interest analysis courts have allowed a party who was not the intended beneficiary of a law to invoke it for the benefit of a nonparty, involve purported state interests that are, at the very least, dubious.<sup>60</sup> In a 1969 New York case, a New Jersey defendant was permitted to invoke the New York statute of frauds provision applicable to a finders' fee contract for the benefit of nonparty State of New York and nonparty brokers in New York.<sup>61</sup> The theory was that if word got out that New York would give out-of-staters the benefit of its commercial law this would "encourage[] the use of New York brokers and finders by foreign principals" and advance "New York [as] a national and international center for the purchase and sale of businesses."<sup>62</sup> Additionally, a California Court of Appeals permitted a California motorist who had injured the Mexican plaintiff in Mexico to invoke—for the benefit of resorts in Mexico—the damages-cap law of Baja California, thereby escaping California's rule of unlimited damages.<sup>63</sup> The theory was that it would "foster[] tourism in Baja California,"<sup>64</sup> its major industry, if persons domiciled outside Mexico were aware they could avoid paying full damages to victims of their torts while on holiday.<sup>65</sup> If one believes the asserted interests really exist, giving standing to the out-of-state party to rely on the law was proper.

*B. Lack of Standing To Invoke a Rule of Law Because Under  
Interest Analysis the Law Is Given a Moderate and  
Restrained Interpretation Concerning Its Scope*

I propose a black letter presumption that a domiciliary of a state who is a party to the litigation is entitled to the benefit of each loss-distributive law of his or her state. To require actual proof from the party that he is a member of a class intended to be benefitted will raise an unfair burden in many cases. Often the courts of the state will not have discussed the issue of which class of persons who in fact benefit from a law were intended beneficiaries of the legislature or appellate court that made the law. Often in the case of state statutes there is no legislative history casting light on what class of persons was the intended beneficiary. Moreover, as has been noted, even if there is a legislative history (or an old case) stating that the legislation was *enacted*

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60. In each of these cases the law of the plaintiff's state favored the defendant and the law of the defendant's state favored the plaintiff—they were zero-interest cases on their face. Possibly the judges in each decision did not want to struggle with creating a break device for zero-interest cases and avoided that task by manufacturing an interest in favor of the general economy of the pro-defendant state.

61. *See* *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 248 N.E.2d 576, 580 (N.Y. 1969).

62. *Id.* at 582-83.

63. *See* *Hernandez v. Burger*, 162 Cal. Rptr. 564, 568-69 (Cal. Ct. App. 1980).

64. *Id.* at 568.

65. *Id.*; *accord* *Boyes v. Greenwich Boat Works, Inc.*, 27 F. Supp. 2d 543, 547 (D.N.J. 1998) (reasoning that tourism industry will be harmed if New Jersey boat seller not held liable under New Jersey law); *Feldman v. Acapulco Princess Hotel*, 520 N.Y.S.2d 477, 486 (Sup. Ct. 1987) (finding a "strong substantive interest in encouraging the development of a tourist industry").

for the sole benefit of a specified class of persons, the state's continuing to *retain* the statute many years later could be based on a realization that it was usefully protecting a different class of persons.

The presumption of standing to invoke any beneficial law of the party's domicile state can be overcome in one of two ways. First, demonstrating that the creator of the rule of law did not intend for a person in the status of the litigant to benefit from the law even though he or she is a domiciliary of the state that created the law and that the law was not retained for the person's benefit even though not originally so enacted. This process is undertaken in wholly domestic cases and does not involve choice-of-law methodology.

Second, as a matter of choice-of-law policy, even though the litigant would have standing in a domestic case to invoke the law, a court may deny standing due to the multistate aspects of the case. Currie urged forum judges to consider whether forum law should be, as a matter of choice-of-law policy, subjected to a "moderate and restrained" interpretation.<sup>66</sup> Since this is a matter of conflicts justice, the same analysis should be made with regard to laws of states other than the forum that are involved in the conflict of laws. The classic example of such moderating and restraining is the dictum in *Bernhard v. Harrah's Club*<sup>67</sup> to the effect that had Fern Myers become inebriated at a small Nevada bar that never advertised in California (perhaps in Ely, Elko, or Battle Mountain), Fern's auto accident victim, a Californian, could not have invoked the California dram shop law against that bar.<sup>68</sup>

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66. See Brainerd Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1233, 1242 (1963); Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757, 759 (1963).

Currie also proposed for his interest analysis methodology "the possibility of rational altruism: for example, when a state has determined upon the policy of placing upon local industry all the social costs of the enterprise, it may well decide to adhere to this policy regardless of when the harm occurs and who the victim is." Currie, *supra* note 15, at 180. He never offered a test as to when a forum should be altruistic. He never suggested that a plaintiff's home state might altruistically give the benefit of its pro-defendant law to an out-of-stater. Currie's "rational altruism" seems a flirtation with the core of the "better law" method.

I propose use of "better law" solely as a break device in a new restatement, see *infra* text accompanying notes 84-90, and hence do not discuss rational altruism as part of the process of determining how and when a party either lacks standing to invoke his own law or is given standing to invoke the law of his adversary's state. Note that if rational altruism is not some form of "better law," its application could turn a zero-interest case into a true conflict case, thereby accomplishing nothing to resolve the conflict. That is, if defendant's home state would altruistically give to the benefit of an out-of-state plaintiff its pro-plaintiff law, why would not plaintiff's home state reciprocate by altruistically declaring the out-of-state defendant the beneficiary of its pro-defendant law?

67. 546 P.2d 719 (Cal. 1976).

68. See *id.* at 725. The defendant, Harrah's Club of Nevada, had advertised extensively in California seeking customers for its resort and gambling operations in Nevada. See *id.* Surely, however, Harrah's Club was at the periphery "of California's regulatory interest," and not, as the *Bernhard* court said, at its "heart." *Id.*; see also Reppy, *supra* note 2, at 669 n.117, 670 n.120.

## V. INTERESTS SHOULD BE FROZEN AT THE TIME OF THE TORT

The *Second Restatement* recognizes the “time of interest” problem<sup>69</sup> arising when a party to litigation changes domicile after the tort cause of action arises (or in a contract case after the contract is made or breached).<sup>70</sup> It declares as of 1971 that pertinent precedent was too minimal to warrant the American Law Institute’s taking a definitive position on the effect of change of domicile but that “[p]resumably, this change of domicil[e] should have no effect upon the law governing most of the issues . . . .”<sup>71</sup> Since then, the leading New York case that accepted the change of domicile as cutting off the interest of the original domiciliary state and shifting it to the new home state has been effectively overruled.<sup>72</sup> California has not suggested any departure from the rule of *Reich v. Purcell*,<sup>73</sup> under which interests arising from domiciliary contacts are frozen as of the time of the tort. Thus, the two major interest analysis jurisdictions are in accord in freezing interests as they exist at the time of the tort. Minnesota, in applying its better law method of choice of law, continues—with the imprimatur of the United States Supreme Court<sup>74</sup>—to seize on change of domicile as one factor that qualifies a state to have its superior law applied, but such a solution to the time of interest problem for the purpose of obtaining a just result is not instructive when the question is assigning domicile for interest analysis.

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69. See, e.g., Moffatt Hancock, *The Effect in Choice of Law Cases of the Acquisition of a New Domicile After the Commission of a Tort or the Making of a Contract*, 2 HASTINGS INT’L & COMP. L. REV. 215 (1979); see also Note, *Post Transaction or Occurrence Events in Conflict of Laws*, 69 COLUM. L. REV. 843, 849 (1969).

70. See SECOND RESTATEMENT, *supra* note 1, ch. 7, introductory note 2, at 414. Since the *Second Restatement* does not use the term “interest” as Currie did and as it is used in this Article, a more apt phrase for the problem it recognized would be “time of contact” or “time of involvement.”

71. *Id.*

72. See *Miller v. Miller*, 237 N.E.2d 877 (N.Y. 1968), was purportedly “distinguishable” for the court in *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679, 682 (N.Y. 1985), but the so-called distinction makes no sense. In *Schultz* the interests of states were frozen at the time of the tort, and one defendant’s post-tort change of its principal place of business from New Jersey, the plaintiffs’ domicile, to Texas was considered irrelevant, *id.* at 682, whereas in *Miller* the change of domicile given effect by the court was a defendant’s move to the plaintiff’s domicile, *Miller*, 237 N.E.2d at 882. See also *Aboud v. Budget Rent-A-Car Corp.*, 29 F. Supp. 2d 178, 183 (S.D.N.Y. 1998) (suggesting that *Miller* had been undermined by *Neumeier*).

73. 432 P.2d 727 (Cal. 1967). The Reichs had a real domicile in Ohio at the time of the accident and were headed for California because they were “contemplating” a change of domicile. *Id.* at 728. Had they sold their Ohio home, loaded up all their belongings, and begun removing themselves and their personalty to California when the accident occurred en route, Ohio would have remained their domicile only in the technical sense. See *supra* text accompanying note 39. If such were the facts and in addition, as did occur, Mr. Reich and his surviving son completed the change of domicile to California, it would be reasonable to assign the deceased Mrs. Reich a California domicile for interest analysis purposes (her heirs will be hypothetically located with her, see *supra* text accompanying note 39) because Ohio truly would have lost interest in her at the time of the tort.

74. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

As one could have expected, the reported cases now include examples of litigants making a change of domicile for the very purpose of improving the law to be applied in tort litigation.<sup>75</sup>

Even if one is willing to tolerate a system in which bona fides of a change of domicile become a litigable issue, time of interest needs to be frozen for another reason: so parties can assess their liability and recovery potential promptly after the tort and begin the process of settlement, usually with a liability insurance company initiating an offer.

I am aware of only one thoughtful decision in the last two decades from a non-better law jurisdiction that has declined to freeze the interests at the time of the tort.<sup>76</sup> I do not agree with it.

VI. A STATE DOES NOT HAVE AN INTEREST IN SEEING ITS DOMICILIARY  
LOSE THE CASE UNDER ITS OWN LAW AND IT DOES NOT HAVE AN  
INTEREST IN SEEING ITS DOMICILIARY WIN UNDER  
THE LAW OF ANOTHER STATE

*A. State's "Interest" in Seeing Its Domiciliary  
Lose the Case Under Its Law*

In New York's *Schultz* case, the plaintiffs' case against the Franciscan Brothers, located in Ohio for choice-of-law purposes by the court, looks like a zero-interest conflict on its face. New Jersey, the plaintiffs' home state, gave the defendant a defense of charitable immunity, but Ohio law had abrogated that doctrine for the type of negligence by a charity involved in the case. The court, nevertheless, found that New Jersey had an "interest in enforcing the decision of its domiciliaries to accept the burdens as well as the benefits of that State's loss-distribution tort rules."<sup>77</sup> Thus, be

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75. See *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 741 (8th Cir. 1995) (applying Nebraska law when plaintiff moved from Nebraska to Minnesota in hopes of avoiding Nebraska statute of repose). In *Hall v. General Motors Co.*, 582 N.W.2d 866 (Mich. Ct. App. 1998), plaintiff's post-tort move to the forum was disregarded and the time of interest frozen at the time of the tort in order to avoid encouragement of forum shopping and the need to litigate bona fides of the move. For a similar holding, see *Summers v. Interstate Tractor & Equip. Co.*, 466 F.2d 42, 48 n.3 (9th Cir. 1972).

76. See *Mills v. State Farm Mut. Auto. Ins. Co.*, 827 F.2d 1418, 1422 (10th Cir. 1987) (guessing in the diversity jurisdiction context what Oklahoma would do in applying its version of the *Second Restatement's* most significant relationship method).

77. *Schultz*, 480 N.E.2d at 687; accord *Murphy v. Acme Markets, Inc.*, 650 F. Supp. 51, 53 (E.D.N.Y. 1986); *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 281 (N.Y. 1993); see also *In re Air Crash Disaster Near Chicago*, 644 F.2d 594, 625 (7th Cir. 1981) ("Missouri would wish to punish MDC, a Missouri-based corporation, for any wrongdoing . . ."); *Stutsman v. Kaiser Found. Health Plan, Inc.*, 546 A.2d 367, 375-76 (D.C. 1988) (stating that Virginia's interest in seeing that Virginia plaintiff not recover in tort would be "seriously impaired" if pro-plaintiff law of District of Columbia were applied); *Kaiser-Georgetown Community Health Plan, Inc. v. Stutsman*, 491 A.2d 502, 509 (D.C. 1985) (The District [of Columbia] has a significant interest . . . in holding its corporations liable for the full extent of the negligence attributable to them."); *Gantes v. Kason Corp.*, 679 A.2d 106, 112 (N.J. 1996) (finding that the state of defendant's domicile has "strong interest" in imposing damages on



gracious losers, Schultzes. Surely, however, Ohio has the same interest in seeing that the Franciscans lose the case under the burdens of the law of their domicile. So, we now have a true conflict rather than a zero-interest case. We still must break the conflict. Nothing has been gained by recognizing a state's interest in having its domiciliary lose the case, which is completely contrary to Currie's theories about interest analysis.<sup>78</sup>

*B. A State Has No "Interest" in Seeing Its Domiciliary  
Win the Case Under Out-of-State Law*

Another perversion of interest analysis, invented by the Ninth Circuit purporting to apply California choice of law, allows a court to escape from admitting the case before it is zero interest. In *Ledesma v. Jack Stewart Produce, Inc.*<sup>79</sup> the California plaintiff's tort suit was time-barred under California law, but the court said California had an "interest in allowing its residents to recover for injuries sustained in a state that would recognize their claim as timely."<sup>80</sup> However, if California had an interest in seeing its plaintiffs win under out-of-state law, surely the domiciliary states of the two defendants had a corresponding interest in seeing their domiciliaries escape tort liability under California law. Thus, a zero-interest case is turned into a true conflict; this conflict still has to be broken, so nothing has been gained.

VII. THE NEW RESTATEMENT SHOULD GIVE STATES A CHOICE OF  
BREAKING NONFALSE CONFLICTS BY REFERENCE EITHER TO  
CENTER OF GRAVITY OR BETTER LAW

At this stage, the court or attorney doing an interest analysis on a loss-distributive issue of tort law has determined whether the conflict of laws on the issue is false or not. If only one state has an interest or if all states having interests have the same law, the analysis is complete. The rule to be applied has been found. If the conflict is not false, however, some device for breaking the conflict must be employed. Nonfalse conflicts are of two types: (1) true conflicts, in which each domiciliary state has a pertinent law under which its domiciliary wins; or (2) zero interest, in which the law of each such state is unfavorable to its domiciliary. Currie proposed breaking both

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defendant to promote safety); *ITO Int'l, Corp. v. Prescott, Inc.*, 921 P.2d 566, 571 (Wash. Ct. App. 1996) ("[A]pplication of Washington law would also encourage Washington residents involved in business transactions to behave responsibly.").

78. See Currie, *supra* note 35, at 261; see also *Ardoyno v. Kyzar*, 426 F. Supp. 78, 82 (E.D. La. 1976) ("Mississippi has an interest only in protecting Mississippi domiciliaries."). Note that a desire to see the domiciliary lose the case is *not* the same variant of interest analysis as rational altruism, see *supra* note 66, although the result of turning a zero-interest case into a true conflict (assuming both jurisdictions are altruistic in wanting the out-of-stater to win under their laws) is the same.

79. 816 F.2d 482 (9th Cir. 1987).

80. *Id.* at 485. The suit was timely not only in the place of injury, whose law was applied, but also under the limitations laws of the two states that were the domiciles of the two defendants. *Id.* The theory for finding an interest works just as well if California had an interest in applying the pro-recovery law of these two states.

types of conflicts by use of forum law.<sup>81</sup> Although a couple of cases decided early in the conflicts revolution took this approach,<sup>82</sup> it now has no support at all.<sup>83</sup> Bias in favor of forum law is not essential to interest analysis, however. While the seminal 1963 case of *Babcock v. Jackson* said in dictum that nonfalse conflicts would be resolved by determining which state “has the strongest interest in the resolution of the particular issue,”<sup>84</sup> the high court of New York has never weighed interests. In my view, Currie is correct in declaring that weighing of interests in a true conflict is impossible.<sup>85</sup> It can only be better law in disguise. With *Neumeier v. Kuehner*<sup>86</sup> in 1972, New York’s high court examined a zero-interest case where interest weighing was impossible (zero cannot outweigh zero); the court chose to use territorialism as the break device for guest statute cases.<sup>87</sup> The *Neumeier* rules for guest statutes later evolved into a rule-free *method* for breaking nonfalse conflicts in which center of gravity replaced place of injury as the break device.<sup>88</sup> I propose center of gravity as

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81. In regard to true conflicts, Currie stated that “[t]he sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law.” Currie, *supra* note 35, at 261. For zero-interest cases, Currie advocated the use of forum law “simply on the basis that this is the rational and convenient way to try a lawsuit when no good purpose is to be served by putting the parties to the expense and the court to the trouble of ascertaining the foreign law.” Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 232 (1958).

82. See *Lilienthal v. Kaufman*, 395 P.2d 543 (Or. 1964); *Hurtado v. Superior Court*, 522 P.2d 666 (Cal. 1974).

83. See ROGER C. CRAMTON ET AL., *CONFLICT OF LAWS* 181 (5th ed. 1993).

84. 191 N.E.2d 279, 285 (N.Y. 1963).

85. See Currie, *supra* note 35, at 260 (“The policies are here in direct conflict. Who is to say which is the more important, or the more deserving, or the more enlightened.”).

86. 286 N.E.2d 454 (N.Y. 1972).

87. See *id.* at 457-58. Notwithstanding this major shift in methodology, the New York high court continues to state in dictum that New York’s device for breaking nonfalse conflicts is determining which state has the strongest or “greatest interest.” See *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 280 (N.Y. 1993). Lower state courts and federal courts echo the phrase. See *Belmac Hygiene, Inc. v. Belmac Corp.*, 121 F.3d 835, 838 (2d Cir. 1997) (seeking “greatest interest” and “paramount interest”); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 14 (2d Cir. 1996); *Kline v. E.I. duPont de Nemours & Co.*, 15 F. Supp. 2d 299, 305 (W.D.N.Y. 1998) (“greatest interest”); *Ackerman v. Price Waterhouse*, 683 N.Y.S.2d 179, 188 (App. Div. 1998).

Territorial connecting factors do not create interests to weigh in a zero-interest case and do not add strength to interests in true conflict cases. Interests arise out of the state’s concern for its domiciliary without regard to territorialism. I ask the New York high court to squarely repudiate the notion that resorting to territorialism to break a nonfalse conflict is the same thing as finding the state with the greatest interest. That verbal formulation can only confuse the bench and the bar.

88. This occurred in the prong of *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679 (N.Y. 1985), involving the wrongful death action against the Franciscan Brothers. The court treated New York as the place of injury (following section 391 of the *First Restatement*, which locates the place of wrong for wrongful death actions not in the place of death, which can be manipulated, but the place of initial injury that lead to death), but looked instead to New Jersey as the center of gravity in the case for the law that would break the zero-interest conflict between New Jersey and Ohio. *Id.* at 683. Apparently, the Schultz boys were abused both in

one break device the new restatement can offer, the alternative being better law. The new restatement should urge courts to be consistent. Pick one of the two approaches for all nonfalse conflicts in all types of cases—not just torts—where interest analysis is used.

#### A. Center of Gravity

Although *Neumeier v. Kuehner* has been subject to great criticism for resuscitating the old place of injury rule<sup>89</sup>—this time as a break device for nonfalse conflicts—territorialism is, in fact, not an illogical theory for the necessary break. A court selects interest analysis as its choice-of-law method because it believes in a personal law theory of sovereignty that a state is concerned with its citizens when they act out of the state as well as when they act in it. The sovereign would also like to regulate all events occurring within its borders, even if its own citizens are not involved. However, as a matter of comity, when it encounters a false conflict as a state having only territorial connections because it is not the domicile of any party, where the issue is loss distributive, the state yields to the greater sovereign interest of the domiciliary state or states. But, when the domiciliary states have different laws, the domiciliary state's sovereign interest in events occurring within its borders need not be subordinated. The domiciliary state having the most important territorial ties

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New York and New Jersey by the Franciscan Boy Scout leader. The plaintiffs had the right to sue only for the damages caused in New York, creating the bizarre “defense” for the Franciscans that Christopher Schultz was driven to kill himself by an episode in New Jersey, not New York. *Id.*

In any event, if the center of gravity is going to displace—under the “escape” provisions of *Neumeier* Rules two and three—the place of injury as the crucial connection for breaking nonfalse conflicts whenever it is situated apart from the place of injury as pleaded by the plaintiff, the rules themselves ought to be revised so as to refer to center of gravity as the break device, not place of injury. Place of injury could be the escape in the rare case where two states had equal territorial connections, typically the products liability case where the defendant manufacturer acts negligently in its home state and plaintiff is injured in his or her home state.

89. For example, Professor Leflar suggested the *Neumeier* decision was “one of the pieces of skull-duggery that the New Yorkers perpetrated.” Maurice Rosenberg, *A Comment on Neumeier*, 34 *ARK. L. REV.* 231, 233 (1981) (citing Robert A. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 *LAW & CONTEMP. PROBS.* 10, 20 (1977)). Professor Twerski felt that the rules had a “basic inconsistency” and were “philosophically unsound.” Aaron D. Twerski, *Neumeier v. Kuehner: Where are the Emperor's Clothes*, 1 *HOFSTRA L. REV.* 94, 118, 121 (1973). Professor Sedler suggested that the third rule put forth in *Neumeier* “cannot rationally be explained.” Robert A. Sedler, *Interstate Accidents and the Unprovided-For Case: Reflections on Neumeier v. Kuehner*, 1 *HOFSTRA L. REV.* 125, 136 (1973). Professor Weintraub concluded, “[t]here is nothing wrong with rules, just with mindless rules, such as those in *Neumeier v. Kuehner*.” Russell J. Weintraub, *Comments on the Roundtable Discussion of Choice of Law*, 48 *MERCER L. REV.* 871, 890 (1997).

to the issue is the appropriate one to supply the law. Use of territorialism as a “tie breaker,” as described by the New York high court in *Cooney v. Osgood Machinery, Inc.*,<sup>90</sup> is theoretically sound.

### B. Center of Gravity in the Three-State Situation

In *Schultz v. Boy Scouts of America, Inc.*, the domiciliary states were New Jersey for the plaintiffs and Ohio for the defendant Franciscans. Apparently, the Franciscans were involved in the case through activities of a branch office of the Order in New Jersey. It was not contended that they negligently sent Brother Coakeley out of Ohio, but rather that they negligently placed him as the school teacher for the Schultz boys—from which post he became their scoutmaster as well—by negligent acts in New Jersey.<sup>91</sup> Since of the two eligible states, New Jersey had numerous territorial connections and Ohio none, the court correctly broke the zero-interest conflict in favor of New Jersey law. Note that the territorial contacts in New York are simply irrelevant, because territorial connections are consulted to determine whether New Jersey or Ohio is the sovereign to take control over the loss-distributive issue of charitable immunity in the suit against the Franciscans.

The law of a nondomiciliary state (often the place of injury) needs to be consulted in the process of “breaking the tie” between the domiciliary states only when those two states have equivalent territorial connections, such as when each has none at all.<sup>92</sup> If the law of that center of gravity is the same as that of one of the domiciliary states on the issue in conflict, consulting that law provides a basis for breaking the tie. What if it provides yet a third rule? Example: Plaintiff’s state has a \$500,000 damage cap statute; defendant’s state a \$250,000 cap. The place of injury does not limit recoverable damages, and plaintiff seeks to prove \$1,000,000 in damages. The domiciliary states have no contacts other than domicile. The pro-plaintiff law of the place of injury can break the tie between the domiciliary states in favor of that most favorable to plaintiff, the \$500,000 cap. It is inconsistent with interest analysis theory to award full damages under the law of a nondomiciliary state, as the issue is one of loss distribution.

With center of gravity used only as a break device, courts employing the version of interest analysis set forth in this Article seldom will encounter the problem that is faced occasionally under the *Second Restatement* or by courts using a pure center-of-

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90. 612 N.E.2d 277, 281 (N.Y. 1993); accord *McCann v. Somoza*, 933 F. Supp. 362, 368 (S.D.N.Y. 1996); *Esco Fastcnrcs Co. v. Korea Hinomoto Co.*, 928 F. Supp. 252, 256 (E.D.N.Y. 1996); see also Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475, 505 n.161 (2000) (“[t]erritorial tie-breaker does have [some] merit”).

91. This is seen most clearly in the account of the case given by the dissenting opinion in the Appellate Division. See *Schultz v. Boy Scouts of Am., Inc.*, 476 N.Y.S.2d 309, 315 (App. Div. 1984) (Murphy, P.J., dissenting), *aff’d*, 430 N.E.2d 679 (N.Y. 1985). Under the approach to interest analysis recommended in this Article, Ohio law would not have been consulted; the Franciscans would have been located for interest analysis purposes at their branch office in New Jersey where the alleged negligence occurred. See *supra* text accompanying note 39.

92. For example, a student from Colorado meets a student from California at the New York prep school they both attend, and in New York the pair become involved in a tort.

gravity method: should the court combine the contacts of states having the same law?<sup>93</sup> As aptly stated in a recent article, the issue is whether center-of-gravity method seeks to assess contacts to a *jurisdiction* or to a *law*.<sup>94</sup> The problem can be illustrated by a hypothetical case in which a numerical value is given to express the weight of the contacts in each jurisdiction to a particular legal issue, a percentage of the total contacts valued at one hundred. State *A*, place of injury, is assigned a weight value of forty; state *B*, domicile of plaintiff, fifteen; state *C*, domicile of defendant, fifteen; state *D*, place of misconduct, thirty. If the laws of *B*, *C*, and *D* are the same and in conflict with *A*'s, combining them gives sixty "points" to the *BCD* law, and *A*'s law is displaced.<sup>95</sup> The *Second Restatement*, in comment i to section 145, seems to endorse the concept of combining points: "When certain contacts involving a tort are located in two or more states with identical local law rules on the issue in question, the case will be treated for choice-of-law purposes as if the contacts were grouped in a single state."<sup>96</sup>

It is conceivable that such combining might be done even though center of gravity is used merely as a break device for nonfalse conflicts. Example: plaintiff is located for interest analysis purposes at its principle place of business in *A* but suffered damages at its branches in *B*, *C*, and *D*. Defendant is domiciled in *E* and acted negligently in *F*. There is a true conflict because *A*'s tort law favors plaintiff and *E*'s provides a defense. The laws of the territorially involved states *B*, *C*, *D*, and *F* are consulted for information needed to break the conflict. If the laws of the four states differ three to one in favor of one party, combining the contacts of the three states with the same law would be appropriate in determining where the center of gravity was located in order to choose between *A* law and *E* law.

### *C. Better Law As a Break Device*

As those who study choice of law well know, there are hundreds of decisions in which modern methods have been manipulated to get the just result, that is, to be able to apply the better law. A few courts have come out of the better law closet to openly admit that better law is a crucial component of the choice-of-law process. Better law has been used both to break true conflicts<sup>97</sup> and zero-interest conflicts,<sup>98</sup> and as an

93. In *O'Connor v. O'Connor*, 519 A.2d 13 (Conn. 1986), should the contacts of Vermont (the place in which the journey began and was to end) have been combined with those of the common domicile, Connecticut, to more readily overcome the *Second Restatement's* presumption that Quebec (place of injury) was the jurisdiction having the most significant relationship to the issue of whether fault-based, unlimited recovery was available to the injured plaintiff?

94. See James A. Meschewski, *Choice-of-Law in Alaska: A Survival Guide for Using the Second Restatement*, 16 ALASKA L. REV. 1, 16-17 (1999).

95. Suppose the issue is a damages cap. State *A* (with its 40 "points") has none; states *C* (15 points) and *D* (30 points) cap at \$500,000; and state *B* (15 points) caps at \$1,000,000. Plaintiff seeks \$2,000,000. Do we combine just *C* and *D* for a combined total of 45 points that displaces state *A* at 40? Do we use *B* law because states with 60 points worth of contacts will award at least \$1,000,000? The latter solution makes some sense if "combining" is to be done.

96. SECOND RESTATEMENT, *supra* note 1, § 145 cmt. i.

97. See, e.g., *Barringer v. State*, 727 P.2d 1222 (Idaho 1986) (using favorable Idaho law

escape from false conflict analysis that would result in applying an archaic rule of law.<sup>99</sup> While I do not endorse the latter use of better law,<sup>100</sup> the new restatement should offer better law as an alternative break device for nonfalse conflicts to states that prefer it over center of gravity.<sup>101</sup>

Professor Weintraub says that better law should be used a break device only when "the two states between whose law the forum is attempting to choose by the 'better law' criterion . . . each have a policy underlying its different domestic law that would be significantly and legitimately . . . advanced by application of its domestic law."<sup>102</sup> I strongly disagree. Better law is just as logically applied to break a zero-interest case as a true conflict. Thus, in the *Franciscan Brothers* prong of the *Schultz* case, the Ohio law abrogating charitable immunity in cases of negligent hiring was better than New Jersey's broad charitable immunity rule. Since better law is chosen as a break device to do justice, not to implement Currie's notions of interest analysis, it should make no difference that its use in *Schultz* benefits New Jersey plaintiffs rather than Ohio litigants.

There is one difference in the use of better law in the context of the zero interest rather than true conflict situation. In the former, a state not involved as domicile of a party but territorially involved as place of injury, place of misconduct, etc., may

where Idaho defendant sought contribution from victim's Washington employer); *Bigelow v. Halloran*, 313 N.W.2d 10 (Minn. 1981) (displacing law of Minnesota favorable to its decedent's estate with Iowa survival law favorable to heirs of Iowa decedent); *Zelinger v. State Sand & Gravel Co.*, 156 N.W.2d 466 (Wis. 1968) (allowing Wisconsin defendant to get contribution from Illinois tortfeasor not liable under Illinois law); *Heath v. Zellmer*, 151 N.W.2d 664 (Wis. 1967) (allowing Wisconsin defendant to get contribution from Ohio host in lieu of guest statute of Ohio or of Indiana, place of injury); see also *Reppy*, *supra* note 2, at 696-98 (analyzing *Hunker v. Royal Indem. Co.*, 204 N.W.2d 897 (Wis. 1973), and concluding that Wisconsin employs better law to break nonfalse conflicts and will accept the result mandated by false conflicts analysis unless that law is so bad it can be called a drag on the coattails of civilization, in which case the better law of a state having only a territorial connection is applied).

98. See *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721, 726 (Cal. 1978) (using "comparative pertinence" as a break device). As I have explained elsewhere, this is the kissing cousin of "better law." *Reppy*, *supra* note 2, at 673-75; see also RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.32, at 360 (3d ed. 1986).

99. See, e.g., *Milkovich v. Saari*, 203 N.W.2d 408, 417 (Minn. 1973) (choosing rule of negligence over a guest statute in the common domicile state to be consistent with modern concepts of fairness and equity); *Pardey v. Boulevard Billiard Club*, 518 A.2d 1349 (R.I. 1986) (limiting geographically the dram shop law of plaintiff's state with result that tort law of plaintiff's state provided no recovery); *Brown v. Church of Holy Name of Jesus*, 252 A.2d 176, 181 (R.I. 1969) (rejecting charitable immunity doctrine on the grounds that it is becoming disfavored).

100. See, e.g., *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968) (applying guest statute of law of common domicile over pro-recovery law of place of tort). This case properly applies the "bad" law in a false conflict situation.

101. I am here referring to better law alone, divorced from the four other Leflar choice-influencing considerations. See Robert Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1586-88 (1966).

102. WEINTRAUB, *supra* note 98, § 6.27, at 343.

have as much claim based on zero interest to supply the governing law as the domiciliary states. If better law is used as the break device for nonfalse conflicts to achieve a just result, arguably the nondomiciliary state's law could displace the law of both domiciliary states. Thus, if plaintiff's state had a \$250,000 damage cap, defendant's state a \$500,000 cap, and the place of injury no cap at all, the most just result is obtained under the third state's law. Better law then, could function as more than a "tie breaker." I would recommend the new restatement offer this expanded use of it in a comment, if not as black letter.

Courts will encounter situations where the conflicting laws are simply different, and it cannot be said one is better than the other.<sup>103</sup> A fallback device is then needed, and I cannot imagine what it would be other than territorialism (center of gravity or place of injury).

Jurisdictions that are currently "cheating"<sup>104</sup> on the concept of an out-of-state law being contra to public policy should openly choose better law rather than center of gravity as the break device to be employed. Attorneys and trial court judges need to know what is really going on in the choice-of-law arena.

#### VIII. USE OF AN "ESCAPE" PROVISIO WILL RARELY OCCUR

Does the method for choice of law in tort set forth in this Article need an escape provision?<sup>105</sup> If a tort is allegedly committed in an airplane in a situation that the passengers are in doubt as to which state's air space they are in, applying the conduct-

103. See *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 741 (8th Cir. 1995); *Jepson v. General Cas. Co.*, 513 N.W.2d 467, 473 (Minn. 1994); *Lommen v. City of E. Grand Forks*, 522 N.W.2d 148, 152 (Minn. Ct. App. 1994) ("We here likewise conclude that neither Minnesota's nor North Dakota's law is 'better' than the other . . .").

104. New York was one of the original "super-cheaters." See, e.g., *Kilberg v. Northeast Airlines*, 172 N.E.2d 526 (N.Y. 1961) (holding that Massachusetts law limiting wrongful death damages was contrary to public policy); *Mertz v. Mertz*, 3 N.E.2d 597 (N.Y. 1936) (holding that Connecticut law abolishing interspousal immunity in tort was contrary to public policy).

Most recently, New York's high court has explained that these decisions cheated on the concept of contra public policy to escape from an unsound choice-of-law rule, a process no longer needed since a modern choice-of-law method is now in place. See *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 285 (N.Y. 1993) ("In view of modern choice-of-law doctrine, resort to the public policy exception should be reserved for those foreign laws that are truly obnoxious."). A useful test to determine if the declaration of "contra public policy" actually evidences dissatisfaction with the jurisdiction's choice-of-law method is whether, having made the declaration, the court dismisses the action, as it should where the governing law "violat[e]s] some fundamental principle of justice . . . [and] good morals," *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918); see also *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 14 N.E.2d 798 (N.Y. 1938), or instead substitutes forum law for the rejected law. See *Alexander v. General Motors Corp.*, 478 S.E.2d 123, 124 (Ga. 1996), *vacated*, 481 S.E.2d 7 (Ga. 1997); *Paul v. National Life*, 352 S.E.2d 550, 556 (W. Va. 1986). When a court finds the governing law determined under a choice-of-law method it is happy with is truly contra to good morals, the correct remedy is dismissal. See, e.g., *Gaines v. Poindexter*, 155 F. Supp. 638 (W.D. La. 1957) (Louisiana choice of law); *Ciampittello v. Campitello*, 54 A.2d 669 (Conn. 1947); *Lobek v. Gross*, 65 A.2d 744 (N.J. 1949); *Windt v. Lindy*, 84 S.W.2d 99 (Tenn. 1935).

105. See *Symeonides*, *supra* note 11, at 474.

regulating rules of that state may be unreasonable. If better law is to be used in the zero-interest case not just to break a conflict, but to furnish a rule not recognized in either domiciliary state, that nondomiciliary state could be involved only fortuitously (e.g., it is where the airplane crashed on a transcontinental flight, having been blown off course by a gale). In most instances, the law to be applied under the choice-of-law method here recommended will be that of the domicile of a party to the litigation (or a decedent through whom a party is claiming). Domicile cannot be fortuitous, and by definition if the issue is loss distributive, domicile law cannot be an unreasonable choice. Nevertheless, since in rare instances the method can result in an unreasonable application of law, an escape section in the new restatement is warranted. My recommendation: "A court may deviate from the choice-of-law methodology set out in this chapter of the Restatement (Third) if, taking into account probable party expectations, applying the law determined under such methodology would be fundamentally unfair."

#### CONCLUSION

Readers may recognize that the choice-of-law method for torts cases recommended here for a new restatement of conflicts is, if center of gravity is chosen as the break device, pretty much what New York is applying today. While others have scathingly criticized New York's choice-of-law method,<sup>106</sup> my view is that, after its transition from unworkable "rules" in *Neumeier* to a method of choice of law based on interest analysis in *Schultz*, the use of territorialism resorted to as a "tie breaker" is sound. However, for those courts that view reaching the most just result in a case as a more important exercise of sovereign power than regulating events that occur within the state, better law is properly employed as a break device.

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106. For example, Dean Borchers has called New York's approach "thoroughly muddled." Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 379 (1992). Professor Posnak has deemed the method "schizophrenia." Bruce Posnak, *Choice of Law—Interest Analysis: They Still Don't Get It*, 40 WAYNE L. REV. 1121, 1177 (1994); see also *Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482 (9th Cir. 1987) (criticizing the *Neumeier* decision).