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## A Suggested Method for the Resolution of Tort Choice-of-Law Problems in Place-of-the-Wrong Rule Jurisdictions

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## NOTES

### A SUGGESTED METHOD FOR THE RESOLUTION OF TORT CHOICE-OF-LAW PROBLEMS IN PLACE-OF-THE-WRONG RULE JURISDICTIONS

#### I. INTRODUCTION

Current analysis in tort choice-of-law problems is characterized by two divergent schools of thought. One, the eroding majority view,<sup>1</sup> embraces the traditional doctrine of *lex loci delicti*: that the law of the place of the wrong governs substantive tort liability regardless of the law of the forum. The other view comprises the several variants of a more recently developed approach generically designated as "interest analysis." Through what has been described as a "result-selective" approach,<sup>2</sup> courts employing interest analysis seek to apply the tort law of the state possessing the greater "interest" in having its law control the litigation.<sup>3</sup>

Because the place-of-the-wrong rule is simple, mechanical, predictable and familiar, it has long commended itself to a judiciary yearning for expediency in decision making. The problem is that such dispatch has too often been obtained at the expense of a just result.<sup>4</sup> Increasingly, an adoption of interest analysis has been the reaction.<sup>5</sup> But abandoning the place-of-the-wrong rule for some form of interest analysis nevertheless foregoes comparatively uninvolved choice-of-law decisions in favor of a lengthy process often fraught with complex and subtle judgments.<sup>6</sup> This note suggests a compromise approach, directed

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1. See Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 220 (1969). See note 41 *infra* for a collection of decisions reflecting judicial disenchantment with the place-of-the-wrong rule.

2. Juenger, *supra* note 1, at 225; see Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 5-6 (1963).

3. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 231-44 (1971). A trend toward interest analysis was underway in 1934 when the first *Restatement of Conflict of Laws* appeared, embodying the place-of-the-wrong rule. Although work on the original *Restatement* began in 1923, general acceptance of the place-of-the-wrong or "vested rights" theory had changed by the time the original *Restatement* was published in final form in 1934. "The vested rights theory, the foundation on which the *Restatement* was constructed, was beginning to come under devastating attack . . ." Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963).

4. See note 41 *infra*. "Yet, the dispassionate neutrality of *lex loci* may be a vice rather than a virtue. Cavers said . . . that 'the fabric of this blindfold is a legal theory.'" Juenger, *supra* note 1, at 222, quoting Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 180 (1933).

5. See note 41 *infra*; Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1585 (1966).

6. See generally Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws*, 28 LAW & CONTEMP. PROB. 795 (1963).

at those courts still adhering to the place-of-the-wrong rule, and designed to avoid both the inequities of *lex loci delicti* and the meta-physical calculus of interest analysis.

## II. THE PLACE-OF-THE-WRONG RULE AND FALSE CONFLICTS: AN ILLUSTRATION

It is in its insensitivity to "false conflicts"<sup>7</sup> that the place-of-the-wrong rule has produced its most unjust results.<sup>8</sup> The typical application of *lex loci delicti* to a false conflict setting can be illustrated by the facts and decision in *Messinger v. Tom*.<sup>9</sup> In that case two Florida residents left Florida on a round trip to the District of Columbia. The automobile they drove was owned, garaged and licensed in Florida. Through the alleged negligence of the driver, the car struck a bridge abutment in North Carolina. Both occupants of the car were killed. The deceased passenger's minor child, also a Florida resident, instituted a wrongful death action through guardians (Florida residents) in a Florida court against the deceased driver's estate, which was being administered in Florida. North Carolina law provided that only the representative of the deceased's estate could maintain an action for wrongful death<sup>10</sup> and thus would not have permitted an action by the minor

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7. Strictly speaking, a false conflict exists "[w]hen certain contacts involving a tort are located in two or more states with identical local law rules on the issue in question." RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Explanatory Notes § 145, comment i at 425 (1971) [hereinafter cited as RESTATEMENT (SECOND)]; see Leflar, *The Torts Provisions of the Restatement (Second)*, 72 COLUM. L. REV. 267, 274 (1972). The term is also commonly used, as it is in this note, to describe the situation where two states have different local law rules on the issue in question, but where the policy underlying the law of one of the states would be furthered by applying its law to the issue and the policy of the other state would not be furthered by applying its law. See Leflar, *supra*, at 275. See also Juenger, *supra* note 1, at 211, quoting Gorman, Book Review, 115 U. PA. L. REV. 288, 291-92 (1966):

[T]he meaning of "false conflicts" as employed by the interest and functional analysts . . . refer[s] to cases "in which the governing rule may be drawn from the domestic substantive law of one state, thus advancing its underlying policy, without frustrating any applicable policy of another jurisdiction involved in the case."

A state whose underlying policy would be advanced by application of its law to the case is said to have an "interest" in a conflicts sense in the litigation. See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 9-10 (1958).

8. Paradoxically, it is also the fact setting characteristically attending the false conflict that ought to prove most amenable to a simple, equitable resolution. The approach advanced later in this note proposes, for example, that place-of-the-wrong rule jurisdictions resort to a form of interest analysis in which the interests of the relevant jurisdictions are neither "weighed" nor "balanced." Instead, the elementary determination to be made is whether both states possess interests in the litigation. The choice-of-law results that follow that initial determination are automatic. See pp. 471-76 *infra*.

9. 203 So. 2d 357 (Fla. 2d Dist. Ct. App. 1967).

10. The controlling North Carolina statutes at the time of the *Messinger* decision

child. Florida law contained no similar provision.<sup>11</sup> Adhering to the place-of-the-wrong rule, the Florida court applied North Carolina law and dismissed the action with prejudice, "despite the overwhelming contacts with the State of Florida and the 'salutary interest' of [Florida] underlying the particular issue before the . . . court."<sup>12</sup>

*Messinger* presented a false conflict. Both the plaintiff and the defendant were Florida residents. Florida's policy—compensation of the child for the wrongful death of his parent—would have been advanced by the application of Florida law. North Carolina's law, limiting standing to sue to the representative of the decedent's estate, was concerned not with the tortious conduct of people within North Carolina but with effectuation of its unusual policy of distributing the recovery through the law of descent and distribution. That policy would not have been advanced by the interjection of North Carolina law into an action in Florida involving only Florida residents and Florida property. Had the Florida court utilized interest analysis, it presumably would have applied Florida law and allowed the suit to be maintained, since Florida was not simply the more interested state, but the only interested state. The not atypical decision in *Messinger* presents the place-of-the-wrong rule at its logical and equitable worst.<sup>13</sup>

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were N.C. GEN. STAT. §§ 28-173, -174, -176 (1966). The statutory scheme provides for the maintenance of an action for wrongful death exclusively by the administrator or executor of the deceased's estate, and the recovery is distributed in accordance with the statutes governing descent and distribution. See *Graves v. Welborn*, 133 S.E.2d 761 (N.C. 1963).

11. The relevant statutes were FLA. STAT. §§ 768.01-.02 (1967). Section 768.01 allows a cause of action for wrongful death only for deaths occurring in Florida. Since Mrs. *Messinger* died in North Carolina, § 768.01 should have barred plaintiff's action, leaving the North Carolina law as the only alternative. Yet the district court of appeal did not discuss the effect of that statute and affirmed in a brief opinion, referring only to the choice-of-law problem and citing *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743 (Fla. 1967). Until 1959 the entire recovery for wrongful death inuring to the deceased's estate under North Carolina law passed via descent and distribution free of the claims of creditors. See *Hines v. Foundation Co.*, 145 S.E. 612 (N.C. 1928). In 1959 N.C. GEN. STAT. § 28-173 was amended to provide a method for paying the medical bills of the deceased from the proceeds of the wrongful death action up to \$500. See *In re Estate of Below*, 184 S.E.2d 378 (N.C. App. 1971). To the extent that the amended version of the law can be viewed as embodying a significant state policy to ensure certain local creditors a fund for recovery of debts owed them by the deceased, *Messinger* could be read to present a true conflict. See p. 466 *infra*. *Messinger* is accordingly used only illustratively herein, and is treated as founded upon invocation of the place-of-the-wrong rule in a situation in which the plaintiff could have sued under the Florida wrongful death statute and in which the North Carolina statute expressed only the policies described in text above.

12. 203 So. 2d at 358.

13. Cf. *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743 (1967). In *Hopkins*, the decision upon which the *Messinger* court relied, a Florida resident was killed in an airplane crash in Illinois while flying from Milwaukee to Tampa. Deceased's wife, as executrix of his estate, sued Northwest Airlines and Lockheed. Northwest settled her

### III. ALTERNATIVES IN INTEREST ANALYSIS AND TRUE CONFLICTS

"Interest analysis" evolved largely in reaction to the injustices worked by mechanical application of the place-of-the-wrong rule. In essence it is a process that seeks to identify the state with the greater interest in having its law applied to a given choice-of-law problem. In false conflict situations interest analysis is disarmingly simple since, by definition, only one state will be found to have any interest in the application of its law. When a "true conflict" arises, however, interest analysis grows more complex.<sup>14</sup> A true conflict exists if two or more states have policies that would be advanced by the application of their law to the litigation and if, in addition, the laws embody different policies and dictate different results. A true conflict would have existed in *Messinger*, for example, had the plaintiff been a North Carolina resident, since the state's policy of distributing wrongful death recoveries was intended to apply only to its residents.

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claim against it for \$32,500. The suit against Lockheed in federal court in Florida resulted in a summary judgment for Lockheed on the ground that the Illinois wrongful death act, ILL. ANN. STAT. ch. 70, §§ 1-2 (Smith-Hurd 1972), limited recovery for wrongful death to \$30,000, and she had already recovered more than that amount from Northwest. Florida law imposed no ceiling on wrongful death recoveries. The Fifth Circuit certified the choice-of-law question to the Florida Supreme Court. The supreme court first held, in a five-to-two opinion, that Florida law should apply. Adopting a form of interest analysis, the court found Florida to be the jurisdiction having the most significant relationship with the occurrence. On rehearing the court reversed itself and, in a three-one-three opinion, returned to the place-of-the-wrong rule. The law of Illinois was thus held controlling. In its first opinion the court found it "clear that we can . . . take the one small logical step forward and hold . . . that the strict *lex loci delicti* rule should be abandoned in favor of a more flexible rule [permitting] analysis of the policies and interests underlying the particular issue . . ." 201 So. 2d at 747. But in its second opinion the court found itself "not persuaded that this case presents any necessity or justification for abandonment of guiding principles in past decisions . . ." *Id.* at 752.

*Hopkins* remains the law in Florida. See *Colhoun v. Greyhound Lines, Inc.*, 265 So. 2d 18 (Fla. 1972) (application of Tennessee statute of limitations for personal injury action arising out of bus accident in Tennessee; plaintiff a Florida resident, defendant corporation a multistate resident); *Hall v. Hertz Corp.*, 247 So. 2d 79 (Fla. 1st Dist. Ct. App. 1971) (per curiam); *Lescard v. Keel*, 211 So. 2d 868 (Fla. 2d Dist. Ct. App. 1968) (application of Georgia statute of limitations for personal injury action arising out of automobile accident in Georgia; no parties to the action were Georgia residents); *Messinger v. Tom*, 203 So. 2d 357 (Fla. 2d Dist. Ct. App. 1967) (application of North Carolina law precluding maintenance of suit for wrongful death of parent by minor child; plaintiff and defendant were Florida residents). See generally Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice of Law Process*, 46 TEXAS L. REV. 141 (1967).

14. In true conflict situations courts employing interest analysis are confronted with at least two tasks. Not only must they grapple conceptually with the frequently ill-defined "interests" of two states, but they must also "weigh" those interests in order to conclude that one state has a greater interest in the suit than the other. See, e.g., *Johnson v. Saint Paul Mercury Ins. Co.*, 236 So. 2d 216 (La. 1970); *Conklin v. Horner*, 157 N.W.2d 579 (Wis. 1968). This process may also put a court in the embarrassing position of declaring

In dealing with true conflicts, most courts and commentators who today apply or advocate interest or "functional" analysis endeavor, in opposition to the methodology advanced by Professor Brainerd Currie,<sup>15</sup> to "weigh" the competing interests of the concerned states in determining which possesses the greater interest in having its law govern the legal issues involved.<sup>16</sup> Largely as a result of this approach, modern interest analysis frequently becomes a rather unwieldy tool, evidently providing unpersuasive competition for the mechanistic simplicity of the place-of-the-wrong rule in a number of jurisdictions.

Although the commentators almost uniformly characterize the place-of-the-wrong rule as anachronistic,<sup>17</sup> it is somewhat difficult to criticize those jurisdictions reluctant to become entangled in the elaborate theories and considerations accompanying most current alternatives. For example, in 1952 Professors Cheatham and Reese catalogued nine important "choice-influencing considerations" and attempted to rank them in descending order of importance.<sup>18</sup> First among the nine stood "the needs of the interstate and international systems," which

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the policy of its own state inferior to that of a foreign state. Brainerd Currie argued persuasively that courts are inherently unsuited to engage in interest weighing:

But assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy. It is a function that the courts cannot perform effectively, for they lack the necessary resources . . . This is a job for a legislative committee, and determining the policy to be formulated on the basis of the information assembled is a job for a competent legislative body.

B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 182 (1963).

15. Professor Currie disdained any "weighing" of interests. To him it was clear that "where several states have different policies, and also legitimate interests in the application of their policies, a court is in no position to 'weigh' the competing interests, or evaluate their relative merits, and choose between them . . ." B. CURRIE, *supra* note 14, at 181. It was Currie's thesis that in instances of true conflict the law of the forum should apply. *Id.* at 182, 184. Only where the forum state possessed no interest in the application of its law and the "foreign" state did possess an interest (a false conflict) would the law of the foreign state be applied. *Id.* at 183-84.

16. Although Professor Currie originally advocated no weighing of interests, "in the practice of all those courts which have adopted [Currie's] original terminology . . . [g]overnmental interests are now to be 'weighed' so that the law of the state with the *prevailing* interest can be applied." Ehrenzweig, "False Conflicts" and the "Better Rule": *Threat and Promise in Multistate Tort Law*, 53 VA. L. REV. 847, 850 (1967); *see, e.g., Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968) (most significant relationship); *Thomas v. United Air Lines, Inc.*, 249 N.E.2d 755, 301 N.Y.S.2d 973, *cert. denied*, 396 U.S. 991 (1969); *Cipolla v. Shaposka*, 267 A.2d 854 (Pa. 1970). *But see Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972).

17. *See, e.g., Cavers, supra* note 4, at 180; Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Juenger, *supra* note 1, at 222; Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267-68 (1966); Reese, *supra* note 3, at 680.

18. Cheatham & Reese, *supra* note 17.

the authors conceded to be a policy "so vaguely worded as to be difficult of application."<sup>19</sup> It was also conceded that "[f]requently it is well-nigh impossible to determine whether the needs of the interstate or international system would best be served by the resolution of a given dispute one way or the other."<sup>20</sup> The second consideration would direct the court to apply the law of the forum unless "good reason" exists for not doing so—a directive that the court ascertain the presence or absence of "good reason" by evaluating and ultimately weighing the remaining seven factors.<sup>21</sup> Those remaining seven factors lead the court through a weighing process.<sup>22</sup> A third factor, "certainty, predictability and uniformity of result," admittedly forms the "chief virtue [of the] practice of determining a plaintiff's right of action in tort by the law of the place of the injury."<sup>23</sup> Another factor, the "protection of justified expectations," is rarely present in the circumstances surrounding tort actions.<sup>24</sup> In the final two factors the court's attention is directed to ascertaining the "fundamental policy underlying the broad local law field involved,"<sup>25</sup> and the working of "justice in the individual case."<sup>26</sup>

Professor Leflar later attempted to reduce the choice-influencing considerations to five,<sup>27</sup> the last of which directs the court to consider "application of the better rule of law."<sup>28</sup> Professor Leflar admits, however, that the "search for the better rule of law may lead a court almost automatically to its own lawbooks."<sup>29</sup> A forum court taking this factor

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19. *Id.* at 962-63.

20. *Id.* at 963.

21. *Id.* at 964-65.

22. The sixth choice-influencing consideration is "application of the law of the state of dominant interest." *Id.* at 972.

23. *Id.* at 969-70.

24. *Id.* at 970-71.

25. *Id.* at 978.

26. *Id.* at 980. The full complement of choice-influencing considerations includes, in descending order of importance: (1) the needs of the interstate and international system; (2) application of a court's own local law unless there is good reason to the contrary; (3) effectuation of the purpose of a court's relevant local law rule; (4) certainty, predictability, uniformity of result; (5) protection of justified expectations; (6) application of the law of the state of dominant interest; (7) ease in determination of applicable law and convenience of the court; (8) fundamental policy underlying the broad local law field involved; and (9) justice in the individual case. *Id.* at 962-81. See Reese, *supra* note 3, at 679, in which Professor Reese rephrased the nine factors slightly and added a new one—"the court must follow the dictates of its own legislature, provided [they] are constitutional." *Id.* at 682.

27. Leflar's five factors are (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. Leflar, *supra* note 17, at 282.

28. *Id.* at 295.

29. *Id.* at 298.

seriously is also regularly cast in the unenviable position of undertaking a substantive reevaluation of both its decisional precedents and the wisdom of legislative determinations. The latter undertaking is clearly one a court would ordinarily refuse. But these reevaluations would occur, of course, without the necessity of overruling those decisions or invalidating those statutes that the court finds untenable or unwise.<sup>30</sup> It should also be noted that Professor Leflar's five factors necessitate a weighing process.<sup>31</sup>

The choice-influencing considerations of Professors Cheatham, Reese and Leflar, although difficult of precise definition and internally contradictory,<sup>32</sup> should produce just results more frequently than would application of the place-of-the-wrong rule. But their unpredictability, their inexactness and their necessarily high subjectivity have rendered them unpalatable to those courts preferring predictability and simplicity in choice-of-law decisions.<sup>33</sup>

Yet another approach appears in the second *Restatement of Conflict of Laws*. Section 145, establishing the "general principle," abandons the place-of-the-wrong rule of the first *Restatement* in favor of a "most significant relationship" test for the resolution of tort choice-of-

30. As for the suspicion that the "better rule of law" consideration would result in uniform application of forum law, Professor Leflar counters that most courts today utilizing interest analysis invoke no automatic forum law preference, but rather engage in a "result-selective" approach, thus achieving *sub silentio* a result similar to the better-rule-of-law inquiry. *Id.* at 299 & n.111.

For decisions using the better-rule-of-law concept, see *Clark v. Clark*, 222 A.2d 205 (N.H. 1966); *Woodward v. Stewart*, 243 A.2d 917 (R.I.), *petition for cert. dismissed*, 393 U.S. 957 (1968); *Conklin v. Horner*, 157 N.W.2d 579 (Wis. 1968); *Zelinger v. State Sand & Gravel Co.*, 156 N.W.2d 466 (Wis. 1968).

31. See generally R. LEFLAR, *AMERICAN CONFLICTS LAW* (1968).

32. See Leflar, *supra* note 17, at 281.

33. See, e.g., *Johnson v. Saint Paul Mercury Ins. Co.*, 236 So. 2d 216 (La. 1970); *Winters v. Maxey*, 481 S.W.2d 755 (Tenn. 1972). For another, somewhat different methodology, consider Professor Weintraub's suggested rule:

An actor is liable for his conduct if he is liable under the law of any state whose interests would be advanced significantly by imposing liability, unless imposition of liability would unfairly surprise the actor.

R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 209 (1971). This approach would not involve a weighing process and would thus offer greater certainty than the multifactor approaches. But Professor Weintraub's method assumes that a jurisdiction having established a liability-limiting policy (such as Illinois in *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743 (Fla. 1967)), is willing to subordinate that policy whenever it conflicts with that of another interested jurisdiction. For example, if the *Messinger* facts were altered by making the plaintiff a resident of North Carolina (thus creating a true conflict), a North Carolina court might prove understandably unreceptive to a rule almost invariably directing the application of another state's law, despite the fact that North Carolina's policy would be advanced by application of its law. See also D. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965); A. EHRENZWEIG, *CONFLICT OF LAWS* (1962); A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* (1965).

law problems. Section 145(1) states generally that "[t]he rights and liabilities of the parties . . . are determined by the local law of the state which . . . has the most significant relationship to the occurrence and the parties,"<sup>34</sup> then directs more focused analysis to a number of factors relevant to the choice-of-law decision as set forth in section 6. The principles of section 6 include, *inter alia*, "the relevant policies of the forum" and "the relevant policies of other interested states and the relative interests of those states,"<sup>35</sup>—and thus invoke a weighing process. Section 145(2) contains four "contacts"<sup>36</sup> that are to be considered in the application of the section 6 factors.

Among the four contacts are "the place where the injury occurred"<sup>37</sup> and "the place where the conduct causing the injury occurred"<sup>38</sup>—both suggestive of the place-of-the-wrong rule. In addition many sections dealing with specific torts or with specific tort issues appear to direct the application of the law of the place of the injury or provide that "the applicable law will usually be the local law of the state where the injury occurred."<sup>39</sup> But those sections indicating application of the

34. RESTATEMENT (SECOND) § 145(1). Entitled "The General Principle," the subsection provides in its entirety:

The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

35. *Id.* § 6. This section, entitled "Choice-of-Law Principles," provides in its entirety:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

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

36. *Id.* § 145(2). This subsection provides in its entirety:

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

37. *Id.* § 145(2)(a).

38. *Id.* § 145(2)(b).

39. *See, e.g., id.* §§ 156(2), 157(2), 158(2), 159(2), 160(2), 162(2), 164(2), 166(2), 169(2),

law of a particular jurisdiction are conclusory only and articulate what, in the opinion of the *Restatement* authorities, would be the usual result of applying the "most significant relationship" test. The second *Restatement* does not retain the place-of-the-wrong rule,<sup>40</sup> but clearly mandates a weighing process.

#### IV. A SUGGESTED APPROACH

While modern commentators and many courts agree upon the undesirability of automatic application of the place-of-the-wrong rule,<sup>41</sup>

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172(2). These sections deal with particular issues in tort (*e.g.*, standard of care, duty owed plaintiff). Also, §§ 146-55, constituting Title B, offer particularized directives for resolving choice-of-law problems in the cases of specific torts. Title B comprises the torts of personal injury, injury to tangibles, fraud, defamation, injurious falsehood, invasion of privacy, interference with marriage relationship, and malicious prosecution. Each section of Title B indicates what might be termed a "presumption" that the law of a particular jurisdiction—the place of the injury—will govern. Typical is § 146, dealing with personal injuries:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

40. The conclusory statements discussed above and § 145(2)(a) (positing the place of the injury as a contact to be considered in "applying the principles of § 6") have prompted Professor Leflar, himself an architect of the new *Restatement*, to observe that the first *Restatement's* place-of-the-wrong rule "hovers like a ghost over the entire chapter." Leflar, *supra* note 7, at 269. But he readily acknowledges that it is erroneous to read the principles embodied in the new *Restatement* as retaining the place-of-the-wrong rule:

[A]lthough the place of the injury may be the point at which to begin to search for the most significant relationship, the *Second Restatement* is misleading to the extent that it may be read to imply that the locus of the wrong is where such a relationship will ordinarily be found.

*Id.* Professor Reese, the Reporter for the second *Restatement*, views the sections discussed above as creating "presumptions" in favor of applying the law of the place of the injury. See note 39 *supra*. He notes, however, that the "presumption" is "rather weak." Reese, *The Kentucky Approach to Choice of Law: A Critique*, 61 KY. L.J. 368, 373 (1973).

41. For criticism of the place-of-the-wrong rule and of the alternatives, see: B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* ch. 1 (1963); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 180 (1933); Cheatham, *Some Developments in Conflict of Laws*, 17 VAND. L. REV. 193, 198 (1963); Childres, *Toward the Proper Law of the Tort*, 40 TEXAS L. REV. 336, 344 (1962); Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 379-80 (1966); Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 222 (1969); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 268 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1585 (1966); Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963); Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 667-69 (1959); Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 216 (1963).

those courts that refuse or are reluctant to adopt the methodology of interest analysis assert that the alternatives to *lex loci delicti* are unacceptably vague or are too involved for efficient administration.<sup>42</sup> This note proposes that those courts adopt an approach in which an initial inquiry is made whether any of the concerned states possesses an inter-

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Since the decision in *Babcock v. Jackson*, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), and the appearance in draft form of the second *Restatement* in 1964, thirty-two jurisdictions have reconsidered the place-of-the-wrong rule in varying tort contexts. Twenty jurisdictions rejected the rule either outright or indicated disapproval while twelve jurisdictions chose to retain it.

Decisions rejecting strict application of the place-of-the-wrong rule are *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968); *Reich v. Purcell*, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Myers v. Gaither*, 232 A.2d 577 (D.C. Ct. App. 1967); *Wartell v. Formusa*, 213 N.E.2d 544 (Ill. 1966); *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968); *Witherspoon v. Salm*, 237 N.E.2d 116 (Ind. App. 1968), *rev'd on other grounds*, 243 N.E.2d 876 (Ind. 1969); *Arnett v. Thompson*, 433 S.W.2d 109 (Ky. 1968); *Beaulieu v. Beaulieu*, 265 A.2d 610 (Me. 1970); *Allen v. Gannaway*, 199 N.W.2d 424 (Minn. 1972); *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968); *Tab Constr. Co. v. Eighth Judicial Dist. Ct.*, 432 P.2d 90 (Nev. 1967); *Clark v. Clark*, 222 A.2d 205 (N.H. 1966); *Mellk v. Sarahson*, 229 A.2d 625 (N.J. 1967); *Babcock v. Jackson*, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Issendorf v. Olson*, 194 N.W.2d 750 (N.D. 1972); *Fox v. Morrison Motor Freight, Inc.*, 267 N.E.2d 405 (Ohio), *cert. denied*, 403 U.S. 931 (1971); *Casey v. Manson Constr. & Eng'r Co.*, 428 P.2d 898 (Ore. 1967); *Griffith v. United Air Lines, Inc.*, 203 A.2d 796 (Pa. 1964); *Brown v. Church of the Holy Name of Jesus*, 252 A.2d 176 (R.I. 1969); *Zelinger v. State Sand & Gravel Co.*, 156 N.W.2d 466 (Wis. 1968).

Decisions declining abrogation of the place-of-the-wrong rule are *McGinty v. Ballentine Produce, Inc.*, 408 S.W.2d 891 (Ark. 1966); *Landers v. Landers*, 216 A.2d 183 (Conn. 1966); *Friday v. Smoot*, 211 A.2d 594 (Del. 1965); *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743 (Fla. 1967); *McDaniel v. Sinn*, 400 P.2d 1018 (Kan. 1965); *Johnson v. Saint Paul Mercury Ins. Co.*, 236 So. 2d 216 (La. 1970); *Abendschein v. Farrell*, 170 N.W.2d 137 (Mich. 1969); *Shaw v. Lee*, 129 S.E.2d 288 (N.C. 1963); *Oshiek v. Oshiek*, 136 S.E.2d 303 (S.C. 1964); *Heidemann v. Rohl*, 194 N.W.2d 164 (S.D. 1972); *Winters v. Maxey*, 481 S.W.2d 755 (Tenn. 1972); *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968).

42. For example, the Louisiana Supreme Court declined in *Johnson v. Saint Paul Mercury Ins. Co.*, 236 So. 2d 216, 222 (La. 1970), to engage in "an excursion into a nebulous field where in complex situations each decision will call for an unstable exercise in legal gymnastics." In 1972 the Tennessee Supreme Court refused to abandon the place-of-the-wrong rule because it found no "uniform common law of conflicts" to take the place of the uniform rule of *lex loci delicti*." *Winters v. Maxey*, 481 S.W.2d 755, 758 (Tenn. 1972). Also in 1972, the Supreme Court of South Dakota refused to abandon the place-of-the-wrong rule, preferring instead to wait and see what future development and refinement of the alternatives brought:

In the application of the modern rule too often the law of a case is not known until after an appeal is taken and all the relevant factors reviewed in a multi-page opinion by the appellate court. This condition is perhaps characteristic of any transitional period . . . and eventually a satisfactory substitute for the *lex loci delicti* rule will be developed. Until then we prefer to retain the traditional "place of wrong" rule with its built-in virtues of certainty, simplicity, and ease of application.

*Heidemann v. Rohl*, 194 N.W.2d 164, 169 (S.D. 1972).

Delaware has evidenced a similar posture in *Friday v. Smoot*, 211 A.2d 594, 597 (Del. 1965): "We think we may not depart by judicial fiat from a rule settled in this state to adopt a 'flexible approach' which must be made certain by future litigation."

est in the litigation. If this analysis discloses that only one state has an interest and thus that a false conflict exists, then the law of the interested state would automatically be applied. If the court finds that a true conflict exists, then it would automatically apply the law of the place of the wrong. Were this approach adopted, much of the certainty and simplicity of the place-of-the-wrong rule would be retained, yet the inequities often produced by its application to false conflicts would be avoided.

Interest analysts will of course criticize automatic application of the place-of-the-wrong rule in true as well as false conflict situations. But the justification for the proposed method does not inhere solely in the appeal it may have for courts reluctant to entangle themselves in interest analysis. The conjuring trick quality of some true conflict resolutions<sup>43</sup>—indeed, the elaborate structures erected by scholars to deal with them<sup>44</sup>—lends force to Brainerd Currie's assertion that courts are ill-equipped to weigh competing interests where true conflicts are involved.<sup>45</sup> These premises, if accepted, necessitate arbitrary resolution of true conflicts. The suggested method is similar to Currie's because in no case would courts undertake to weigh or balance the competing interests of two or more states.<sup>46</sup> It differs from his method in that he would apply the tort law of the forum in the presence of a true conflict,<sup>47</sup> while the suggested approach would apply the law of the place of the wrong. Currie's method has been criticized because it tends to encourage forum shopping.<sup>48</sup> Here the suggested method is demon-

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43. See, e.g., *Casey v. Manson Constr. & Eng'r Co.*, 428 P.2d 898 (Ore. 1967); *Conklin v. Horner*, 157 N.W.2d 579 (Wis. 1968); A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 97-98 (1967); Juenger, *supra* note 41, at 224; Morse, *Characterization: Shadow or Substance*, 49 COLUM. L. REV. 1027 (1949). Professor Leflar's "better rule of law" principle should also be considered in respect to the "result-selective" approach. See R. LEFLAR, *supra* note 31, at 216-217.

44. See pp. 467-71 *supra*.

45. See notes 14 & 15 *supra*.

46. *Id.*

47. Currie states that "[i]f the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy . . ." B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 184 (1963).

48. The term "forum shopping" denotes a situation in which the choice-of-law rules of the available forums would produce or would tend to produce different results in the anticipated litigation so that a plaintiff having a choice of more than one forum would be induced by the variant choice-of-law rules to sue in one state rather than in another.

In all subsequent footnotes dealing with forum shopping, the following four variables exist: the place of the wrong, the favorability of each forum's substantive tort law to the plaintiff, whether the plaintiff anticipates a true or a false conflict finding by the court (where applicable), and the choice-of-law rule applied by each of the available forums.

Certain premises control the plaintiff's choice of forum. First, suit can be brought in either of the two forums presented. Secondly, plaintiff will, where applicable, choose

strably preferable, because Currie's method would encourage forum shopping even if adopted in all forums whereas the suggested method would not.<sup>49</sup> The suggested method is also preferable in this respect to the place-of-the-wrong rule, which always encourages forum shopping if the other interested forum employs interest analysis.<sup>50</sup> Substituting

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the certainty of the favorable result provided by the availability of a place-of-the-wrong rule forum over the anticipated probability, no matter how high, of the favorable result that would be produced by a true or a false conflict finding by the other forum. Thirdly, plaintiff will choose the probability, no matter how slight, of obtaining favorable tort law by his anticipation of a true or a false conflict finding, where applicable, over the certainty of unfavorable tort law provided by the availability of a place-of-the-wrong rule forum. Fourth, all courts that engage in interest analysis under any situation (*e.g.*, Currie rule courts and courts following the suggested method engage in interest analysis to the extent of determining the existence of a true conflict) will find a true or a false conflict when confronted with the same facts and will similarly agree upon which state is primarily interested in true conflicts and upon which state is interested in false conflicts.

These variables and premises do not, of course, include such plaintiffs' considerations as the relative costs of maintaining suit in each of the alternate forums. Rather, the examples used herein confine themselves to those considerations most clearly tied to the choice-of-law theory of each of the methods discussed.

An example of all these variables and premises is as follows. The available forums are a Currie rule state and an interest analysis state. The place of the wrong is the interest analysis state. That state's substantive tort law is unfavorable to plaintiff while the tort law of the Currie rule state is favorable to plaintiff. The plaintiff anticipates that a true conflict will be found by either court. Forum shopping will occur. Plaintiff knows that the Currie rule state will apply its own favorable tort law to his suit if it finds a true conflict as he anticipates both courts will. He also knows that the interest analysis state will apply its law to the suit only if it finds itself to be the primarily interested state. Thus it will make a difference to plaintiff which state he sues in. He would sue in the Currie rule state in order to obtain the best chance of obtaining favorable tort law based on his informed anticipation of the resolution of each court on the choice-of-law issue.

49. For example, the place of the wrong is state *A*, and that state's tort law is favorable to plaintiff. State *B* is the alternate forum. Both states follow the Currie rule. If plaintiff anticipates a false conflict finding, no forum shopping will occur since both states will resolve a false conflict in favor of the same state. *See* note 15 *supra*. But if plaintiff anticipates a true conflict finding, he will sue in the state offering the most favorable tort law—state *A*. This result occurs, of course, because each Currie rule state would react to a true conflict by applying its own law.

Using the suggested approach as the choice-of-law rule applied in both available forums, forum shopping would never occur. This would be the result because in cases of false conflict both states would resolve the question in favor of the same state—the place of the wrong. This would be the result regardless of whether the plaintiff anticipated a true or false conflict finding.

Forum shopping would also not occur when both states applied interest analysis to choice-of-law problems. Both states would resolve a true conflict in favor of the same state. They would similarly apply the law of the same state in a false conflict.

Finally, if both states were place-of-the-wrong rule states, each would apply the same law in all cases—that of the place of the wrong.

50. Under the premises set out in note 48 *supra*, forum shopping will always occur when one forum applies the place-of-the-wrong rule and the alternate forum applies either the Currie rule, the suggested approach, or interest analysis. For example, forum

the suggested method for the place-of-the-wrong rule, however, would result in a substantial number of commonly encountered situations in which there would be no forum shopping.<sup>51</sup>

Finally, the suggested approach avoids entirely the inability of Currie's method to deal adequately with the problem of the disinterested forum.<sup>52</sup> How, for example, should a true conflict between states *A* and *B*, the interested jurisdictions, be resolved by a court in state *C*, whose only connection with the case is that it is the state in which suit is brought? The suggested method, of course, would simply apply the law of the place of the wrong. Currie never resolved this issue in an entirely satisfactory manner.<sup>53</sup> His attempt to dismiss it as occurring too infrequently to occasion concern seems increasingly difficult to accept.<sup>54</sup>

The suggested approach seeks to create a method that eliminates the chief fault of the place-of-the-wrong rule: its failure to recognize false conflicts and to resolve them in an equitable fashion. The imponderables of interest analysis are avoided in true conflict situations by automatic application of the place-of-the-wrong rule, with the concomitant advantages of minimizing forum shopping and avoiding the problem of

shopping will occur if the tort occurs in the place-of-the-wrong rule state, that state's tort law is the most favorable to plaintiff, and the alternate forum applies the suggested approach. Plaintiff will sue in the place-of-the-wrong rule state. He will do so even if he anticipates a true conflict finding in the suggested approach forum because he will choose the certainty of obtaining favorable tort law afforded by the place-of-the-wrong rule over the probability, no matter how high, that the suggested approach forum would find a true conflict and thus apply the law of the place of the wrong.

51. As demonstrated in note 49 *supra*, forum shopping is encouraged in all permutations in which a place-of-the-wrong rule state is one of the alternate forums. But either the Currie rule or the suggested method produce forum shopping in only one-half of the permutations available when the alternate forum is an interest analysis forum because forum shopping would be encouraged only when the plaintiff anticipates a true conflict finding.

52. See R. CRAMTON & D. CURRIE, *CONFLICT OF LAWS* 295 (1968): "Professor Currie's interest analysis is subjected to considerable strain . . . when a true conflict case is brought in an interested forum. When such a case is brought in a third state that has no interest of its own, the system seems to break down altogether." Speaking of the disinterested third state, Professor Hill noted that "Currie's theory simply makes no provision for the treatment of a significant class of cases—significant particularly in a federation like the United States." Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 479 (1960).

53. See Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 764-94 (1963).

54. America has become a highly mobile society, and the likelihood that litigants may take up residence in a third state after the commission of a tort has increased commensurately. See, e.g., *Gore v. Northeast Airlines, Inc.*, 373 F.2d 717 (2d Cir. 1967); *Reich v. Purcell*, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Symposium, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 551 (1968); Note, *Post Transaction or Occurrence Events in Conflict of Laws*, 69 COLUM. L. REV. 843 (1969); cf. *Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965).

the disinterested forum. It should be emphasized that this approach is advanced not as a replacement for interest analysis in those states now applying it, but as a compromise for those states unwilling to abandon the place-of-the-wrong rule for "an excursion into a nebulous field where in complex situations each decision will call for an unstable exercise in legal gymnastics."<sup>55</sup>

One obvious criticism of the suggested method is that in order to ascertain the existence of a true or false conflict, a court must dabble a toe, at least, in the murky waters of interest analysis. But no weighing process is involved, rather only a determination whether interests exist. The interests of each state are thus considered separately to determine whether it can assert *an* interest, not whether it can assert a *greater* interest than another state. The fairly simple determination that a state is "interested" in the litigation is a more definite one than the "balancing" or "weighing" or "grouping of contacts" involved in interest analysis. As a practical matter, this threshold determination would be so easily made in many cases that it could be almost automatic. Consider, for example, that the Florida court in *Messinger v. Tom*,<sup>56</sup> while utilizing the place-of-the-wrong rule, had apparently already recognized the false conflict before it.

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55. *Johnson v. Saint Paul Mercury Ins. Co.*, 236 So. 2d 216, 222 (La. 1970).

56. 203 So. 2d 357 (Fla. 2d Dist. Ct. App. 1967). Both the trial and appellate courts remarked on the "overwhelming contacts" with Florida and the "salutary interest" of that state in the issues involved in the litigation. *Id.* at 358.