

# Choice of Law in Conflicts Torts Cases: A Third Restatement or Rules of Choice of Law?

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## I. INTRODUCTION

A major impetus behind the proposal for a third conflicts restatement is the purported uncertainty and lack of predictability in American conflicts law today. The consequences of this purported uncertainty and lack of predictability are said to be “contradictory results in the case law, confusion, and a ‘homeward trend.’”<sup>1</sup> There is a claimed need for *choice-of-law rules* as a “vehicle for producing predictability,” and according to Professor Symeonides, “a new restatement is the best forum for debating and articulating these rules.”<sup>2</sup>

I totally disagree. When we look at the actual decisions of the courts in conflicts cases and the results that they reach in practice, particularly in the torts area, I submit that there is indeed a high degree of certainty and predictability and a pattern of results that is fairly consistent and coherent.<sup>3</sup> This is because what has emerged from the actual decisions of the courts in conflicts torts cases are *rules of choice of law*. Unlike choice-of-law rules, whether the broad, state-selecting rules of the traditional approach or the narrower and policy-based rules that many commentators have long favored,<sup>4</sup> rules of choice of law are not formulated *a priori* by courts<sup>5</sup> or by

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1. EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* § 2 (3d. ed. 2000).

2. Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 *IND. L.J.* 437 (2000).

3. Obviously, with conflicts cases being decided by the highest and intermediate appellate courts of 50 states and the District of Columbia, as well as by federal courts of appeal and federal district courts applying the conflicts law of the state in which they sit, there will be some variation in results. If, however, we look to the results reached by the courts within each state, applying the conflicts law propounded by the highest state court, we are much more likely to see a greater degree of consistency and a fairly coherent body of conflicts decisional law in that state.

4. See, e.g., Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 *CORNELL L. REV.* 315, 325 (1972); Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 *COLUM. L. REV.* 946 (1981).

5. As the New York Court of Appeals did in *Neumeier v. Kuehner*, 286 N.E.2d 454, 458 (N.Y. 1973). Although New York generally follows interest analysis, its application of the interest analysis approach in interstate accident cases is qualified by the *Neumeier* rules. Under the first *Neumeier* rule, when both the plaintiff and the defendant are from the same state, the law of that state applies. See *id.* at 457. Under the second and third *Neumeier* rules, when the plaintiff and defendant are from different states—which in terms of interest analysis includes both the true conflict and the unprovided-for case—the law of the state where the accident occurs generally applies. See *id.* at 457-58; *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 281-82 (N.Y. 1993). I have been a harsh critic of the *Neumeier* rules ever since they were first

restatements and then applied to the facts of particular cases. Rather rules of choice of law are like common-law rules in other areas, such as tort law or contract law, in that they are derived from the decisions of the courts in actual cases and serve as precedents for the resolution of future cases.<sup>6</sup> In time, as a number of conflicts cases have been decided by the courts of a particular state, a body of conflicts decisional law, embodying rules of choice of law, will emerge in that state.<sup>7</sup>

Some twenty years ago I explained how rules of choice of law had been developed in conflicts torts cases, and I identified some nine tort rules of choice of law.<sup>8</sup> These rules of choice of law were based solely on the *results* of the decided cases in a number of states that had abandoned the traditional approach and were independent of the courts' explanation of their decisions in those cases or on the application of the particular choice-of-law approach that the court was purportedly following.<sup>9</sup> My review of the decided cases persuaded me that in practice the courts generally were making the choice-of-law decision with reference to the policies and interests of the involved states and considerations of fairness to the parties, so that the results were generally consistent with the results that would be produced under the interest analysis approach to choice of law.<sup>10</sup> I also concluded that the courts were reaching fairly uniform solutions in the different fact-law patterns presented in conflicts torts cases, and that when the courts differed, the differences were sufficiently clear as to indicate "majority" and "minority" views, as in other areas of law.<sup>11</sup> My submission,

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promulgated, see Robert A. Sedler, *Interstate Accidents and the Unprovided-For Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 131-37 (1973), and continue to be so today. See Robert A. Sedler, *Interest Analysis, Party Expectations and Judicial Method in Conflicts Torts Cases: Reflections on Cooney v. Osgood Machinery, Inc.*, 59 BROOK. L. REV. 1323, 1345-50 (1994) [hereinafter Sedler, *Reflections on Cooney*].

6. That is, they are developed through the normal workings of binding precedent and stare decisis in the common law tradition and applied in subsequent cases with such extensions or modifications as the court deems appropriate.

7. For a discussion of judicial method in conflicts adjudication, see Robert A. Sedler, *A Real World Perspective on Choice of Law*, 48 MERCER L. REV. 781, 782-89 (1997) [hereinafter Sedler, *A Real World Perspective*]; Robert A. Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 KY. L.J. 27 (1967); Robert A. Sedler, *Choice of Law in Michigan: Judicial Method and the Policy-Centered Conflict of Laws*, 29 WAYNE L. REV. 1193 (1983).

8. See Robert A. Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 1033-41 (1977).

9. Courts do not generally refer to rules of choice of law as such. *But see* Sexton v. Ryder Truck Rental, Inc., 320 N.W.2d 843, 851 (Mich. 1982) (referring to "[t]he most 'universal' rule of choice of law": when two residents of the forum are involved in an accident in another state, the law of the forum applies (quoting Robert A. Sedler, *Choice of Law in Michigan: A Time to Go Modern*, 24 WAYNE L. REV. 829, 849 (1978))).

10. As to the reasons why courts tend to use interest analysis in practice regardless of the particular modern approach that they are purportedly following, see Sedler, *A Real World Perspective*, *supra* note 7, at 788-89.

11. One major reason for this substantial uniformity of results in conflicts torts cases is that these cases tend to fall into easily identifiable fact-law patterns. The fact part of the fact-law pattern relates to the states where the parties reside, the state where the harm occurred, and if it differs, the state where the act or omission causing the harm occurred. The law part of the

therefore, was that choice-of-law rules were not necessary to bring about certainty and predictability. Certainty and predictability, at least within each state, were achieved by the rules of choice of law that emerged from the results reached by the courts in the actual cases coming before them for decision.

The experience of the last twenty years has reaffirmed my view as to the correctness of this submission. Rules of choice-of-law continue to operate in practice in the torts area, and at least insofar as certainty and predictability are concerned, render completely unnecessary any effort to formulate choice-of-law rules, by a new restatement or otherwise. In this Article, I will review the tort rules of choice-of-law that I identified twenty years ago and demonstrate that they are generally supported by the more recent decisions of the courts in conflicts torts cases.

## II. A "REAL WORLD" PERSPECTIVE

Before doing so, however, I want to make some observations about the "real world" in which rules of choice of law operate. First, as I have emphasized, the tort rules of choice of law are based on the *results* that the courts reach in the actual cases that come before them for decision. In my writings, I have always focused much more on the results that the courts reach in practice rather than on the rationale of their decisions or on their adoption and application of a particular choice-of-law approach. My review of the courts' decisions in practice indicated to me that courts generally reached the same results in cases presenting the same fact-law pattern regardless of the particular methodology that they were purportedly following, and I am very pleased that Dean Borchers and Professor Solimine have demonstrated this point empirically.<sup>12</sup> I also found, as pointed out previously, that these results were generally consistent with the Currie version of interest analysis, and I maintained that this was because the courts found that in practice that the interest analysis approach produced results that were functionally sound and fair to the parties.<sup>13</sup>

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fact-law pattern relates to whether the law in question allows or denies recovery, that is, whether it is plaintiff-favoring or defendant-favoring (a law limiting the amount of damages recoverable, for example, is defendant-favoring and so is treated for these purposes as a law denying recovery), whether it reflects only a loss-allocation policy or a conduct-regulating policy as well, and whether it involves other policy considerations, such as those relating to worker's compensation. See Sedler, *A Real World Perspective*, *supra* note 7, at 787. The other major reason for this substantial uniformity of results is the tendency of the courts to use interest analysis in practice, regardless of which particular modern approach to choice of law they are purportedly following. See *id.* at 788-89.

12. Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 383-84 (1992); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989). And as Professor Sterk has observed: "[t]he result in the case often appears to have dictated the judges' choice of law approach at least as much as the approach itself generated the result." Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 951 (1994).

13. See Sedler, *A Real World Perspective*, *supra* note 7, at 788-89; Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics"*, 34 MERCER L. REV. 593, 635-43 (1983); Robert A. Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a*

Second, in the last decade or so I have been extensively involved in the “real world” of conflicts litigation and consultation in my home state of Michigan and elsewhere. This involvement has enabled me to see how conflicts law looks to lawyers and judges in practice, and this seems to be quite different from how conflicts law often looks to academic commentators. Lawyers and judges must look primarily to the applicable conflicts *precedents* and decisional law in their own states and are only concerned incidentally, if at all, with the conflicts decisions of other state courts. Academic commentators, in contrast, look to the totality of conflicts cases, and with a large number of conflicts cases being decided by many different courts, it is not surprising that academic commentators tend to see “inconsistency and unpredictability.”<sup>14</sup> Whereas, if they were to look separately to the conflicts decisions of the courts within each state, they would be far more likely to find that within each state the results are fairly consistent and coherent, so that the conflicts law of that state is sufficiently certain and predictable for the lawyers and judges who are called upon to apply it.<sup>15</sup>

Third, in the “real world” of conflicts litigation, the question of choice-of-law cannot be separated fully from the question of jurisdiction as it relates to the possible states in which suit can be brought. While academic commentators may decry “forum shopping” for a more favorable law and may search for uniform solutions in conflicts cases, litigating lawyers know that the choice-of-law result in a particular case and the possible outcome of the case as well may often depend on the state where suit can be brought. They quite realistically assume that a court is more likely to apply its own law in preference to the law of another state and that where a state has a real interest in applying its own law in order to implement the policy reflected in that law, the courts of that state are highly likely to do so.<sup>16</sup> This being so, plaintiffs’ lawyers will

*Response*, 23 U.C. DAVIS L. REV. 865, 891-95 (1990); Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 190-220 (1977).

14. See SCOLLES, HAY, BORCHERS & SYMEONIDES, *supra* note 1; Symeonides, *supra* note 2.

15. For a discussion of the development of the conflicts law of one state, Michigan, in conflicts torts cases, see Robert A. Sedler, *Continuity, Precedent, and Choice of Law: A Reflective Response to Professor Hill*, 38 WAYNE L. REV. 1419, 1429-37 (1992). As I there concluded:

This operation of judicial method and the policy-centered conflict of laws in Michigan, with the resulting *lex fori* approach to choice of law, contradicts Professor Hill’s assertion that choice of law decisions are currently made on an “essentially ad hoc basis.” To the contrary, the Michigan experience indicates that courts can perform the judicial function [in conflicts cases] in the manner advocated by Professor Hill and can use precedent to establish a body of conflicts law for the state.

*Id.* at 1436-37 (emphasis in original) (quoting Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1600 (1985)). For an earlier discussion of the development of torts rules of choice of law in 13 states as of 1977, see Sedler, *supra* note 8, at 994-1032.

16. In other words, they assume that in the true conflict situation, the forum is likely to apply its own law, as Currie long ago advocated. As to the forum’s application of its own law in the true conflict situation, see also the discussion in Sedler, *A Real World Perspective*, *supra* note 7, at 788-89.

try to bring their suit in the state whose law is plaintiff-favoring, while defendants' lawyers will assert jurisdictional and forum non conveniens objections to suit in the plaintiff-favoring state and try to force the plaintiff to litigate the case in a forum whose law is defendant-favoring. The lawyers on both sides will also consult the choice-of-law precedents of the different involved states and will try to get the case before a court whose choice-of-law precedents are likely to result in the application of the state's law that is more favorable to their client. Because there is this strong connection between jurisdiction and choice of law in practice, the tort rules of choice of law that I have identified are sometimes framed with reference to the state in which suit has been brought.

### III. THE RULES OF CHOICE OF LAW

I will now review the tort rules of choice of law that I identified some twenty years ago and demonstrate that they are generally supported by recent decisions in conflicts torts cases.<sup>17</sup> Some of the rules will be revised slightly in light of intervening decisions of the last twenty years. In the next Part I will formulate a new Rule of Choice of Law in products liability cases, which, nonetheless, incorporates some of the other rules of choice of law. On the whole, however, the same results obtain today as obtained when I first identified the tort rules of choice of law.

*Rule One: When two residents of the forum are involved in an accident in another state, the law of the forum applies.*

In the earlier article, I referred to this as the most "universal" Rule of Choice of Law that was and continues to be followed by all of the states that have abandoned

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In the true conflict situation, it seems fully reasonable to a court for it to apply its own law in order to advance its own policy and interest, so long as this will not produce any unfairness to the party against whom that law is being applied. Although academic commentators may search endlessly for a neutral solution to the true conflict, the results in practice indicate that neutral solutions do not have much appeal to the courts deciding the cases before them. Thus, in practice, the courts will almost invariably resolve true conflicts by simply applying their own law, as Currie advocates.

*Id.* (footnote omitted).

17. For the most part, though not entirely, I will limit myself to the cases discussed in the 1998, 1997, 1996, 1995, and 1994 Surveys of Choice of Law in the American Courts prepared by Dean Symeonides for the Association of American Law Schools Section on Conflict of Laws. The 1998 Survey is published in Symeon C. Symeonides, *Choice of Law in the American Courts in 1998: Twelfth Annual Survey*, 47 AM. J. COMP. L. 327 (1999); the 1997 Survey is published in Symeon C. Symeonides, *Choice of Law in the American Courts in 1997*, 46 AM. J. COMP. L. 233 (1998); the 1996 Survey is published in Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey*, 45 AM. J. COMP. L. 447 (1997); the 1995 Survey is published in Symeon C. Symeonides, *Choice of Law in the American Court System in 1995: A Year in Review*, 44 AM. J. COMP. L. 181 (1996); the 1994 Survey is published in Symeon C. Symeonides, *Choice of Law in the American Courts in 1994: A View "From the Trenches"*, 43 AM. J. COMP. L. 1 (1995).

the traditional approach.<sup>18</sup> Where both parties are forum residents, the forum has a real interest in applying its law in order to implement the policy reflected in that law, since the social and economic consequences of the accident and of allowing or denying recovery will be felt in the forum. That interest is the same whether the forum's law is plaintiff-favoring or defendant-favoring.<sup>19</sup> Where the forum's law is plaintiff-favoring, the plaintiff will bring suit in the forum, and with the choice-of-law result completely predictable, the parties will treat the case as if it were a purely domestic case. Where the forum's law is defendant-favoring, the plaintiff's lawyer will bring suit in the accident state, obtaining jurisdiction on the basis of forum-transaction contacts with that state, and the resolution of the case will involve the Third Rule of Choice of Law.

*Rule Two: When two parties from a recovery state, without regard to forum residence, are involved in an accident in a nonrecovery state, recovery will be allowed.*

This Rule of Choice of Law applies to the situation where a plaintiff and a defendant from different recovery states are involved in an accident in a nonrecovery state. This case presents the false conflict, since the plaintiff's home state has a real interest in having its law allowing recovery applied, the law of the defendant's home state also allows recovery, and the accident state generally has no interest in having

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18. The earlier cases are discussed in Sedler, *supra* note 8, at 1033-34 n.278. For more recent cases, see Knoell v. Cerkvenik-Anderson Travel, Inc., 917 P.2d 689 (Ariz. 1996) (operator served excessive amounts of liquor to Arizona vacationer who jumped or fell to his death in Mexico; Arizona law imposing liability for supplying liquor to a person under age 21 applied, although legal drinking age in Mexico was 18); Crowell v. Clay Hyder Trucking Lines, Inc., 700 So. 2d 120 (Fla. Dist. Ct. App. 1997) (where Florida residents were involved in an accident in Georgia, Florida vehicle owners' liability law applied); Esser v. McIntyre, 661 N.E.2d 1138 (Ill. 1996) (where Illinois vacationers were involved in an accident in Mexico, Illinois law allowing recovery applied); Veasley v. CRST Int'l, Inc., 553 N.W.2d 896 (Iowa 1996) (where Iowa plaintiff was injured in Arizona while riding in a truck registered in Iowa and owned by a company that had its principal place of business in Iowa; Iowa vehicle owners' liability law applied); Cribb v. Augustyn, 696 A.2d 285 (R.I. 1997) (where both parties were from Rhode Island and accident occurred in New Hampshire, Rhode Island law applied on issue of statute of limitations); Miller v. White, 702 A.2d 392 (Vt. 1997) (where Vermont residents were involved in an accident in Quebec, Vermont law allowing higher recovery applied).

19. When the forum is a recovery state and the issue on which the laws of the involved states differ is one of loss allocation, in terms of interest analysis, the case clearly presents a false conflict, because the nonrecovery state has no interest in applying its law to deny recovery to an out-of-state plaintiff injured there. Where the forum is a nonrecovery state, it can be contended that the state where the accident occurs does have an interest in applying its law to allow recovery to a nonresident injured there. Certainly, this is true where the recovery law of the accident state is conduct regulating, such as a law allowing recovery for the commission of an intentional tort. Any interest of the other involved state, however, is not important to the forum, which will apply its own law to advance its own policy and interest.

its law denying recovery applied in favor of a nonresident defendant. Assuming that the defendant is not subject to jurisdiction in the plaintiff's home state, the plaintiff will sue in the defendant's home state, and that state will allow recovery.<sup>20</sup>

*Rule Three: Where two parties from a nonrecovery state are involved in an accident in a recovery state, and suit is brought in the recovery state, the courts are divided. Some courts will apply their own law allowing recovery, while other courts will apply the law of the parties' home state, denying recovery.*

Assuming that the matter in issue involves a loss-allocation rule, the state of injury does not have a real interest in applying its law allowing recovery, since the consequences of the accident and of allowing or not allowing recovery will be felt by the parties in their home state.<sup>21</sup> The courts that have denied recovery have emphasized their own lack of real interest and the real interest of the parties' home state in applying its defendant-favoring rule.<sup>22</sup> In contrast, the courts that have applied

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20. The earlier cases are discussed in Sedler, *supra* note 8, at 1034 n.279. A more recent case involving this situation is *Olmstead v. Anderson*, 400 N.W.2d 292 (Mich. 1987). The Minnesota victim was killed in an accident in Wisconsin by a vehicle driven by a Michigan defendant. Wisconsin law limited recovery for wrongful death. Minnesota law and Michigan law did not. *Id.* at 293. The beneficiaries sued in Michigan, and Michigan held that under its *lex fori* approach to choice of law, there was no basis for displacing Michigan law, so that Michigan law allowing unlimited recovery applied as the law of the forum. *See id.* at 305; *see also* *Armstead v. National R.R. Passenger Corp.*, 954 F. Supp. 111 (S.D.N.Y. 1997) (applying New York law, where New York resident slipped and fell on ice in Virginia, on property belonging to District of Columbia resident, and only Virginia had an all or nothing contributory negligence rule; Virginia law did not apply); *Reach v. Pearson*, 860 F. Supp. 141 (S.D.N.Y. 1994) (applying New York law, where New Jersey plaintiff and New York defendant were involved in accident in Quebec, and New Jersey and New York law both allowed unlimited recovery; Quebec law limiting recovery did not apply). This Rule of Choice of Law would also cover the rare situation where two parties from the same recovery state are involved in an accident in a nonrecovery state, and suit is brought in the accident state or in a disinterested third state. Earlier cases involving this situation are discussed in Sedler, *supra* note 8, at 1034 nn.280-81. A more recent case involving this situation is *Scheer v. Scheer*, 881 P.2d 479 (Colo. Ct. App. 1994) (where California family members were involved in an accident in Colorado, California law allowing suit applied rather than Colorado law recognizing family immunity).

21. If the law of the state where the harm occurred reflects a conduct-regulating policy, that state has a real interest in applying its own law in order to implement the conduct-regulating policy reflected in its law and will do so. In terms of interest analysis, this case presents a true conflict between the defendant-favoring rule of the parties' home state and the plaintiff-favoring rule of the state where the harm occurred, and that state will apply its own law in order to implement the conduct-regulating policy reflected in that law.

22. Earlier cases denying recovery are cited in Sedler, *supra* note 8, at 1035 n.283. In New York, recovery would be denied under the first *Neumeier* rule, which provides that when both parties are from the same state, the law of their common domicile applies. *See* *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679 (N.Y. 1985). In that case New Jersey children attending a parochial school there were taken on a school sponsored trip to a Boy Scout camp located in New York. While there, they were sexually abused by a teacher of the school, who served as the scoutmaster. The parents brought suit in New York against the religious order, which

their own law, allowing recovery, have expressed a concern for the even-handed treatment of nonresidents injured there and a preference for their own "better law."<sup>23</sup> In terms of predictability, the result will be known in the states that have decided the question, and the case presumably could go either way in the states that have not yet done so. Where the courts of the accident state have decided the question in favor of the application of law of the parties' home state, the out-of-state plaintiff cannot recover on the claim, since under the First Rule of Choice of Law, the courts of the parties' home state will apply their own law in favor of the resident defendant. Where the courts of the accident state have decided the question in favor of the application of their own law, the result is again known, and the parties will litigate the case with that in mind. Where the courts of the accident state have not yet decided the question, the plaintiff will bring suit in that state, and the parties' behavior will be the same as in any other case of first impression. The arguments on both sides are collected in the conflicting precedents and in the views of academic commentators, and the court will resolve the question, thereby settling it in that state.<sup>24</sup>

*Rule Four: When a forum resident suffers injury in the forum either because of an act done there or because of an act done elsewhere that creates a foreseeable risk of harm in the forum, the forum will apply its own law allowing recovery.*

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was incorporated in Ohio, and against the Boy Scouts of America. The Boy Scouts of America was incorporated in New Jersey, which recognized charitable immunity. *See id.* at 682. New York did not. *See id.* The New York court treated both defendants as New Jersey parties for purposes of New Jersey's charitable immunity rule, and applied New Jersey law, denying recovery. *See id.* at 689. Recent cases have applied the law of the parties' home state denying recovery. *See* *Dillon v. Dillon*, 886 P.2d 777 (Idaho 1994) (applying Saskatchewan statute of limitations barring the suit, where Saskatchewan parties were involved in fatal accident in Idaho); *Collins v. Trius*, 663 A.2d 570 (Me. 1995) (applying Canadian law limiting damages recoverable for pain and suffering rather than Maine law allowing unlimited recovery, where Canadian parties were involved in an accident in Maine); *Myers v. Langlois*, 721 A.2d 129 (Vt. 1998) (applying Quebec law disallowing tort action, where Quebec parties were involved in an accident in Vermont).

23. The earlier cases are cited in *Sedler*, *supra* note 8, at 1035 n.283. A more recent case reaching this result is *Matson v. Antcil*, 979 F. Supp. 1031 (D. Vt. 1997) (applying Vermont law, where a Rhode Island child was injured in Vermont in a vehicle driven by her father which collided with a vehicle driven by a Quebec resident; Vermont law, which did not allow contribution against the father for his fault in the accident, applied over Rhode Island and Quebec law, which allowed contribution). In *Lucero v. Valdez*, 884 P.2d 199 (Ariz. Ct. App. 1994), Utah spouses were involved in an accident in Arizona, which did not recognize spousal immunity. The Arizona court predicted that the Utah courts would no longer recognize spousal immunity, but held that in any event, Arizona law, allowing recovery, would apply. *See id.* at 204-06.

24. In the earlier article, I formulated this Rule of Choice of Law with reference to "majority-minority" views. At that time the majority of courts passing on the question had made the decision in favor of applying their own law. *See* *Sedler*, *supra* note 8. I have not echecked out all the cases in the intervening 20 years, but the more recent cases show that the results continue to be divided. *See supra* notes 22, 23. Instead of counting the decisions, I have simply reformulated the Rule of Choice of Law to eliminate any "majority-minority" view.



This is the true conflict, brought in the plaintiff's home state. Since the forum has a real interest in applying its own law, it will do so in order to implement its own policies and interests. The application of the forum's own law is fully fair to the out-of-state defendant, who either acted in the forum or whose act done elsewhere created a foreseeable risk of harm in the forum.<sup>25</sup> A number of products liability cases are easily resolved under this Rule of Choice of Law. Because the out-of-state manufacturer sent its product into the stream of commerce, it can constitutionally be subject to jurisdiction in the forum for harm caused by the product there, and the forum can and will apply its plaintiff-favoring rule, including allowing the recovery of punitive damages.<sup>26</sup>

*Rule Five: When a plaintiff from a recovery state is injured by a defendant from a nonrecovery state in the defendant's home state, and the suit is brought in the plaintiff's home state, the courts are divided, with the majority view appearing to be that the forum should apply its own law in the absence of unfairness to the defendant.*

This situation, of course, presents the true conflict. The plaintiff's home state is interested in applying its own law allowing its resident to recover, while the defendant's home state is equally interested in applying its own law to protect its resident and insurer. In this situation, suit frequently can be brought in the plaintiff's home state because of forum-defendant connections with that state, such as where the defendant is a business enterprise, conducting sufficient business activity in that state so as to be subject to jurisdiction there on a nonforum related claim. Some courts take the position that where the underlying accident had no connection with the forum, it would be improper for the forum to apply its own law, and they apply the law of the defendant's home state denying recovery.<sup>27</sup> Other courts, however, take the position

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25. The earlier cases are discussed in Sedler, *supra* note 8, at 1035-36 n.287. More recent cases, other than those involving products liability, which will be discussed separately, include: *Kuehn v. Childrens Hosp.*, 119 F.3d 1296 (7th Cir. 1997) (applying Wisconsin law where bone marrow was extracted from Wisconsin child in Wisconsin, sent to California for processing and sent back to Wisconsin, where it arrived in unusable condition; Wisconsin law allowing claim for child's pre-death pain and suffering applied); *Drinkall v. Used Car Rentals, Inc.*, 32 F.3d 329 (8th Cir. 1994) (Iowa owner's liability law applied where Nebraska auto rental company rented vehicle that was involved in accident in Iowa, injuring Iowa victim); *Brown v. National Car Rental Sys., Inc.*, 707 So. 2d 394 (Fla. Dist. Ct. App. 1998) (Florida law imposing owners liability applied to Florida accident involving Florida victim and Georgia ear-owner); *Church v. Massey*, 697 So. 2d 407 (Miss. 1997) (Mississippi would not apply Alabama law of sovereign immunity which would have barred suit, where vehicle driven by Alabama state employee was involved in accident in Mississippi and injured a Mississippi resident); *Brown v. Harper*, 647 N.Y.S.2d 245 (App. Div. 1996) (New York law holding dealer liable for harm caused by vehicle to New York resident applied, where Pennsylvania car dealership sold vehicle to New York resident in circumstances that under New York law would cause dealer to be liable based on a theory of imputed ownership).

26. See *infra* text accompanying note 44.

27. The classic case representing this viewpoint is *Cipolla v. Shaposka*, 267 A.2d 854 (Pa. 1970). In that case, a Pennsylvania resident was injured in an accident in Delaware while he was a passenger in an automobile operated by a Delaware driver. The accident occurred during

that they should apply their own law in order to implement the policy reflected in that law, so long as this produces no unfairness to the defendant.<sup>28</sup> The

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a trip that began in Delaware and was to terminate across the river in Pennsylvania. Delaware had a guest statute which would bar recovery; Pennsylvania did not. Suit was brought in Pennsylvania. The court emphasized the lack of factual contacts between the accident and the importance of "territorialist" considerations in making choice of law decisions. *Id.* at 856-57. See the discussion of the case and territorial considerations in Robert A. Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394 (1971). Since *Cipolla* has resolved this issue in Pennsylvania, it serves as a precedent for future cases presenting the same fact-law pattern. See *Lejeune v. Bliss-Salem, Inc.*, 85 F.3d 1069 (3d Cir. 1996) (applying Pennsylvania law where Pennsylvania resident was injured while working on machinery at a Delaware steel mill; Delaware law imposing liability only for negligence rather than Pennsylvania's strict liability rule applied). Another older case reaching this result is *Casey v. Manson Construction & Engineering Co.*, 428 P.2d 898 (Or. 1967) (where Oregon victim was injured in Washington by Washington defendant, Washington law barring an action for loss of consortium applied rather than Oregon law, which allowed such an action).

Where an accident involving a New York plaintiff occurred in the defendant's home state, the second *Neumeier* rule directs the New York courts to apply the defendant-favoring law of the defendant's home state. The application of the second *Neumeier* rule in this situation would effectively overrule some pre-*Neumeier* New York cases, and the Second Circuit has held that the second *Neumeier* rule does not apply to displace New York law allowing unlimited recovery for wrongful death because of New York's "strong public policy" against limiting liability in this area. See *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973) (applying New York law, thus avoiding the overruling of *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 526 (N.Y. 1961)). The Second Circuit has also held that where a New York employee of a New York employer was killed while temporarily working on a project in Virginia due to the negligence of an employee of another company working on the project, New York law allowing a tort action against the other company applied. The court said that in this situation the New York courts would not refuse to apply the second *Neumeier* rule on "public policy" grounds. See *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir. 1978). But where there is no basis for invoking a "public policy" exception, in this situation, the second *Neumeier* rule requires application of the law of the defendant's home state to the detriment of New York's own policy and interest. See, e.g., *Heisler v. Toyota Motor Credit Corp.*, 884 F. Supp. 128 (S.D.N.Y. 1995) (where New York resident was injured by New Jersey defendant in New Jersey, New Jersey law generally immunizing owner of vehicle for negligence of driver applied rather than New York law imposing such liability).

28. Older cases allowed recovery in this situation. See *Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974) (applying Rhode Island law where Rhode Island victim was killed in Massachusetts as a result of defect in a vehicle purchased in Massachusetts; Rhode Island law imposing strict liability and allowing unlimited recovery for wrongful death applied); *Schwartz v. Consol. Freightways Corp.*, 221 N.W.2d 665 (Minn. 1974). A Minnesota plaintiff was injured in an accident in Indiana by trucks owned by Ohio corporations traveling to states other than Minnesota. Minnesota law allowing recovery on the basis of comparative negligence applied, rather than law of state of injury or defendant's home state, which would have barred recovery on the basis of contributory negligence. See *id.*; see also *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972) (where the underlying accident had factual connections with the forum). The trip began in Kentucky and was to terminate there, though the accident occurred when the parties, a Kentucky victim and an Ohio defendant, were driving in Ohio. See *id.* at 827. The court held that Kentucky law, allowing recovery by a guest passenger against the host-driver for ordinary negligence applied. See *id.* at 829. More recent cases have reached this

application of the forum's law will be unfair to the defendant only where the defendant was entitled to rely on the law of the state in which it acted and conformed its conduct and insurance coverage to the requirements of that state's law.<sup>29</sup> In the absence of unfairness to the defendant, the forum will be strongly disposed to apply its own law in order to implement its own policy and interest.

*Rule Six. When a plaintiff from a recovery state is injured by a defendant from a nonrecovery state and the suit is brought in the defendant's home state, that state will apply its own law denying recovery.*

This is the true conflict, brought in the defendant's home state, and that state can be expected to apply its own law denying recovery. This situation will only occur when the accident took place in the defendant's home state, and the plaintiff cannot obtain jurisdiction over the defendant in the plaintiff's home state. When the plaintiff decides nevertheless to bring the suit in the defendant's home state, the plaintiff must expect that the courts of that state will apply its defendant-favoring law for the benefit of its resident defendant.<sup>30</sup>

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result. *See Kenna v. So-Fro Fabrics, Inc.*, 18 F.3d 623 (8th Cir. 1994) (applying North Dakota law where North Dakota resident was injured in Minnesota store owned by company that did business in both states). North Dakota's plaintiff-favoring rules relating to survival and wrongful death applied over Minnesota's defendant-favoring rules. *See id.*; *see also Pollack v. Bridgestone/Firestone, Inc.*, 939 F. Supp. 151 (D. Conn. 1996) (applying Connecticut law where Connecticut victims were involved in accident resulting from blowout of tire manufactured by Ohio company in Illinois; Connecticut victim-favoring products law applied).

29. One case where fairness considerations justified application of the law of the defendant's home state in this situation is *Blakesley v. Wolford*, 789 F.2d 236 (3d Cir. 1986) (applying Pennsylvania law). In that case a Pennsylvania resident arranged with a Texas oral surgeon to have a complicated procedure performed at a hospital in Texas. The operation was unsuccessful and caused additional injury to the plaintiff. In a malpractice action against the oral surgeon in Pennsylvania (the defendant made no objection to the exercise of jurisdiction in Pennsylvania, as he might have done), the court held that the defendant-favoring Texas law applied on the issues of informed consent and limitations on malpractice damages. *See id.* at 243. Here, since the parties had entered into a consensual arrangement and the plaintiff voluntarily went to Texas to have the procedure performed, it can be contended that the defendant was entitled to rely on the Texas law or informed consent and limited liability for damages.

Another case where fairness considerations justified application of the law of the defendant's home state in this situation is *Barrett v. Foster Grant Co.*, 450 F.2d 1146 (1st Cir. 1971) (applying New Hampshire law). There a New Hampshire employee of a New Hampshire contractor suffered serious injuries while working on an electrical transformer in Massachusetts, and brought suit against the Massachusetts landowner in New Hampshire. The landowner would not be liable under Massachusetts law, which imposed only a duty to warn of hidden dangers. *See id.* at 1149. The plaintiff contended that New Hampshire law imposed a higher duty of care. The court held that Massachusetts law applied on the duty of care owed by landowners to persons on the land, emphasizing that the Massachusetts landowner was entitled to rely on the Massachusetts standard of care when acting on its Massachusetts land. *See id.* at 1153.

30. The earlier cases are discussed in Sedler, *supra* note 8, at 1037-38. Recent cases have

*Rule Seven. When the law of state in which an act or omission occurs reflects a conduct-regulating policy, the defendant will be held liable if that act causes harm in another state or to a nonresident in the defendant's home state. Conversely, a state will not apply a law reflecting only a conduct-regulating policy to conduct that takes place entirely in another state.*

In this situation, the state where the act or omission occurs has a real interest in applying its law in order to implement the conduct-regulating policy reflected in its law. Ordinarily the state in which the harm occurs would have no interest in insulating the actor from liability, since the actor usually will be a resident of the state where the conduct occurs. In terms of interest analysis, then, this is the false conflict,

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applied the forum's law in order to implement the forum's own policy and interest. *See Adam v. J.B. Hunt Transp., Inc.*, 130 F.3d 219 (6th Cir. 1997) (applying Kentucky law where Ohio victim was killed in accident in Kentucky with Kentucky defendants; Kentucky law prohibiting recovery of wrongful death damages for non-economic injuries applied); *Poust v. Huntleigh HealthCare*, 998 F. Supp. 478 (D.N.J. 1998) (applying New Jersey law where Pennsylvania resident was injured while undergoing medical procedure as a result of defective product manufactured in New Jersey by New Jersey defendant; defendant-favoring New Jersey law for calculating damages applied); *Austin v. Dionne*, 909 F. Supp. 271 (E.D. Pa. 1995) (applying Pennsylvania law where New Jersey accident victim brought suit in Pennsylvania to recover damages against New Jersey defendant resulting from Pennsylvania accident; Pennsylvania law barring recovery for lost wages covered by liability insurance applied); *Amoroso v. Burdette Tomlin Mem'l Hosp.*, 901 F. Supp. 900 (D.N.J. 1995). The court applied New Jersey law where a Pennsylvania resident brought a wrongful death and survival action against New Jersey defendants in New Jersey to recover for death of decedent in New Jersey. New Jersey law, which does not permit the recovery of prospective lost earning capacity in survival actions, applied over Pennsylvania law, which does. *See also Motenko v. MGM Dist., Inc.*, 921 P.2d 933 (Nev. 1996). This case involved a Massachusetts resident whose parent was injured at the defendant's Nevada hotel bringing action in Nevada to recover for loss of the parent's consortium. Nevada law barring such actions applied over Massachusetts law, which allowed them. *See also In re Disaster at Detroit Metro. Airport*, 750 F. Supp. 793 (E.D. Mich. 1989) (applying Michigan law). The law of Minnesota, which was the air carrier's home state, imposed liability for punitive damages, but the law of Michigan, where the air carrier had a major hub and where the fatal accident occurred, did not. There was a true conflict between Minnesota's "corporate regulatory policy," and Michigan's defendant-protecting policy, and Michigan law applied as the law of the forum. *See id.* In *McCann v. Somoza*, 933 F. Supp. 362 (S.D.N.Y. 1996) (applying New York law), the court's application of the third *Neumeier* rule led to New York's failing to apply New York law to protect the New York defendant from liability in the same manner as New York's application of the second *Neumeier* rule led to New York's failure to protect its resident plaintiff in the situation covered by the Fifth Rule of Choice of Law. *See supra* text accompanying note 27. In this case, the automobile accident involving a New Jersey plaintiff and a New York defendant occurred in Connecticut. *See McCann*, 933 F. Supp. at 364. Under Connecticut and New Jersey law, the plaintiff could recover damages for non-economic loss; under New York law, she could not. *See id.* at 364-65. Since the plaintiff chose to bring her suit in New York, the Sixth Rule of Choice of Law would ordinarily operate to bring about the application of New York law in favor of the New York defendant. However, since the plaintiff and defendant were from different states, the third *Neumeier* rule applied, and the court applied Connecticut law, enabling the New Jersey plaintiff to recover against the New York defendant. *See id.* at 366-68.

and the law of the state of acting will be applied.<sup>31</sup> The same is true when the harm occurs in the state of acting, but the victim is a resident of another state.<sup>32</sup> This Rule of Choice of Law is involved in product liability cases, where the court applies the law of the manufacturer's home state imposing strict liability or liability for punitive damages.

Conversely, where a state's law reflects only a conduct-regulating policy, that state would have no interest in applying its law to conduct occurring entirely in another state and having its effect in that state. This situation is illustrated by a series of New York cases involving the asserted application of a New York "worksite" law to accidents occurring in other states. The law requires that worksites be made safe and provides that the failure to do so results in strict and vicarious liability of the owner of the property or general contractor. When the matter came before the New York Court of Appeals, the court held that the law reflected only a conduct-regulating policy, and so did not apply extraterritorially to a Massachusetts scaffolding accident, although both the victim and the worksite owner were New York residents.<sup>33</sup> Following this decision, a federal court in New York held that since the imposition

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31. The earlier cases are discussed in Sedler, *supra* note 8, at 1038 n.301. Recent cases have involved this false conflict situation. See *In re Disaster at Detroit Metro. Airport*, 750 F. Supp. 793 (applying Michigan law where aircraft involved in Michigan accident was manufactured by California manufacturer in California; California law imposing strict liability in products cases reflected a "producer regulatory policy" and would be applied over Michigan's negligence only rule); *Isley v. Capuchin Province*, 878 F. Supp. 1021 (E.D. Mich. 1995) (applying Michigan law where sexual abuse of plaintiff occurred in Wisconsin; Wisconsin law providing for recovery of punitive damages applied instead of Michigan law, which did not).

32. See *Ramey v. Wal-Mart, Inc.*, 967 F. Supp. 843 (E.D. Pa. 1997) (applying Pennsylvania law where Pennsylvania resident was injured while shopping at the defendant's business establishment in New Jersey; New Jersey's plaintiff-favoring "mode of operation" doctrine, which relieved the plaintiff of the burden of demonstrating the precise cause of an accident, applied); *Leane v. Joseph Entertainment Group*, 642 N.E.2d 852 (Ill. App. Ct. 1994) (where Illinois resident suffered an acute respiratory attack and died while attending a concert at an outdoor amphitheater in Wisconsin, Wisconsin law, imposing a duty to provide medical care on the operator of the amphitheater, applied over Illinois law).

33. See *Padula v. Lilarn Properties Corp.*, 644 N.E.2d 1001 (1994). The court emphasized that under interest analysis, a state's interest in applying its law in order to implement the policy reflected in that law differs depending on whether the law reflects a conduct-regulating policy or a loss-allocation policy. See *id.* at 1002-03. If the law had been found to reflect a loss-allocation policy in addition to the conduct-regulating policy, New York law would apply under the first *Neumeier* rule and under the First Rule of Choice of Law. It may also be noted in this regard that the law provided for New York's labor commissioner to establish safety rules for jobsites, and as a concurring judge pointed out, it would be unreasonable for New York's labor commissioner to establish rules for jobsites in another state. See *id.* at 1003 (Titone, J., concurring). Once the New York court held that the New York law did not apply extraterritorially to conduct occurring in another state, there was no longer a conflict of laws between New York law and Massachusetts law, since under the common law rules of both states the plaintiff could recover only on the basis of negligence. As to the absence of a conflict of laws when the statute of one of the involved states is found not to be applicable extraterritorially to conduct occurring in another state, see Robert A. Sedler, *Functionally Restrictive Rules in American Conflicts Law*, 50 S. CAL. L. REV. 27, 40-44 (1976).

of punitive damages is conduct-regulating rather than loss-allocating, New York law authorizing the imposition of punitive damages did not apply to a fatal accident in Pennsylvania in which a New York resident was killed.<sup>34</sup>

This Rule of Choice of Law has been reformulated to include the converse component. Both components of the Rule of Choice of Law indicate the importance of distinguishing between a rule of law that reflects only a conduct-regulating policy and one that reflects a loss-allocation policy in addition to or instead of a conduct-regulating policy. When a law reflects only a conduct-regulating policy, the state interested in applying its law to implement that policy is the state where the conduct that the law was designed to regulate took place.

*Rule Eight. When a plaintiff from a nonrecovery state is involved in an accident with a defendant from a recovery state, and the accident occurs in the defendant's home state, recovery will be allowed. When the accident occurs in the plaintiff's home state, recovery will usually be allowed, but sometimes the courts apply the law of the plaintiff's home state denying recovery.*<sup>35</sup>

Where the accident occurs in the defendant's home state, the recovery state, the considerations that influence some courts to allow recovery in the situation covered by Third Rule of Choice of Law issues apply with greater force, since the defendant's home state also allows recovery. Here the plaintiff will be permitted to recover under the law of the defendant's home state.<sup>36</sup> Where the accident occurs in the plaintiff's home state, the unprovided-for case is clearly presented: neither state is interested in applying its law in order to implement the policy reflected in that law.<sup>37</sup> A clear majority of the courts passing on this question have allowed recovery,<sup>38</sup> but a few

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34. See *Wang v. Marziani*, 885 F. Supp. 74 (S.D.N.Y. 1995) (applying New York law). Since the victim and defendant were from different states, application of Pennsylvania law on this issue would also be mandated by the second *Neumeier* rule.

35. This Rule of Choice of Law was first stated in terms of recovery generally being allowed irrespective of where the accident occurred, since *Neumeier* was the only exception to the pattern of decisions allowing recovery. The rule has now been reformulated slightly to take account of the fact that some cases will be found where the courts have applied the law of the plaintiff's home state to deny recovery when the accident occurred in that state.

36. The earlier cases are discussed in Sedler, *supra* note 8, at 1038 n.302. More recent cases include: *Rodriguez v. American Airlines, Inc.*, 886 F. Supp. 967 (D.P.R. 1995) (New York plaintiff, Puerto Rican defendant, accident in Puerto Rico; Puerto Rican law apparently more favorable to plaintiff on issues of negligence and the like); *Rigdon v. Pittsburgh Tank & Tower Co.*, 682 So. 2d 1303 (La. Ct. App. 1996) (Kentucky plaintiff, Louisiana defendant, accident in Louisiana; suit against employer may be maintained under Louisiana law, but not under Kentucky law); *Singh v. Swan*, 639 N.Y.S.2d 216 (App. Div. 1996) (Ontario plaintiff, New York defendant, New York accident; New York law apparently more favorable to plaintiff than Ontario law).

37. However, in some of these cases the courts refer to the purported "interest" of the defendant's home state in applying its loss allocation rules to regulate the conduct of its resident defendant acting in the state.

38. The earlier cases are discussed in Sedler, *supra* note 8, at 1038-39. More recent cases have also allowed recovery. See *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8 (D.D.C. 1995) (a Maryland plaintiff sued a District of Columbia defendant over the purchase of product in

have not.<sup>39</sup> Again, in the products liability situation, the courts that hold that the law of the plaintiff's home state applies to all products liability questions will apply the defendant-favoring rules of the plaintiff's home state over the plaintiff-favoring rules of the manufacturer's home state.<sup>40</sup>

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the District of Columbia and an accident in Maryland; District of Columbia law allowing unlimited recovery for economic loss applied instead of the Maryland cap); *see also* Department of Corrections v. McGhee, 653 So. 2d 1091 (D. Fla. 1995). The court applied Florida law where Florida prison escapees killed a Mississippi resident in Mississippi. Florida law recognized liability for negligence in such circumstances where Mississippi law did not. *See In re Colorado Springs Air Crash*, 867 F. Supp. 630 (N.D. Ill. 1994) (applying Illinois law). A Colorado victim sued an Illinois defendant over a fatal air crash in Colorado. Plaintiff-favoring Illinois rule imposing joint and several liability among tortfeasors applied over a defendant-favoring Colorado rule apportioning liability. *See also* McKinney v. S & S Trucking, Inc., 885 F. Supp. 105 (D.N.J. 1995) (applying New Jersey law); Farrell v. Davis Enters., Inc., No. Civ.A. 95-2986, 1996 WL 21128, at \*1 (E.D. Pa. 1996) (applying Pennsylvania law). A New Jersey plaintiff sued a Pennsylvania defendant over an accident in New Jersey. Plaintiff-favoring Pennsylvania rule imposing joint and several liability among tortfeasors applied over defendant-favoring New Jersey rule apportioning liability. *See also* Coats v. Hertz Corp., 695 N.E.2d 76 (Ill. App. Ct. 1998). New York owner's liability law applied where an Illinois plaintiff sued a New York defendant who had leased vehicle in New York. *See* Burney v. PV Holding Corp., 553 N.W.2d 657 (Mich. Ct. App. 1996). An Alabama plaintiff was injured by a Michigan defendant who had leased a vehicle in Michigan causing an accident in Alabama. Michigan vehicle owner's liability law applied, not the Alabama guest statute. *See* Butkera v. Hudson River Sloop "Clearwater," 693 A.2d 520 (N.J. Super. Ct. App. Div. 1997). A New Jersey plaintiff sued a New York charity defendant involving an accident in New Jersey. New Jersey law of charitable immunity was not applicable for benefit of New York defendant. *See also* Haggerty v. Cedeno, 653 A.2d 1166 (N.J. Super. Ct. App. Div. 1995). A New Jersey plaintiff involved in an accident in New Jersey sued a New York defendant who had leased the vehicle in New York. New York vehicle owner's liability law applied. *See also* Victoria v. Smythe, 703 A.2d 619 (R.I. 1997). A Rhode Island plaintiff sued a Florida-based automobile rental company involving an accident in Rhode Island with vehicle rented in New Jersey. Florida owner's liability law applied.

39. At the time the Rule of Choice of Law was formulated, New York was the only state to deny recovery under the first *Neumeier* rule. *See* Sedler, *supra* note 8, at 1038-39. More recent cases have also applied the law of the plaintiff's home state to deny recovery in this situation. *See* Salavarría v. National Car Rental Sys., 705 So. 2d 809 (La. App. 1998) (involving Louisiana plaintiff who was injured in Louisiana by unauthorized driver of vehicle that had been leased from rental company in Florida, Louisiana law—which did not impose liability on the rental company—applied over Florida law); Vizcarra v. Roldan, 925 S.W.2d 89 (Tex. App. 1996) (involving a Mexican plaintiff who was injured in Mexico in automobile accident with Texas defendant). Mexican law limiting damages recoverable applied. It was also relevant that the defendant did business in Mexico. *See id.* at 91-92.

40. Where the manufacturer is doing business other than manufacturing in the plaintiff's home state, such as marketing its product, that state may see an interest in applying its manufacturer-favoring rule for the benefit of the out-of-state manufacturer doing business there. *See, e.g.,* Farrell v. Ford Motor Co., 501 N.W.2d 567 (Mich. Ct. App. 1993).

*Rule Nine: The tort liability of an employer to an employee who is covered by worker's compensation and the liability of the employer for contribution to a third-party tortfeasor in a claim involving that employee is determined by the law of the state where the employer has taken out worker's compensation to cover the particular employee.*<sup>41</sup>

This Rule of Choice of Law is also "universal."<sup>42</sup> It is based on considerations relating to the policy behind worker's compensation and on considerations relating to fairness to the employer. The policy behind the law of workers' compensation is that workers' compensation should be the primary means of providing compensation for work-related injuries, and it will be the exceptional case where an employee covered by workers' compensation is able to maintain a tort action as well. Since the injured employee is entitled to receive workers' compensation payments, the employee's subsistence needs will be met, and the policy behind the worker's compensation law of the employee's home state will have been satisfied. Moreover, the employer is considered to be entitled to rely on the law of the state where worker's compensation, covering the particular employee, was taken out to immunize it from tort liability to that employee.<sup>43</sup>

#### IV. A NEW RULE OF CHOICE OF LAW FOR PRODUCTS LIABILITY CASES

I am adding a new Rule of Choice of Law for products liability cases. This new Rule of Choice of Law is necessary to reflect the fact that some courts have held that in products liability cases, the applicable law, whether plaintiff-favoring or defendant-favoring, is the law of the plaintiff's home state, where the injury has occurred.

In the typical conflicts products liability case, the defendant has manufactured the product in one state, put the product into the stream of commerce, and the harm to the plaintiff resulting from the use of the product has occurred in the plaintiff's home state. Since the out-of-state manufacturer has put the product into the stream of commerce, it is subject to suit in the plaintiff's home state on the basis of forum-

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41. This Rule of Choice of Law has been revised slightly to make it clear that it also covers the liability of the employer for contribution to a third-party tortfeasor in a claim involving the employee.

42. See Sedler, *supra* note 8, at 1040.

43. This Rule of Choice of Law and the earlier cases supporting it are discussed in Sedler, *supra* note 8, at 1040. In *Cooney v. Osgood Mach.*, 612 N.E.2d 277 (N.Y. 1993), the New York Court of Appeals effectively applied this Rule of Choice of Law to hold that the liability of an employer for contribution to a third-party tortfeasor in a claim involving that employee is determined by the law of the state where the employer has taken out worker's compensation to cover the particular employee. In a symposium on *Cooney* in the *Brooklyn Law Review*, to which Professors Twerski and Silberman also contributed, I had the opportunity to discuss the Ninth Rule of Choice of Law and its application in *Cooney*. See Sedler, *Reflections on Cooney*, *supra* note 5, at 1333-39. For a very recent case applying the employer-protecting workers' compensation law of the state where a "borrowing" employer had taken out workers' compensation insurance to cover the "borrowed" employee, see *Benoit v. Test System, Inc.*, 694 A.2d 992 (N.H. 1997).



transaction contacts. It is also subject to suit in its home state on the basis of forum-defendant contacts.

Where the products law of the plaintiff's home state is plaintiff-favoring, the plaintiff will bring suit in the home state, and that state will apply its own law for the benefit of its resident plaintiff, as per the Fourth Rule of Choice of Law.<sup>44</sup>

Where the products law of the plaintiff's home state is defendant-favoring,<sup>45</sup> the plaintiff will argue that the court in which suit has been brought,<sup>46</sup> should apply the law of the defendant's home state imposing liability. The defendant is likely to argue that the applicable law in products cases should be the law of the plaintiff's home state, where the injury occurred. If the law of the defendant's home state reflects a conduct-regulating policy, such as a law imposing strict liability or for punitive damages, application of the law of the defendant's home state is called for under the Seventh Rule of Choice of Law, and some cases have reached this result.<sup>47</sup> If the point on which the laws of the involved states differ reflects a loss-allocation policy, such as one relating to a statute of repose or recovery of compensatory damages, the unprovided-for case is presented, which calls into play the Eighth Rule of Choice of Law. Some courts have held that in this situation the plaintiff-favoring law of the defendant's home state applies.<sup>48</sup>

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44. Because this result is so obvious, the issue will rarely be litigated. *See Kramer v. Showa Denko K.K.*, 929 F. Supp. 733 (S.D.N.Y. 1996) (applying New York law where New York resident was injured in New York due to impurities of drug manufactured by Japanese manufacturer in Japan, New York law permitting recovery of punitive damages applied); *Stephan v. Sears Roebuck & Co.*, 266 A.2d 855 (N.H. 1970) (stating that where New Hampshire resident was injured in New Hampshire due to a defect in power saw manufactured in Michigan, New Hampshire law imposing strict liability applied). *But see Kelly*, 993 F. Supp. 465 (applying Pennsylvania law). The court predicted that the Pennsylvania Supreme Court, applying the state of the most significant relationship test, would find that on the issue of punitive damages the state of the most significant relationship would be the state where the product was manufactured. This was Michigan, which disallowed punitive damages, and so the court barred the claim for punitive damages of a Pennsylvania resident injured by the product in Pennsylvania.

45. Where the law of the defendant's home state is defendant-favoring, the plaintiff has no reason to bring suit in that state.

46. The plaintiff would be better advised to bring the suit in the courts of the defendant's home state, since it is always easier to persuade a court to apply its own law in preference to the law of another state. Particularly is this so when the plaintiff-favoring law of the defendant's home state reflects a conduct-regulating policy.

47. *See, e.g., In re Disaster at Detroit Metro. Airport*, 750 F. Supp. 793 (E.D. Mich. 1989) (applying Michigan law).

48. *See Long v. Sears Roebuck & Co.*, 877 F. Supp. 8 (D.D.C. 1995); *Gantes v. Kason Corp.*, 679 A.2d 106 (N.J. 1995) (stating that where Georgia resident was killed in Georgia by product manufactured by New Jersey defendant in New Jersey, Georgia statute of repose barring the suit did not apply).

Two identical cases that I litigated in Michigan saw conflicting results on the question of whether the plaintiff's home state, where the accident occurred, had a real interest in applying its statute of repose for the benefit of Ford Motor Company, a Michigan manufacturer, which did not engage in any manufacturing activities in the plaintiff's home state, but which conducted extensive sales activity there. The Sixth Circuit held that the policy behind the

Some courts have held, however, that in products liability cases, the applicable law is that of the plaintiff's home state, where the accident occurred. Courts taking this position thus will apply the manufacturer-favoring law of the plaintiff's home state for the benefit of the out-of-state defendant, and this is so whether the law of the manufacturer's home state reflects a conduct-regulating policy or a loss-allocating policy.<sup>49</sup>

This result prevents the operation of the Seventh and Eighth Rules of Choice of Law in products liability cases. For this reason, I have added a new Rule of Choice of Law for products liability cases.

*Rule Ten: Where a plaintiff is injured in the home state by a product manufactured elsewhere, and the products law of the plaintiff's home state is plaintiff-favoring, the plaintiff will bring suit in the home state, and that state will apply its own plaintiff-favoring law.*<sup>50</sup>

*Where a plaintiff is injured in the home state by a product manufactured elsewhere, and the products law of the plaintiff's home state is defendant-favoring, the courts are divided. Some courts will apply the plaintiff-favoring rules of the defendant's home state.*<sup>51</sup> Some courts, however, hold that in products liability

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statute of repose of the plaintiff's home state was to protect manufacturers, so that state had no interest in applying its statute of repose for the benefit of the nonresident manufacturer. *See Mahne v. Ford Motor Co.*, 900 F.2d 83 (6th Cir. 1990) (applying Michigan law). This meant that the unprovided-for case was presented, and under Michigan's *lex fori* approach to choice of law, Michigan law allowing recovery applied. *See id.* The Michigan Court of Appeals, however, held that the plaintiff's home state did have a real interest in applying its statute of repose for the benefit of Ford, and since there was no countervailing Michigan interest in allowing recovery to a nonresident injured in the nonresident's home state, the case presented a false conflict, justifying the displacement of Michigan law in favor of the statute of repose of the accident state. *See Farrell v. Ford Motor Co.*, 501 N.W.2d 567 (Mich. Ct. App. 1993).

49. *See Dorman v. Emerson Elec. Co.*, 23 F.3d 1354 (8th Cir. 1994) (applying Missouri law where British Columbia resident was injured there by product designed by Missouri manufacturer in Missouri, British Columbia negligence rule applied rather than Missouri strict liability rule); *Lakie v. Smithkline Beecham*, 965 F. Supp. 49 (D.D.C. 1997) (involving Virginia resident injured in Virginia who brought products claim against District of Columbia manufacturer; Virginia negligence rule applied rather than District of Columbia strict liability rule); *Rutherford v. Goodyear Tire & Rubber Co.*, 943 F. Supp. 789 (W.D. Ky. 1996) (applying Kentucky law where Indiana plaintiff was injured in collision in Indiana due to allegedly defective tire on vehicle of other driver; plaintiff's claim against out-of-state manufacturers was governed by Indiana law and barred by Indiana statute of limitations); *Egan v. Kaiser Aluminum & Chem. Corp.*, 677 So. 2d 1027 (La. Ct. App. 1996) (involving Louisiana plaintiff who was injured in Louisiana due to exposure to asbestos products manufactured by Ohio defendant; Louisiana law prohibiting recovery of punitive damages applied).

50. This is the Fourth Rule of Choice of Law applied to products liability cases.

51. Where the plaintiff-favoring rules of the defendant's home state are conduct-regulating, this result follows under the Seventh Rule of Choice of Law. Where the plaintiff-favoring rules of the defendant's home state relate to loss allocation, this result follows under the Eighth Rule of Choice of Law.

*cases, the applicable law, whether plaintiff-favoring or defendant-favoring, is the law of the plaintiff's home state.*

#### V. A CONCLUDING NOTE

The rules of choice of law that I have identified will cover most of the conflicts torts cases that arise in practice. These rules of choice of law are based on the results that courts reach in practice when presented with conflicts torts cases and thus serve as the precedents that comprise the conflicts law of the different states. While there is some division among the courts of the different states with respect to the Third, Fifth, Eighth, and Tenth Rules of Choice of Law, this division is the same as appears in other areas of law, and sometimes can be stated in terms of “majority” and “minority” views.<sup>52</sup>

These rules of choice of law provide the “certainty” and “predictability” that the critics claim is lacking in American conflicts laws today. If we were truly trying to formulate a *restatement* of the conflict of laws that would *restate* the law that is in fact applied by the courts in actual cases, we would need to go no further in the torts area than to *restate* these rules of choice of law. This is something we should bear in mind when we consider embarking on the road to a third restatement.

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52. Of course, with so many different courts deciding conflicts cases, there will always be some variation in results between the courts of different states. And there will be some cases that cannot be explained with reference to the rules of choice of law. But there will not be very many.