EASON-WEINMANN LECTURE

Choice of Law for Products Liability: 
The 1990s and Beyond

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This Article provides a comprehensive review of product-liability conflicts cases decided by American courts between 1989 and 2004 and involving significant choice-of-law questions. Among the Article’s findings are that choice-of-law methodology plays a less significant role in the courts’ choice of the governing law than do other factors, such as the number and pertinence of factual contacts with a given state. For example, regardless of methodology, in 79% of the cases in which the product’s acquisition and the victim’s domicile and injury were in the same state, the courts applied that state’s law; regardless of whether it favored the plaintiff or the defendant and regardless of whether that state was also the forum. Among the Article’s unexpected findings are that, contrary to prevailing perceptions, forum-shopping is not as common or rewarding as critics assume, and that courts do not unduly favor plaintiffs as a class nor the law or the domiciliaries of the forum state.

The Article concludes that an all-inclusive review of the cases reveals that, on the whole, the record of American courts in resolving these most intractable of conflicts is much better than one might assume from a selective reading of a few cases. However, because this record entails a heavy cost in time and resources for courts and litigants, the Article proposes a new choice-of-law rule that would produce mostly the same results as the decided cases, but much more quickly and at a lower cost.

The proposed rule differentiates between liability and damages and, within certain narrow parameters, allows plaintiffs and secondarily defendants to choose the state whose law will determine liability. Surprisingly, this rule will not favor plaintiffs more than the decided cases, but it should increase the incentive for early negotiations with regard to damages and encourage settlements without resort to litigation.

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I. INTRODUCTION

A. The Purpose and Scope of the Article

This Article is a study of the judicial process of resolving conflicts of laws in product-liability cases. Although the Article proposes a choice-of-law rule for resolving these conflicts, the purpose of the Article is neither to advocate adoption of that rule nor to propagate a choice-of-law theory. Rather, it is to provide a systematic examination of the recent experience of American courts in handling these most complex and intractable conflicts so that the readers can draw their own conclusions or test their own assumptions about choice of law. For this exercise to be meaningful, the examination must be comprehensive rather than selective. Indeed, at least in this area of the law, one who advocates a particular theory can find many cases to support it. In contrast, one who examines all cases may come away with much less conviction about the soundness of a particular theory. At the risk of being seen as tedious, this Article aspires to provide a comprehensive review of all the cases that fit within certain parameters defined below.

B. Conflicts in Products Liability

The law of products liability as a distinct body of law, at least partly independent from general tort and contract law from which it grew, is a relatively new phenomenon. Coincidentally, in the United States, its life parallels that of another phenomenon known as the
American "conflicts revolution"1—it was born in the 1960s, emancipated in the '70s, grew by leaps and bounds in the '80s when it also influenced the laws of other countries, and then began slowing down in the '90s.2 This Article discusses the experience of American courts in resolving product-liability conflicts during this last period.

Although this period coincides with a period of substantive and numerical retrenchment, it has nevertheless produced a number of product-liability cases that is unrivaled in the rest of the world.3 Indeed, it is no secret that, for a variety of reasons,4 "Americans use their product liability law a lot while victims and courts elsewhere don't."5 Naturally, the higher the number of product-liability lawsuits, the higher the likelihood that many of them will have multistate elements, thus producing conflicts of laws. This is particularly true in the United States, which is essentially a single market, yet artificially segregated by state boundaries into multiple, diverse products-liability regimes. Thus, for better or worse, American courts have had and continue to have the lion's share of product-liability conflicts, and they have had to handle these conflicts with virtually no legislative guidance.6 This Article examines the experience of American courts in

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2. For the substantive development and numerical growth of American product-liability law, see generally Joachim Zekoll, *Liability for Defective Products and Services, in American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law* 121 (Symeon C. Symeonides & John C. Reitz eds., 2002). The author reports that the number of personal-injury product-liability filings in federal courts alone grew from 2393 in 1975 to 32,856 in 1997 and then began to slow down to 26,886 in 1998, 18,781 in 1999, and 14,428 in 2000. See *id.* at 148-49. These numbers do not include filings in state courts, where the numbers are lower. *Id.* at 148.

3. Professor Reimann reports that, on average, about 30,000 product-liability actions (about one for every 90,000 inhabitants) are filed annually in the United States, whereas, for example, the European Commission reports "barely 100 court decisions ... in all the [EU] member states together," over a 15-year period. Mathias Reimann, *Liability for Defective Products and Services: Emergence of a Worldwide Standard?, in General Report to the XVIth International Congress of Comparative Law* 54, 57 (2002).

4. For a discussion of the reasons, see the incisive analyses of Reimann, *supra* note 3, at 63-84, and Zekoll, *supra* note 2, at 143-59.

5. Reimann, *supra* note 3, at 53; see also *id.* at 57 ("[P]roducts liability litigation in the United States is big business while it is of marginal importance in the rest of the world.").

handling these conflicts and attempts to identify the common patterns, trends, and lessons that emerge from this experience.

C. The Parameters of the Study

In order to keep the length of this Article within manageable limits, certain chronological and substantive limitations became necessary. Thus, this Article is confined to cases decided in the last 14 years (1990 to 2003, inclusive) and, within that period, excludes: (1) class actions;\(^7\) (2) cases decided as contract conflicts;\(^8\) (3) cases in which both the plaintiff and the defendant were affiliated with the same state or with states the laws of which produced the same outcome;\(^9\) and (4) cases in which the choice-of-law question remained undetected or uncontested, or the court’s discussion of it was cursory or inconsequential.\(^{10}\)

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7. Class actions are excluded because, in most of them, the choice-of-law discussion is limited to whether the application for class certification meets the commonality and predominance requirements, which depend in part on whether the same or similar laws would govern the claims of the members of the entire class or of manageable subclasses. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2001: Fifteenth Annual Survey*, 50 AM. J. COMP. L. 1, 83-88 (2002); Symeon C. Symeonides, *Choice of Law in the American Courts in 2000: As the Century Turns*, 49 AM. J. COMP. L. 1, 25-28 (2001).

8. Typically, these cases involve defective products that have not caused physical injury to a person or to property other than the product itself. See, e.g., Rocky Mountain Helicopters, Inc. v. Bell Helicopter Textron, Inc., 24 F.3d 125, 127-29 (10th Cir. 1994) (employing contract analysis and applying the law of Texas, which was the manufacturer’s principal place of business and place of manufacture, in a negligence and breach of warranty action for damage to a helicopter caused by its defective design); Thornton v. Cessna Aircraft Co., 886 F.2d 85, 89-90 (4th Cir. 1989) (applying the law of the accident state to the plaintiff’s tort claims, and the law of the place of both the product’s acquisition and the plaintiff’s domicile to his breach of warranty claims); Robinson v. Am. Marine Holdings, Inc., No. Civ.A.01-0882, 2002 WL 873185, at *1 (E.D. La. Apr. 30, 2002) (concerning an action for breach of warranty and redbition); Premix-Marbleite Mfg. Corp. v. SKW Chem., Inc., 145 F. Supp. 2d 1348, 1353-54 (S.D. Fla. 2001) (applying Florida law under U.C.C. § 1-105(1) to an action by a Florida buyer against a Georgia seller of a defective product purchased and used in Florida because Florida had an appropriate relation to the transactions at issue, being the place of negotiation, purchase, and delivery of the product and the buyer’s domicile and injury); R-Square Invs., Inc. v. Teledyne Indus., Inc., No. Civ.A.96-2978, 1997 WL 436245, at *5, *7 (E.D. La. July 31, 1997) (involving a defective airplane engine that caused damage to the plane; employing contract analysis to claim for damage to the engine, and tort analysis to claim for damage to the plane; applying Minnesota law to the former and Louisiana law to the latter claim); Boudreau v. Baughman, 368 S.E.2d 849, 855-56 (N.C. 1988) (resolving a breach of warranty case under U.C.C. § 1-105(1) and applying the law of the state of injury, which was also the place of the sale and use of the product).

9. See, e.g., Winsor v. Glasswerks PHX, L.L.C., 63 P.3d 1040, 1044 (Ariz. Ct. App. 2003) (applying Arizona law to a case in which the only non-Arizona contact was the incorporation of the defendant’s successor).

10. Also excluded are cases disposed on forum non conveniens grounds, and cases in which the choice-of-law discussion, though substantial, is not related to the manufacturer’s
On the other hand, this Article includes lower court cases that either have not been appealed or have been affirmed by a higher court without opinion. For, even if lacking in precedential value, these cases represent the final resolution of the particular conflict, and thus help compose a more complete picture of the reality of American conflicts law.

The above limitations reduce the total number of cases to no more than 80, a manageable number that is also high enough to permit the drawing of some general conclusions. This Article discusses all of these cases.

D. The New Choice-of-Law Approaches

Until the 1960s, the prevailing method for resolving tort conflicts was to apply the law of the state in which the injury occurred (the lex loci delicti rule), without regard to the content of that law, and even if that state had no other contacts with the case. The American conflicts revolution has changed all of that. By the 1990s, the majority of states of the United States had abandoned the traditional method in favor of new, flexible approaches.

Although these approaches differ from each other in some important respects, these differences are not pertinent for the purposes of this Article because, as will be seen shortly, methodological differences rarely affect the outcome of actual cases. Be that as it may, what is relevant for the purposes of this Article is that all of the new approaches share two basic characteristics: (a) they rely on multiple contacts and factors, rather than on the single contact of the place of injury; and (b) they overtly consider the content of the substantive laws of the contact states before choosing the law that will govern the case.

For this reason, the discussion in this Article begins by identifying the contacts that are pertinent in product-liability conflicts, considering the laws of the respective contact states, and then cataloguing the emerging fact-law patterns.

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liability, for example, whether the proceeds of a survival action belong to the estate or to the heirs or other beneficiaries.

11. For the traditional American approach to tort conflicts, see EUGENE F. SCOLLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS §§ 2.7-.8, 17.2-.10 (3d ed. 2000).

12. By 1990, 36 states had abandoned the traditional lex loci rule for tort conflicts. By 2003, this number had risen to 42. For documentation, see Symeonides, supra note 1, §§ 40-42, 46-51. For a discussion of each of the new approaches, see id §§ 14-38, 57-104.
E. The Pertinent Contacts

1. The List

The abandonment of the *lex loci delicti* rule has allowed courts to consider multiple factual contacts, or connecting factors, in the process of identifying the concerned jurisdictions. In product-liability conflicts, these contacts are:

1. the domicile, habitual residence, or "home state" of the party injured by the product, hereinafter interchangeably referred to as "plaintiff" or "victim";
2. the place where the injury occurred;
3. the place where the product was sold as such, either to the eventual victim (as in the case of most consumer products) or to a third party who owned the product at the time of the injury (as in the case of industrial machinery or public transportation). This place is referred to hereinafter as the "place of acquisition";
4. the place where the product was manufactured or designed (even though these two contacts do not always coincide in the same state); and
5. the principal place of business of the manufacturer, hereinafter referred to as "defendant."13

2. Qualifications

The above list calls for explanation and qualification. First, the list should not lead to the inference that all of these contacts are taken into account in all cases. For example, cases decided under the *lex loci delicti* rule do not consider, and often do not mention, the other contacts.

Second, in some cases, one or more of these contacts may be located in more than one state. Thus, in the case of certain products used over long periods in several states, the injury may be peripatetic.

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13. In some cases, parties other than the manufacturer, such as a distributor or retailer, may be defendants. Nevertheless, all but 5 of the cases discussed in this Article involve lawsuits against manufacturers. The 5 cases in which the defendant was the retailer are *Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618 (8th Cir. 2001); *Gadzinski v. Chrysler Corp.*, No. 00 C 6229, 2001 WL 629336 (N.D. Ill. May 29, 2001); *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8 (D.D.C. 1995); *McKinnon v. F.H. Morgan & Co.*, 750 A.2d 1026 (Vt. 2000); and *Danielson v. National Supply Co.*, 670 N.W.2d 1 (Minn. Ct. App. 2003). In *McKinnon* and *Gadzinski*, the retailer had also serviced the product.
Examples from recent experience include pharmaceuticals, breast implants, or tobacco products that the victims used over long periods of time while residing in several states. Similarly, in many cases, the manufacturing process takes place in different phases in different states. The product is designed in one state, tested in another, approved in another, and manufactured and assembled in yet another state.

Third, each of the above contacts may be fortuitous in a given case, such as the place of injury in an airplane crash, or the place of

14. *Braune v. Abbott Laboratories*, 895 F. Supp. 530 (E.D.N.Y. 1995), is a typical example of peripatetic injury caused by a pharmaceutical product. In the 1950s, a drug known as DES and designed to prevent miscarriages was prescribed by doctors to pregnant women living in several states. *Id.* at 537. The plaintiffs in *Braune* were among the daughters of those women, and had been exposed to DES during gestation in their mothers’ wombs. *Id.* As a result of that exposure, plaintiffs gradually developed various abnormalities in their reproductive organs, including infertility, miscarriages, and cervical cancer, which became evident when the plaintiffs reached child-bearing age. *Id.* The plaintiffs, like their mothers, had lived in several states since the mothers had used the drug, thus raising difficult questions on when and where the injuries occurred. *Id.* at 537-41. The court concluded that the injuries occurred in the states in which they were diagnosed. *Id.* at 565; *see also* Millar-Mintz v. Abbott Labs., 645 N.E.2d 278, 280, 282 (Ill. App. Ct. 1994) (applying Illinois’ pro-plaintiff law to an action filed by a plaintiff whose mother had used DES in the 1940s while domiciled in Illinois). The plaintiff had lived in New York, California, and then in Illinois, where she was first advised of her infertility and its causal relation to her mother’s use of DES.

15. *See* Tune v. Philip Morris Inc., 766 So. 2d 350, 351-52 (Fla. Dist. Ct. App. 2000) (invoking an action against a tobacco manufacturer brought by a plaintiff who used tobacco products for many years while domiciled in 2 states and who was diagnosed with lung cancer while domiciled in the second state); Philip Morris Inc. v. Angeletti, 752 A.2d 200, 233 (Md. 2000) (concerning a class action against tobacco manufacturers by former and current Maryland domiciliaries who were addicted to tobacco products. The court decertified the class because it was unlikely that the “deleterious” effect of nicotine had taken effect upon the bodies of all plaintiffs in the same state).


18. *See*, e.g., *In re* Air Crash Disaster at Sioux City, Iowa, 734 F. Supp. 1425, 1431 (N.D. Ill. 1990) (discounting as fortuitous the occurrence of the injury in Iowa in a case involving a flight from Denver to Chicago).
acquisition in the case of a product purchased by a tourist in a distant state.\textsuperscript{19}

Fourth, the above contacts are not necessarily of equal weight or pertinence. For example, the place of the product's acquisition is generally less pertinent when a party other than the victim acquired the product, or when the victim was not the original acquirer. Likewise, in today's world of multistate corporate mobility, the manufacturer's principal place of business is justifiably given less weight,\textsuperscript{20} and in some cases—though not as many as one might expect—the defendant is not the manufacturer, but rather the seller of the product.\textsuperscript{21} Finally, it has been argued that the place of manufacture should not be a pertinent contact.\textsuperscript{22}

A final qualification affecting the relative pertinence of some of the above contacts has to do with the inherent breadth of the very term "product" in encompassing things of widely diverse qualities and uses. For example, certain products, such as industrial or similar production equipment, are intended for use in one state, while other products, such as airplanes or other means of public transportation, are intended for use in more than one state. In between the two categories are consumer products, such as pharmaceuticals, appliances, foods, cosmetics, and personal vehicles that are used primarily, but not

\textsuperscript{19} See, e.g., Danielson v. Nat'l Supply Co., 670 N.W.2d 1 (Minn. Ct. App. 2003) (involving a stepladder that a Minnesota trailer owner purchased while traveling through Texas).

\textsuperscript{20} See, e.g., In re Air Crash Disaster, 734 F. Supp. at 1434 (noting that New York was General Electric's principal place of business only because the company's other holdings, unrelated to manufacture, were located in that state, and discounting this contact for this reason); Crouch, 699 F. Supp. at 589-90, 592 (involving a defendant that had its principal place of business in New York, its headquarters in Connecticut, its engine manufacturing division's headquarters in Ohio, and its engine design and manufacturing division in Massachusetts).

\textsuperscript{21} See discussion supra note 13.

\textsuperscript{22} See Rutherford, 943 F. Supp. at 792-93 ("Legal claims do not arise at the time or at the place of manufacture. They arise when an injury occurs. Thus, the place of injury, not the place of manufacture is the central focus of the cause of action."); Malv v. Genmar Indus., Inc., No. 94C3611, 1996 WL 28473, at *2 (N.D. Ill. Jan. 23, 1996) (involving a decision in which the court does not even mention the place of manufacture, apparently because of the court's conclusion that the critical conduct was "the placement of a defective product in the stream of commerce"); P. John Kozyris, Values and Methods in Choice of Law for Products Liability: A Comparative Comment on Statutory Solutions, 38 Am. J. Comp. L. 475, 500 (1990):

[T]he mere making of a product, however defective, does not create the risk of causing harm. . . . Production is only a preparatory act which does not rise to the level of the wrongful conduct. The tort does not commence until the product is placed in a position to cause harm; i.e. is distributed to a potential user.
exclusively, in one state. While products of the last category are usually purchased directly by the user and eventual victim of the product, the products of the first two categories are purchased by someone other than the victim, and are usually not subject to the victim's control. The nature of the product often determines the relative pertinence of each of the above contacts. For example, the place of injury is given significant weight in cases of industrial machinery, especially one attached to a building, and much less weight in the case of an airplane crash. Similarly, as said above, the place of acquisition is given more weight when the acquirer is the victim than when it is not.

Despite the above qualifications, the list of contacts shown above remains a useful vehicle through which to catalogue and analyze product-liability conflicts. The analysis, or at least the description of it, can be further facilitated by grouping these contacts into plaintiff-affiliating and defendant-affiliating contacts. Thus, the plaintiff’s domicile and the place of injury are plaintiff-affiliating contacts, while the defendant’s principal place of business and the place of the manufacture are defendant-affiliating contacts. The remaining contact, the place of the product's acquisition, is where, figuratively speaking, the two sides meet each other. However, at least when the product is acquired by the victim rather than by a third party (as in the case of an airplane acquired by an airline company), this contact can be considered a victim-affiliating contact and is treated as such in the discussion below.

Table 1

<table>
<thead>
<tr>
<th>Plaintiff-Affiliating Contacts</th>
<th>Defendant-Affiliating Contacts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victim’s domicile Injuy</td>
<td>Manufacture</td>
</tr>
<tr>
<td>Acquisition</td>
<td></td>
</tr>
</tbody>
</table>

3. Dispersement of Contacts

Although today’s products travel great distances, both before and after the time of purchase, it appears that most of the individual product-liability lawsuits involve cases that have contacts with only 2 or 3 states. For example, in more than two-thirds of the cases (57 out of 80, or 71%), the 5 contacts listed above were grouped in either 2 or
3 states. 23 In 10 cases, the contacts were dispersed in 4 states, and in 1 case in 5 states.

In exactly 50% of the cases (40 out of 80), 3 of the 5 contacts were in the same state. 24 In 41% of the cases (33 out of 80), both the acquisition of the product and the eventual injury occurred in the plaintiff's home state. 25

F. The Content of the Contact States' Laws

One important lesson of the modern American conflicts experience is that one cannot resolve conflicts intelligently and rationally without considering the substantive content of the laws of each involved state, and without making that content an integral part of the whole choice-of-law process. 26 This fundamental premise should be kept in mind, not only by the judge in resolving conflicts, but also by the commentator in discussing and analyzing them.

Product-liability laws may be categorized in many different ways, but at the most basic level these laws either favor the manufacturer or they favor the person injured by the product. This Article refers to the former laws as pro-defendant laws and to the latter as pro-plaintiff laws.

The most common examples of pro-defendant laws are statutes of repose that bar lawsuits against manufacturers when filed after a specified number of years from the date the product entered the stream of commerce (first use), regardless of when the injury occurs. Other examples are rules that prohibit punitive damages, require the plaintiff to prove the manufacturer's negligence, accord manufacturers special defenses such as "state of the art," or shield a manufacturer's successor from liability for the predecessor's products.

Conversely, among the clearest examples of pro-plaintiff laws are the absence of a statute of repose protecting manufacturers, and rules that impose strict liability, punitive damages, unlimited compensatory damages, or corporate successor liability on manufacturers.

23. The 5 contacts were grouped in 2 states in 29 cases, and in 3 states in 28 cases.
24. In 78% of those cases (31 out of 40, or 39% of the total), the court applied the law of that state.
25. In 82% of those cases (27 out of 33, or 34% of the total), the court applied the law of that state.
G. Typical Patterns of Product Conflicts

The combination of pertinent contacts and product-liability laws produces 3 typical patterns of product-liability conflicts (depicted below), depending on the laws of the involved states and on whether each state has contacts affiliating it only with the plaintiff, only with the defendant, or with both parties.

<table>
<thead>
<tr>
<th>Patterns</th>
<th>Plaintiff-Affiliating Contacts</th>
<th>Defendant-Affiliating Contacts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>P’s domicile</td>
<td>Injury</td>
</tr>
<tr>
<td>Direct conflicts</td>
<td>Pro-P</td>
<td>Pro-P</td>
</tr>
<tr>
<td>Inverse conflicts</td>
<td>Pro-D</td>
<td>Pro-D</td>
</tr>
<tr>
<td>Mixed Conflicts</td>
<td>Pro-P or other combinations</td>
<td>Pro-D</td>
</tr>
</tbody>
</table>

The first pattern, hereinafter called direct conflicts, encompasses cases in which all 3 plaintiff-affiliating contacts are located in a state or states that have pro-plaintiff laws, while both defendant-affiliating contacts are located in a state or states that have pro-defendant laws.

The second pattern, hereinafter called inverse conflicts, encompasses cases in which all 3 plaintiff-affiliating contacts are located in a state or states that have pro-defendant laws, while both defendant-affiliating contacts are located in a state or states that have pro-plaintiff laws.

The third pattern is the residual pattern. It encompasses all the remaining combinations, such as situations in which the 3 plaintiff-affiliating contacts (domicile, injury, and product acquisition) are located in different states the laws of which favor a different party. These cases are hereinafter called mixed conflicts.

In the prevailing conflicts jargon, direct conflicts are called true conflicts and inverse conflicts are called no-interest or unprovided-for cases. Professor Brainerd Currie introduced these terms, which now are used by most Conflicts teachers. According to Currie’s
“governmental interest analysis,” conflicts cases fall into 3 patterns: (a) “false conflicts,” when only one of the involved states has an “interest” in applying its law; (b) “true conflicts,” when more than one of the involved states have an interest in applying their respective laws; and (c) “unprovided-for” or “no-interest” cases, when none of the involved states have an interest in applying their respective laws. According to Currie’s assumptions about state interests, particularly his “personal-law” principle, a state has an interest in applying its law, inter alia, when that law benefits that state’s domiciliaries but not when it benefits out-of-staters, especially at the expense of local domiciliaries.

Even if one agrees with Currie’s assumptions, his 3 labels for conflicts cases are problematic because they forejudge the answer to the basic question—whether in fact a state has an interest in applying its law to the particular case—a question that reasonable minds often answer differently. Indeed, as the discussion in this Article demonstrates: most courts do not subscribe to Currie’s assumptions, many courts do not employ his labels, and courts that employ these labels reach different conclusions regarding each state’s interests than Currie would have reached. For example, in many inverse conflicts—which Currie would label as no-interest cases—the court concluded that one of the involved states did in fact have an interest, and this conclusion would move these cases from the no-interest category to the false-conflict category. While it is true that many courts are likely to treat most direct conflicts as true conflicts and many inverse conflicts as no-interest cases, other courts will reach different conclusions.

For this reason, it is better to employ categorizations that are descriptive but nonprescriptive. The terms “direct” and “inverse” conflicts meet this requirement. Rather than being dependent on largely subjective assumptions about each state’s ostensible or real


28. See, e.g., Gantes v. Kason Corp., 679 A.2d 106, 115 (N.J. 1996) (concluding that, although each party was affiliated with a state whose law favored the other party, this was not a no-interest case but rather a false conflict because one of the 2 states had an interest in applying its law); infra notes 91-102 and accompanying text; see also Jones v. S.E. Pa. Transp. Auth., Nos. CIVA.91-7179, CIVA.92-2053, 1993 WL 141646, at *5-*8 (E.D. Pa. Apr. 30, 1993) (concluding that, although each party was affiliated with a state whose law favored that party, this was not a true conflict but rather a false conflict because one state’s interest was attenuated); infra notes 231-237 and accompanying text; cases # # 29-33, 42-44 infra tbl. 3.
interests, these terms describe objectively the content of each state’s substantive laws: direct conflicts are those in which the application of each state’s law would favor the party affiliated with that state (each for its own), while inverse conflicts are those in which the application of each state’s law favors the party affiliated with the other state (each for the other). These terms are also nonprescriptive, because they do not forejudge the court’s own categorization of the conflict or its ultimate outcome.

The only problem with these 2 terms is that, in product-liability conflicts, these terms can be underinclusive: they only cover cases in which the contacts affiliated with one party are situated either in the same state or in states whose laws favor the same party. Because the number of relevant contacts in product-liability conflicts is as high as 5, many cases do not fit the above specification. One example is cases in which the 3 plaintiff-affiliating contacts (domicile, injury, and place of acquisition) are located in 2 or 3 different states and one of those states has a law that favors the plaintiff while the other favors the defendant. Considering that the same possibility exists with regard to the 2 defendant-affiliating contacts, many more permutations are possible. Depending on the other factors, these permutations may present a direct conflict with regard to one pair of states and an inverse conflict with regard to another pair of states. For the purposes of this Article, all of these permutations are placed in one residual category which, for lack of a better term, are called mixed conflicts.

II. THE CASES: 1990-2003

In order to facilitate the understanding of these complex cases, but also to enable the reader to verify the author’s observations and conclusions, this Article frequently resorts to the use of tables. The next table depicts the 80 cases decided during the survey period of 1990-2003. The table lists the name of the case, the forum state, the states that had the 5 pertinent contacts, as well as an abbreviated description of their respective substantive laws. The use of shading denotes the state whose law the court applied.

29. Pro-plaintiff laws are abbreviated as “Pro-P” and pro-defendant laws as “Pro-D.” The use of a dash, “(-),” means that the case contains no information on the particular state or its law.
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Product-Liability Conflicts, 1990-2003

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**A. Direct Conflicts (Each for its Own) (8)**

- Applying Pro-P Law (7)

**B. Inverse Conflicts (Each for the Other) (25)**

- Applying Pro-D Law (19)
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2. CASES IN WHICH P'S DOMICILE AND INJURY WERE IN SAME STATE (13)

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A. Direct Conflicts (Each for its Own) (3)

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### 3. Cases in which the P’s domicile and acquisition were in same state (9)

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### 5. The Rest (11)

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A. **Cases in Which the Three Plaintiff-Affiliating Contacts Are in the Same State**

1. **The Cases**

   The discussion of cases begins with those that fit in the most frequent pattern: cases in which 3 of the 5 pertinent contacts—the ones affiliated with the plaintiff—were situated in the same state. As the above table indicates, the first 33 of the 80 cases (41%) fall within this category, that is, they involved situations in which the plaintiff’s injury and the acquisition of the product were in the plaintiff’s home state. In thirteen of the 33 cases, or 42%, that state was also the forum state. In 26 of the 33 cases, or 79%, the court applied the law of the state that had the 3 plaintiff-affiliating contacts. In 12 of the 26 cases, or 46%, that state was also the forum state.

2. **Direct Conflicts (Each for Its Own)**

   The first 8 of the 33 cases presented the direct or true conflict pattern because the state with the 3 plaintiff-affiliating contacts had a pro-plaintiff law, while the state with the defendant-affiliating contacts had a pro-defendant law. Under the assumptions of interest analysis, the fact that each of the 3 plaintiff-affiliating contacts is in a state that has a pro-plaintiff law generates an interest on the part of that state to apply its law: (1) the injured plaintiff’s domicile in a state brings into play that state’s interest in financially repairing the consequences of the injury for the victim and the victim’s dependents, (2) the occurrence of the injury within a state brings into play that state’s interest in determining the legal consequences of the injury and minimizing similar injuries in the future, and (3) the sale of the product in a state implicates that state’s interest in ensuring that products marketed there...
conform with certain minimum standards of safety. By the same token, the fact that the state with defendant-affiliating contacts has a pro-defendant law also generates an interest in applying its law to protect its manufacturers and, through them, its own economic welfare.

According to Currie’s interest analysis, all of these true conflicts should be resolved by applying the law of the forum if the forum state is one of the interested states. Indeed, 6 of the 8 cases in this category applied the law of the forum state, and this would seem to be a vindication of Currie’s analysis. However, the fact that in all 6 of those cases the forum state also had all 3 plaintiff-affiliating contacts may have been more determinative than the fact that it was the forum. Indeed, a perusal of the above table suggests that, whenever the 3 plaintiff-affiliated contacts are all in the same state, the law of that state will likely govern, regardless of whether that state is also the forum state or its law favors the plaintiff or the defendant, and regardless of the methodology the court follows.

Custom Products, Inc. v. Fluor Daniel Canada, Inc., is one of 2 cases in this pattern that did not apply the law of the forum state. This is noteworthy because: (1) the forum state officially follows a lex fori approach and (2) the application of forum law would have benefited a forum defendant. The case also illustrates the strategy that many manufacturers now employ in hopes of taking advantage of choice-of-law approaches that favor the lex fori. Rather than waiting to be sued for injuries their products caused, manufacturers strike first by filing actions for declaratory judgments in a favorable forum. In Custom Products, this forum was Kentucky, which “no doubt ... prefers the

30. In one of those cases, Nelson v. Sandoz Pharmaceutical Corp., the court applied the law of the transferee forum. 228 F.3d 954, 965 (7th Cir. 2002). The action was initially filed in New Jersey but was transferred to Indiana and decided under New Jersey conflicts law as per Van Dusen v. Barrack. Id. at 963 (citing Van Dusen v. Barrack, 376 U.S. 612 (1964)). The court applied Indiana’s pro-plaintiff discovery rule rather than New Jersey’s pro-defendant rule to an Indiana plaintiff’s action against a New Jersey manufacturer for injury caused in Indiana by a product acquired there. Id. at 965. It is unclear whether this case should be credited for or against the Currie column. Because Currie died before Van Dusen articulated the obligation of the transferee court to act as surrogate for the transferor court, Currie did not have the opportunity to explain how his preference for the lex fori would work in federal transfer cases. Under Van Dusen, the Indiana court is to act as a surrogate for the New Jersey federal court, which under Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941), is to act as a surrogate for the New Jersey state court, which according to Currie should apply New Jersey law whenever New Jersey has an interest. Yet, the Nelson court applied Indiana law. 288 F.3d at 965.


32. For Kentucky’s lex fori approach, see Symeonides, supra note 1, §§ 68, 71.
application of its own laws over those of another forum” and applies forum law whenever the forum has “significant contacts—not necessarily the most significant contacts.” In this case, those contacts were the manufacture of the product and the manufacturer’s principal place of business. The victim’s domicile, place of injury, and the product’s acquisition were all in Canada, the law of which favored the victim. Thus, under Currie’s assumptions, this was a true conflict in that Kentucky would have an interest in applying its pro-manufacturer law to protect the Kentucky manufacturer, while Canada would have an interest in applying its pro-victim law to protect a Canadian victim injured in Canada. The court agreed that Canada had an “overwhelming interest,” but rejected the manufacturer’s arguments that Kentucky had either “significant contacts” or significant interests. The court noted that the Kentucky manufacturer, albeit the nominal plaintiff, was not the injured party and was “[f]or all practical purposes” the defendant. The court found “no evidence that Kentucky’s laws [were] intended to shield [such] a party when they cause injury in [another] jurisdiction, and then seek to avoid paying damages,” and concluded that “[t]he law of [the] forum cannot merely always follow the products of Kentucky corporations wherever they may cause damage in other jurisdictions.

While *Custom Products* refused to extend the benefit of the forum’s pro-manufacturer law to a forum-state manufacturer, *Kelly v. Ford Motor Co.* refused to extend the benefit of the forum’s pro-victim law to a victim domiciled and injured in the forum state. *Kelly* was a wrongful death action arising from the death of a Pennsylvania resident who was killed in Pennsylvania while driving a car he acquired in that state. Defendant Ford, a Michigan-based corporation, had designed, tested, and manufactured the car in

36. *Id.* at 768, 770.
37. *Id.* at 773, 775.
38. *Id.* at 773-74. For this reason, and to facilitate comparison with the other cases, Table 3 places the contacts affiliated with the “plaintiff,” i.e. the victim, in Canada, and the contacts affiliated with the “defendant,” i.e., the manufacturer, in Kentucky. See supra tbl. 3.
39. *Custom Prods.*, 262 F. Supp. 2d at 774. Noting that the Kentucky party “beat [the Canadian party] to the courthouse door,” the court found that Kentucky had a “greater interest . . . in deterring the type of lawsuit which might seek a choice of law advantage.” *Id.*
40. *Id.* at 775.
42. *Id.* at 467.
Michigan.\textsuperscript{43} Pennsylvania, but not Michigan, imposed punitive damages on the manufacturer.\textsuperscript{44} The court acknowledged Pennsylvania’s interests “in punishing defendants who injure its residents and . . . in deterring them and others from engaging in similar conduct which poses a risk to Pennsylvania’s citizens.”\textsuperscript{45} However, the court also found that Michigan had “a very strong interest” in denying such damages, so as to ensure that “its domiciliary defendants are protected from excessive financial liability.”\textsuperscript{46} By insulating companies such as Ford, who conduct extensive business within its borders, said the court, “Michigan hopes to promote corporate migration into its economy . . . [which] will enhance the economic climate and well being of the state of Michigan by generating revenues.”\textsuperscript{47} On balance, the court concluded that if faced with such a conflict the Pennsylvania Supreme Court would “adopt a test that focuses on either the place of the defendant’s conduct or the defendant’s . . . principal place of business,” both of which were situated in Michigan, and would apply Michigan law.\textsuperscript{48}

Although this prediction has yet to materialize, \textit{Kelly} remains noteworthy for resisting the all-too-common temptation of favoring the local victim who is favored by local law.\textsuperscript{49} Such resistance is easier in cases involving punitive damages (in which the defendant-affiliated contacts justifiably attract more attention) than in cases involving other issues, such as compensatory damages.\textsuperscript{50}

Indeed, as the above table demonstrates, except for \textit{Kelly}, all the other cases involving the same pattern have reached the opposite result—they applied the pro-plaintiff law of the plaintiff’s home state, which was also the place of injury and the product’s acquisition.\textsuperscript{51} This

\begin{itemize}
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} \textit{Id.} at 471.
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{Id.} at 467, 469.
\item \textsuperscript{49} Professor Kozyris finds the \textit{Kelly} result “plainly unacceptable under any reasonable approach.” Phaedon John Kozyris, \textit{Conflicts Theory for Dummies: Après le Deluge, Where Are We on Producers Liability?}, 60 LA. L. REV. 1161, 1178 n.39 (2000). Indeed, \textit{Kelly} would have been even more unacceptable had it involved compensatory rather punitive damages.
\item \textsuperscript{50} For a discussion of punitive-damages conflicts, see Symeon C. Symeonides, \textit{Resolving Punitive-Damages Conflicts}, 5 Y.B. OF PRIV. INT’L L. (2004).
\item \textsuperscript{51} \textit{See} Kramer \textit{v.} Showa Denko K.K., 929 F. Supp. 733, 739-41 (S.D.N.Y. 1996) (applying New York law and imposing punitive damages on a Japanese company who manufactured the product in Japan and sold it in New York where it injured the plaintiff, a New York domiciliary. Japan did not allow punitive damages); Eimers \textit{v.} Honda Motor Co.,
\end{itemize}
result is entirely appropriate, whether that state is also the forum, and regardless of whether one thinks in terms of state interests, party expectations, or factual contacts. As long as the product reached the particular state through ordinary commercial channels, then the application of that state’s law is fair to the victim and not unfair to the defendant. A consumer who is injured in her home state by a product she has purchased there is entitled to the protection of that state’s law, regardless of where the product was manufactured or by whom. Correspondingly, in a global market with free and predictable circulation of goods, the manufacturer who chooses to market his products in the plaintiff’s state may not reasonably expect to carry with him the protective laws of the state of manufacture. One of the tradeoffs in entering a particular market and benefiting from it is the foreseeable and insurable risk of being held accountable under the higher product-liability standards of that market. As Peter Nygh put it, “[A] manufacturer should not be allowed to escape a higher risk by establishing itself in a low risk haven as a base for its activities.”

3. Inverse Conflicts (Each for the Other)

In 25 of the 80 cases, or 31%, the state with the 3 plaintiff-affiliating contacts had a pro-defendant law, while the state with the defendant-affiliating contacts had a pro-plaintiff law. Thus, these cases

785 F. Supp. 1204, 1208-10 (W.D. Pa. 1992) (applying New York’s pro-plaintiff law to an action by a New York plaintiff injured in New York by a motorcycle acquired in that state and manufactured by a Japanese defendant in Japan); Hoover v. Recreation Equip. Corp., 792 F. Supp. 1484, 1489-92 (N.D. Ohio 1991) (following the Restatement (Second) of Conflict of Laws (1971) and applying Ohio law to both product-liability and successor-liability claims of an Ohio resident injured in Ohio by a slide manufactured in Indiana by an Indiana corporation that was acquired by another Indiana corporation); Savage Arms, Inc. v. W. Auto Supply Co., 18 P.3d 49, 52-54 (Alaska 2001) (concerning a successor-liability conflict resolved under the Restatement (Second) of Conflict of Laws (1971) and applying the pro-plaintiff law of Alaska, which was the victim’s domicile, as well as the place of injury and the product’s acquisition); Tune v. Philip Morris, Inc., 766 So. 2d 350, 352-55 (Fla. Dist. Ct. App. 2000) (applying Florida’s pro-plaintiff law to an action filed against a tobacco manufacturer by a Florida domiciliary who was diagnosed with lung cancer in Florida after using tobacco products in Florida and New Jersey, his previous domicile); see also In re Masonite Corp. Hardboard Siding Prods. Liab. Litig., 21 F. Supp. 2d 593, 597-98 (E.D. La. 1998) (involving a case decided under Florida’s Restatement (Second) of Conflict of Laws (1971) approach, noting Florida’s strong interest in applying its law to protect its citizens from building materials which were sold and used in that state and which could not withstand that state’s extreme weather conditions).


53. See cases ##-33 supra tbl. 3.
presented the inverse conflict pattern because each state's law favored the party affiliated with the other state. According to Currie, these are the unprovided-for or no-interest cases in which neither state has an interest in applying its law because neither state wishes to protect nondomiciliaries at the expense of local domiciliaries. Thus, again according to Currie, all of these cases should be resolved by applying the law of the forum in its role as the residual law.

As Table 3 indicates, slightly more than half of the cases (13 of 25) did not apply forum law, including 3 cases decided in states that officially follow the *lex fori* approach. The remaining 12 cases applied forum law, but, except for *Kemp v. Pfizer, Inc.*, none of them based that application on Currie's advocacy of the dominant role of the forum *qua* forum. Rather, they based that application on the forum state's contacts with the case and, in some instances, its *affirmative* interest—rather than lack of interest—in applying its law. In short, few of these cases accepted Currie's assumption that a state whose law disfavors the local litigant necessarily has no interest in applying it.

a. Applying the Pro-Defendant Law of a Plaintiff-Affiliated State

Three-fourths (or 19) of the 25 cases applied the pro-defendant law of a state that had all three plaintiff-affiliating contacts. In 6 of those cases, that state was also the forum state. *Kemp v. Pfizer, Inc.*, which was decided under Michigan's *lex fori* approach, is representative of these cases. In *Kemp*, the plaintiff's decedent, a


56. Among these cases are *Mahne v. Ford Motor Co.*, 900 F.2d 83 (6th Cir. 1990) (discussed *infra* notes 111-112 and accompanying text); *Rutherford v. Goodyear Tire & Rubber Co.*, 943 F. Supp. 789 (W.D. Ky. 1996) (discussed *infra* notes 81-89 and accompanying text), *aff'd*, 142 F.3d 436 (6th Cir. 1998); and *In re Eli Lilly & Co. Prozac Products Liability Litigation*, 789 F. Supp. 1448, 1454 (S.D. Ind. 1992) (concerning an action by California residents, injured in California by a drug acquired and used in California, against an Indiana defendant who manufactured the drug in Indiana, and concluding that "Indiana would have no interest in the application of [its] more pro-plaintiff rule to . . . cases [] in which plaintiffs have no connection to Indiana and the Indiana connections all involve the business of the defendant").

57. See cases #9-14 *supra* tbl. 3.

58. 947 F. Supp. at 1141.
Michigan domiciliary, died in Michigan as result of a malfunction of a heart valve manufactured in California and implanted in him in a Michigan surgical procedure. 59 California, but not Michigan, imposed punitive damages. 60 The court found that, as the place of both the defendant’s principal place of business and the product’s manufacture, California had an interest in applying its punitive-damages law so as to “punish its corporate defendants and deter future misconduct.” 61 However, the court concluded that, because the defendant was also doing business in Michigan, Michigan had an interest in extending to the defendant the benefit of its defendant-protecting law. 62 Thus, rather than viewing this as a no-interest case, the court characterized it as a true conflict in which both states had an interest. 63 The court felt relieved from not having to engage in the “admittedly abstruse exercise” of determining “which state’s interest is greater” because, under Michigan’s lex fori approach, where “Michigan has a strong interest in applying its laws . . . , the Michigan courts would not displace its [sic] own laws in favor of the law of a foreign state.” 64 Thus, to the extent it relied on the lex fori presumption, Kemp is consistent with Currie’s method. However, to the extent it extended the benefit of the forum’s pro-defendant law to a foreign defendant at the expense of a forum victim, Kemp rejected Currie’s “personal law principle,” which assumes that a state is never interested in protecting nondomiciliaries at the expense of local domiciliaries. 65

59. Id. at 1140.
60. Id.
61. Id. at 1142.
62. Id. at 1143.
63. See id.
64. Id. (quoting In re Disaster at Detroit Metro. Airport on Aug. 16, 1987, 750 F. Supp. 793, 807-08 (E.D. Mich. 1989)).
65. Similarly, in Burleson v. Liggett Group Inc., which was decided under the Restatement (Second) of Conflict of Laws (1971), the court held that a statute of the forum state of Texas that barred suits against tobacco manufacturers was meant to protect foreign manufacturers, even vis-à-vis plaintiffs who were domiciled in Texas and were injured there. 111 F. Supp. 2d 825, 827-30 (E.D. Tex. 2000). The remaining 4 cases were decided under article 3545 of the Louisiana codification, which requires the application of the law of the forum state if that state is also the victim’s home state, place of injury, and place of acquisition. See Clark v. Favalora, 722 So. 2d 82 (La. Ct. App. 1st Cir. 1998); Orleans Parish Sch. Bd. v. U.S. Gypsum Co., CIV. No.89-0070, 1993 WL 205091 (E.D. La. June 8, 1993), aff’d, 9 F.3d 103 (5th Cir. 1993); Jefferson Parish Hosp. Serv. Dist. # 2 v. W.R. Grace & Co., CIV. No.92-0891, 1992 WL 167263 (E.D. La. June 30, 1992); see also Pittman v. Kaiser Aluminum & Chem. Corp., 559 So. 2d 879 (La. Ct. App. 4th Cir. 1990) (reaching the same result under precodification law).
In the remaining thirteen cases, the forum had a pro-plaintiff law, while the 3 plaintiff-affiliating contacts were in a state that had a pro-defendant law. All thirteen cases applied the latter state’s law. In 10 of those cases, that law favored a manufacturer that had contacts with the forum state. Among these cases, *Dorman v. Emerson Electric Co.* is representative of those decided under the *Restatement (Second) of Conflict of Laws*, particularly section 146, which establishes a presumption in favor of the place of the injury. The injury occurred in British Columbia, which was also the plaintiff’s domicile and the place where he acquired the product. The product, a

66. See cases #15-27 supra tbl. 3.

67. Two of the 3 cases in which the defendant did not have such contacts with the forum state were obvious examples of forum shopping. In *Nesladek v. Ford Motor Co.*, the plaintiff candidly admitted that Minnesota’s pro-plaintiff law was part of the reason for which she moved to Minnesota from Nebraska, after a Nebraska accident that resulted in her son’s death. 46 F.3d 734, 738 (8th Cir. 1995). Her action was barred by Nebraska’s 10-year statute of repose, but could have been maintained under Minnesota’s “useful life” statute. *Id.* at 739-40. The defendant Ford did business in Minnesota and a critical component of the car that caused the accident had been installed in the car in Ford’s assembly plant in Minnesota. *Id.* at 739. The court applied Nebraska’s statute of repose and dismissed the action under it, partly “because of the distinct presence of forum shopping.” *Id.* at 740. In *Walls v. General Motors, Inc.*, an Oregon plaintiff, injured in Oregon by a car he purchased there, sued the defendant in Mississippi, hoping to take advantage of the latter state’s longer statute of limitation. 906 F.2d 143, 144-45 (5th Cir. 1990). This strategy did not pay off because the court applied Oregon’s statute of repose, barring the action. *Id.* at 146-47. The third case, *Rice v. Dow Chemical Co.*, 875 P.2d 1213 (Wash. 1994) (en banc), is discussed infra note 77.

68. 23 F.3d 1354, 1358 (8th Cir. 1994) (involving a case decided under Missouri conflicts law).

69. For other cases decided under a similar presumption, see *Walls*, 906 F.2d at 144-47 (discussed supra note 67); *Bain v. Honeywell International, Inc.*, 257 F. Supp. 2d 872, 874-79 (E.D. Tex. 2002) (applying British Columbia’s pro-defendant law to the action of an Australian residing in British Columbia and arising from an injury there); *Walters v. Maren Engineering Corp.*, 617 N.E.2d 170, 173-74 (Ill. App. Ct. 1993) (applying Kansas law to the action of a Kansas plaintiff who was injured in Kansas by a machine partly manufactured in Illinois). For a case decided under Indiana’s significant-contacts approach, see *In re Eli Lilly & Co. Prozac Products Liability Litigation*, 789 F. Supp. 1448, 1454 (S.D. Ind. 1992) (discussed supra note 56). For a case reaching the same result under Leflar’s better-law approach, see *Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618 (8th Cir. 2001). In *Hughes*, the defendant, an Arkansas retailer, sold a product in Louisiana to a Louisiana plaintiff whose child was injured in Louisiana while using the product. *Id.* at 619. The plaintiff could recover under Arkansas law, but not under Louisiana law. *Id.* at 621-22. The court held that Louisiana law governed because only one of the 5 Leflar factors was dispositive—“maintenance of interstate and international order”—and this factor pointed to Louisiana, because that state had nearly all the significant contacts. *Id.* at 620-21. Arkansas had no interest in applying its pro-plaintiff law against an Arkansas defendant when the plaintiff was not a resident of Arkansas and the injury did not occur there. *Id.* at 621. The “better-law” factor was also not dispositive because Louisiana law was not particularly “archaic and unfair” and thus, said the court, “our subjective view of which law represents the more reasoned approach would not persuade us that Arkansas law should apply . . . .” *Id.* at 621-22.
miter saw, was manufactured in Taiwan by a Taiwanese corporation under license from defendant, a Missouri corporation, that had designed and tested that line of products in Missouri.\textsuperscript{70} Unlike Missouri, British Columbia did not impose strict liability on manufacturers.\textsuperscript{71} The plaintiff argued that, because the saw was designed in Missouri, that state had an interest in deterring substandard conduct within its territory.\textsuperscript{72} The court acknowledged the existence of this interest, but found it insufficient to rebut the \textit{lex loci} presumption.\textsuperscript{73} The court enumerated the contacts of British Columbia and, without articulating any corresponding interests, concluded that those contacts were "at least as substantial as Missouri's."\textsuperscript{74}

Considering the starting point of the court's analysis, the application of British Columbia law is not surprising, not only because the court began with the \textit{lex loci} presumption, but also because the court assumed that only state contacts, not state interests, may rebut the presumption.\textsuperscript{75} However, there is more room for disagreement when the court purports to base the application of the product-manufacturer law of the victim's home state on the ostensible "interests" of that state.

One such case is \textit{Hall v. General Motors Corp.}\textsuperscript{76} In \textit{Hall}, a Michigan court held that North Carolina had an "obvious and

\begin{itemize}
\item \textsuperscript{70} \textit{Dorman}, 23 F.3d at 1356. The miter saw had been purchased by a Canadian corporation affiliated with the defendant and sold to a Canadian retailer without ever having entered the United States. \textit{See id.}
\item \textsuperscript{71} \textit{Id.} at 1361.
\item \textsuperscript{72} \textit{Id.} at 1359.
\item \textsuperscript{73} \textit{Id.} at 1358-61.
\item \textsuperscript{74} \textit{Id.} at 1361.
\item \textsuperscript{75} \textit{See id.} at 1358-61.
\item \textsuperscript{76} 582 N.W.2d 866 (Mich. Ct. App. 1998). For a virtually identical case involving the same pattern and another one of Michigan's "big three" manufacturers, see \textit{Farrell v. Ford Motor Co.}, 501 N.W.2d 567 (Mich. Ct. App. 1993). Farrell was a product liability action arising from a North Carolina accident in which a North Carolina domiciliary was killed while using a car manufactured in Michigan by Ford, a Michigan-based manufacturer. \textit{Id.} The action was timely in Michigan, but was barred by North Carolina's statute of repose. \textit{Id.} at 567-68. The court applied this statute after concluding that North Carolina had "an obvious and substantial interest in shielding Ford from open-ended products liability claims ... and [in] encourag[ing] manufacturers, such as Ford, to do business in North Carolina." \textit{Id.} at 572. The court thought that this interest was "[n]o less compelling solely by virtue of the fact that the defendant does not have a manufacturing plant ... in ... North Carolina." \textit{Id.} On the other hand, the court concluded, Michigan was "merely the forum state and situs of defendant's headquarters" and "had no interest in affording greater rights of tort recovery to a North Carolina resident than those afforded by [his own state]." \textit{Id.}
\item North Carolina's statute of repose was also applied in \textit{Vestal v. Shiley Inc.} to bar a product-liability action by a North Carolina domiciliary against a California manufacturer of heart valves implanted in the plaintiff during a North Carolina surgery. No. SACV96-1205-GLT (EEX), 1997 WL
\end{itemize}
substantial interest” in applying its statute of repose to bar an action brought by a North Carolina domiciliary against a Michigan-based manufacturer (GM) who was not protected by Michigan law. 77 This reading of North Carolina’s interests, however, is doubly suspect in that (1) it emanates from a court that purports to adhere to a lex fori approach and (2) it conveniently serves one of Michigan’s 3 major automakers. With regard to point (1), the court concluded that the strong presumption in favor of Michigan law was rebutted because “Michigan ha[d] only a minimal interest in the matter.” 78 With regard to point (2), the court opined that (a) North Carolina had an obvious and substantial “interest in shielding GM from ‘open ended products liability claims,’” so as to encourage GM to do business in its state, and (b) Michigan had “no interest in affording greater rights of tort recovery to a North Carolina resident than those afforded by North Carolina [because] Michigan [was] merely the forum state and situs of

77. Hall, 582 N.W.2d at 869. The plaintiff was domiciled in North Carolina at the time of the injury, and in Michigan at the time he filed the action. Id. at 868-70. While acknowledging that the record did not reveal the plaintiff’s motives for changing his domicile, the court decided to discount the change of domicile because of the potential for encouraging forum shopping. See id. at 870.

The product in question, a car, was designed in Michigan and manufactured in Ohio, but neither party urged the application of Ohio law. See id. at 872.

In Rice v. Dow Chemical Co., the plaintiff was exposed to an herbicide while domiciled and working in Oregon, but moved his domicile to Washington before the injury manifested itself. 875 P.2d 1213, 1214 (Wash. 1994) (en banc). His action was timely under Washington’s 12-year statute of repose, but was barred by Oregon’s 8-year statute of repose. See id. at 1215. The court concluded that Oregon’s statute applied because Oregon had a more significant relationship given that, except for the manifestation of the disease in Washington, all other contacts were with Oregon. Id. at 1217-19. After rejecting the plaintiff’s argument that the manifestation of the disease in Washington would make that state the place of the injury, the court examined the respective interests of the 2 states and concluded that “Oregon’s interest . . . in providing repose for manufacturers doing business in Oregon and whose products are used in Oregon” was not extinguished by the plaintiff’s subsequent move to Washington. Id. at 1219. Although Washington had an interest in protecting its residents, “residency in the forum state alone has not been considered a sufficient relation to the action to warrant application of forum law.” Id. The court reasoned that “[a]pplying Oregon law achieves a uniform result for injuries caused by products used in the state of Oregon and predictability for manufacturers whose products are used or consumed in Oregon.” Id. Neither party offered evidence of the place of design, testing, or manufacture of the product, or of the defendant’s principal place of business or state of incorporation. See id. at 1218.

78. Hall, 582 N.W.2d at 868.
defendant's headquarters." Needless to say, the statement regarding Michigan's lack of interest raises the corollary question of why North Carolina had any interest in affording a Michigan defendant greater protection than that afforded by Michigan.

In *Rutherford v. Goodyear Tire & Rubber Co.*, which was decided under Kentucky's *lex fori* approach, the court applied the pro-defendant law of Indiana, which was the plaintiff's home state and place of injury, and, indirectly, the place of the product's acquisition. The product, a car tire, had been manufactured in Kansas by Goodyear, an Ohio corporation, and was purchased by Ford, a Michigan corporation, and mounted on a car in Ford's assembly plant in Kentucky. The car was sold to an Indiana motorist who, while driving in Indiana, collided with a car driven by another Indiana motorist, the plaintiff. Indiana, but not Kentucky, had a statute of repose that barred the action. While acknowledging Kentucky's strong preference for the *lex fori*, the court concluded that in this case, this preference was not warranted by the forum's contacts or interests and was outweighed by Indiana's "overwhelming interest."

79. *Id.* at 869. *But see id.* at 871 (Matuzak, J., concurring) ("GM's commercial relationship with [North Carolina] is insignificant when compared to its enormous economic presence in Michigan and consequential effect on this state. . . . GM's headquarters and a significant part of its operations are located in Michigan.")

80. Concurring Judge Matuzak saw "no good reason to extend the benefits of the North Carolina statute of repose to defendant," an out-of-state manufacturer, "for . . . wrongs alleged to have been committed in Michigan or Ohio," and pointed out that, because of defendant's enormous presence in Michigan, applying Michigan law "should not defeat defendant's expectations." *Id.* at 871-72 (Matuzak, J., concurring). See also the court's analysis of Florida's statute of repose in a virtually identical case, *Mahne v. Ford Motor Co.*, 900 F.2d 83 (6th Cir. 1990) (discussed *infra* notes 111-112 and accompanying text).

In *Harlan Feeders, Inc. v. Grand Laboratories, Inc.*, the court refused to apply Iowa law, which imposed punitive damages, and applied Nebraska law, which did not allow such damages. 881 F. Supp. 1400, 1402 (N.D. Iowa 1995). The product was manufactured in Iowa and was sold to a Nebraska plaintiff in Nebraska and caused injury there. *Id.* at 1402-03. Said the court:

Nebraska has made a policy choice that punitive damages are inappropriate, and that interest is not outweighed by Iowa's contrary interest in imposing punitive damages as a deterrent, at least not . . . where the plaintiff is a resident of Nebraska, not Iowa, where the alleged injury occurred in Nebraska, not Iowa, as the result of use of a product produced by a South Dakota, not an Iowa, corporation, even when the corporation physically produced the product in Iowa.

*Id.* at 1410.

82. *Id.* at 791.
83. *Id.* at 790-91.
84. *Id.*
85. *Id.* at 791-93.
contrast to the court in *Custom Products, Inc. v. Fluor Daniel Canada, Inc.*, which concluded that Kentucky’s pro-defendant law was not intended to shield Kentucky manufacturers who caused injury outside Kentucky,\textsuperscript{86} the *Rutherford* court reasoned that Kentucky’s statute of limitation was “designed primarily to protect its own citizens or those injured within its boundaries ... [and not to] regulat[e] products assembled within its boundaries.”\textsuperscript{87} The court opined that a certain “federalist concept,” which the court did not define, “inherently limits the reach of any state’s perceived interest to matters which occur within its boundaries or which impact its citizens.”\textsuperscript{88} The court rejected the plaintiff’s plea to choose the law of the place where the product was manufactured or assembled, because such a choice would create practical difficulties in cases in which the design, testing, manufacture, and assembly take place in different states, and because “[l]egal claims do not arise at the time or at the place of manufacture. They arise when an injury occurs. Thus, the place of injury, not the place of manufacture is the central focus of the cause of action.”\textsuperscript{89}

b. Applying the Pro-Plaintiff Law of a Defendant-Affiliated State

One can usefully contrast cases like *Hall* and *Rutherford* with 6 of the 25 inverse conflicts that reached the opposite result.\textsuperscript{90} These cases applied the pro-plaintiff law of a state that was both the manufacturer’s principal place of business and the place of manufacture. The fact that, in all 6 cases, that state was also the forum state means that these cases applied the forum’s pro-plaintiff law for the benefit of a foreign plaintiff at the expense of a forum defendant.

*Gantes v. Kason Corp.* is representative of these cases.\textsuperscript{91} *Gantes* was an action brought by the survivors of a Georgia woman who was killed in Georgia while working with a machine that was manufactured thirteen years earlier in New Jersey by a New Jersey-based corporation.\textsuperscript{92} Georgia’s 10-year statute of repose barred the action, which was timely under New Jersey’s 2-year statute of limitations.\textsuperscript{93}

\begin{footnotes}
\begin{footnotenum}
86. 262 F. Supp. 2d 767, 774-75 (W.D. Ky. 2003); see discussion supra notes 31-40 and accompanying text.
88. *Id.*
89. *Id.* at 792-93.
90. See cases ## 28-32 supra tbl. 3.
92. *Id.* at 107-08.
93. *Id.* at 108.
\end{footnotenum}
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Relying on a Georgia case, the New Jersey court noted that the Georgia statute was designed "to address problems generated by the open-ended liability of manufacturers so as to . . . stabilize products liability underwriting." Assuming that the Georgia statute was "intended only to unburden Georgia courts and to shield Georgia manufacturers," the court concluded that Georgia had no interest in applying that statute, because the defendant was not a Georgia manufacturer, and Georgia courts were not involved in this case. The plaintiffs' Georgia domicile brought into play Georgia's general policy "of fair compensation for injured domiciliaries." The Georgia statute subordinated that policy to the policy of protecting manufacturers, but only in those cases that involved Georgia manufacturers. Because the defendant in this case was not a Georgia manufacturer, Georgia had no real interest in applying its statute.

In contrast, said the court, New Jersey had a "cognizable and substantial interest in deterrence that would be furthered by the application of its statute of limitations." The court noted that the goal of tort law in general and product-liability law in particular is "to encourage reasonable conduct, and, conversely, to discourage conduct that creates an unreasonable risk of injury to others." The court concluded that, because the machine had been "manufactured in, and placed into the stream of commerce from, [New Jersey]," New Jersey had a "strong interest in encouraging the manufacture and distribution of safe products for the public and, conversely, in deterring the manufacture and distribution of unsafe products within the state." The court rejected the lower court's conclusion that this interest in deterrence was outweighed by the possibility of unduly discouraging manufacturing in New Jersey. Thus, by reading the forum's interests in a nonprotectionist way, the court concluded that what might have

94. Id. at 109 (quoting Chrysler Corp. v. Batten, 450 S.E.2d 208, 212 (Ga. 1994)).
95. Id. at 114-15.
96. Id. at 115.
97. Id.
98. Id. at 115-16.
99. Id. at 113. The court described the policies embodied in that statute which, as a result of a judicially-engrafted discovery rule, is permeated by "flexible, equitable considerations based on notions of fairness to the parties and the justice in allowing claims to be resolved on their merits." Id. at 110.
100. Id. at 111.
101. Id. at 111-12.
102. Id. at 112. The court also dismissed the forum-shopping argument because, as shown by the defendant's contacts with the forum state, the plaintiff had legitimate reasons to sue there. Id. at 112-13.
been a no-interest case under Currie’s analysis was in fact a false
conflict in which only the forum state had an interest in applying its
law.

Like the other cases in this group, *Gantes* applied a law that
favored a foreign victim at the expense of a local manufacturer, but did
so not so much for the sake of protecting the foreign victim, but rather
in pursuance of the forum’s own policy of deterring the manufacture of
substandard products within its territory. While some commentators
and some courts have questioned this policy, other courts have
espoused it, including courts sitting in states with defendant-
affiliating contacts. For example, in *Mitchell v. Lone Star
Ammunition, Inc.*, the court concluded that Texas had a “substantial
interest” in applying its pro-plaintiff law “as an incentive to encourage
safer design and to induce corporations to control more carefully their
manufacturing processes.” In *McLennan v. American Eurocopter
Corp.*, the court concluded that Texas had a strong interest in enforcing
its strict product-liability law against manufacturers operating in that
state, while noting that the application of that law did not impose an
unexpected burden on a Texas-based manufacturer. In *DeGrasse v.
Sensenich Corp.*, the court concluded that applying Pennsylvania law,
which favored an Arkansas plaintiff at the expense of a Pennsylvania

103. *See, e.g.*, Kozyris, *supra* note 22, at 500-01 (stating that (1) “[the assumption] that
imposing the stricter standards of the state of production to the out-of-state distribution and
harm may indirectly improve the in-state component as well . . . is . . . questionable in its logic
of prohibiting what should be lawful to deter what is unlawful”; (2) that “a purported ‘moral’
concern of the state of production about local activities which endanger people worldwide . . .
is [also] not persuasive”; and (3) “[p]refer[ing] the law of the state of production over those of
distribution, harm and personal connections of the parties would be inconsistent with
considerations both of allocating sovereign authority and of fairness to the parties”).

(C.D. Cal. Nov. 17, 1997) (discussed *supra* note 76); Hall v. Gen. Motors Corp., 582 N.W.2d

105. In the cases discussed in the text, see, for example, *Lewis-DeBoer v. Mooney Aircraft Corp.*, 728 E. Supp. 642, 643-45 (D. Colo. 1990) (discussed *infra* notes 128-130 and accompanying text) (concluding that Texas, as the place of the defendant’s
conduct and principal place of business, “ha[d] a greater policy interest in applying its laws
and providing deterrence than Colorado ha[d] in preventing a windfall to its citizens.”
Colorado was the victim’s home state and place of injury).

106. 913 F.2d 242, 250 (5th Cir. 1990) (applying Texas law and allowing an action
against a defendant who manufactured the product in Texas in an action brought by foreign
plaintiffs and arising from injury that occurred in a state whose statute of repose would bar
the action).

107. 245 F.3d 403, 425-26 (5th Cir. 2001) (deciding the case under Texas conflicts law
and applying Texas pro-plaintiff law to an action of a Canadian domiciliary injured in Canada
by a product manufactured by a Texas manufacturer in Texas).
manufacturer, was in line with Pennsylvania’s interests because “Pennsylvania’s policy involves the attainment of broader objectives than simply ensuring full recovery for its domiciliary plaintiffs . . . [such as] deterring the manufacture of defective products by, and assigning responsibility for such an activity to, Pennsylvania manufacturers.”108 Finally, in *Lacey v. Cessna Aircraft Co.*, the court concluded that the application of Pennsylvania’s strict liability law to a case involving a product that was manufactured in Pennsylvania and caused injury in British Columbia would “further Pennsylvania’s interest in deterring the manufacture of defective products . . ., but would not impair British Columbia’s interest in fostering industry within its borders.”109

Even more numerous are the cases in which, without expressly articulating this policy, the courts allowed claims against a forum manufacturer that were barred by the statute of repose of the other, plaintiff-affiliated, state. They did so either by characterizing the foreign statute as procedural, or by concluding, as *Gantes* did, that the foreign repose statute was not intended to protect forum manufacturers.110 Thus, in *Mahne v. Ford Motor Co.*, the court concluded that Florida’s statute of repose was intended to protect Florida manufacturers, not Michigan manufacturers such as the ones involved in this case.111 The latter “cannot argue that applying Michigan law would defeat their expectations,” said the court, and “[t]hus, there is simply no reason to extend the benefits of the Florida statute of repose to the Michigan defendants.”112

110. See Baxter v. Sturm, Ruger & Co., 644 A.2d 1297, 1302 (Conn. 1994) (holding that, under Connecticut’s characterization standards, Oregon’s statute of repose was procedural and thus did not bar a Connecticut action that was timely under Connecticut’s statute of limitation and was filed by an Oregon plaintiff against a Connecticut gun manufacturer for injury caused by the gun in Oregon).
112. Id.; see also Marchesani v. Pellerin-Milnor Corp., 269 F.3d 481, 484, 493 (5th Cir. 2001) (applying Louisiana’s statute of limitations and allowing a products liability action that was barred by Tennessee’s statute of repose; the action was brought against a Louisiana manufacturer by a Tennessee domiciliary who was injured in Tennessee by a product manufactured in Louisiana); Dabbs v. Silver Eagle Mfg. Co., 779 F.2d 1104 (Or. Ct. App. 1989) (hearing an action by a Tennessee resident injured in Tennessee by a product acquired there and manufactured in Oregon by an Oregon-based defendant; concluding that Tennessee had no interest in applying its shorter statute of limitation barring the action, because no Tennessee defendant was involved in this case; and applying Oregon’s longer statute of limitation, permitting the action). In *Davis v. Shirley, Inc.*, Oregon, the place of the victim’s domicile and injury, had a statute of repose barring the action, whereas California, the state of...
B. Cases in Which Two Plaintiff-Affiliating Contacts Were in the Same State

In the cases discussed in Subpart A, all 3 plaintiff-affiliating contacts were congregated in 1 state, while the 2 defendant-affiliating contacts were in one or 2 other states. Subpart B discusses cases in which only 2 of the 3 plaintiff-affiliating contacts were in the same state, while the remaining 3 contacts were in one or more other states. Under a quantitative significant-contacts or Restatement (Second) of Conflict of Laws (1971) analysis, one can easily conclude that the state with the 3 plaintiff-affiliating contacts has a more significant relationship to the cause of action than the state or states with the 2 defendant-affiliating contacts. One would expect that such a conclusion would be more difficult to derive in cases in which the first state has only 2 plaintiff-affiliating contacts. However, as the following discussion indicates, most courts confronted with such cases have not acknowledged this difficulty. Indeed, more than two-thirds of the 37 cases that belong to the latter group (25, or 68%) applied the law of the state that had the 2 plaintiff-affiliating contacts. Lest one mistake this for a pro-plaintiff tilt, it should be noted that in almost two-thirds of the 25 cases (16, or 64%), that state had a pro-defendant law.

1. Plaintiff’s Domicile and Injury

In thirteen cases, the plaintiff’s domicile and injury were in the same state, while the other 3 contacts were in another state or states. The first 8 of those cases applied the law of the state with the 2 plaintiff-affiliating contacts. The first 3 of those cases, Smith v. DaimlerChrysler Corp., R-Square Investments, Inc. v. Teledyne Industries, Inc., and Allstate Insurance Co. v. Wal-Mart, fell within manufacture and defendant’s principal place of business, did not. 75 Cal. Rptr. 2d 826, 828 (Cal. Ct. App. 1998) (unpublished opinion). The court allowed the action after finding the Oregon statute inapplicable because of Oregon’s lack of interest in applying it to protect a foreign manufacturer at the expense of an Oregon domiciliary. Id. at 830-31.

113. See cases ## 34-69 supra tbl. 3.
114. See cases ## 34-46 supra tbl. 3.
115. No.CIVA.94c-12-002JEB, 2002 WL 31814534, at *1 (Del. Super. Ct. Nov. 20, 2002) (unpublished opinion) (deciding a case under Restatement (Second) of Conflict of Laws (1971); applying Delaware’s pro-plaintiff law to a Delaware plaintiff’s action against a Maryland dealer and a Michigan manufacturer arising out of an accident in Delaware).
the direct conflict pattern in that the state with the plaintiff-affiliating contacts had a pro-plaintiff law, while the state with the defendant-affiliating contacts had a pro-defendant law. All 3 cases applied the pro-plaintiff law of the former state. In all 3 cases the product was commercially available in that state, thus negating any argument of unfair surprise on the defendant’s part. In Smith, the court took note of the fact that the Maryland defendant, who was located “a few miles from the Delaware line,” knowingly sold the product to a Delaware domiciliary and “[could] not reasonably expect to be subject only to the laws of Maryland.”

The remaining 10 cases presented the inverse conflict pattern in that the state with the plaintiff-affiliating contacts had a pro-defendant law, while the state with the defendant-affiliating contacts had a pro-plaintiff law. Five of these cases applied the pro-defendant law of the plaintiff-affiliated state. These cases were decided under the Restatement (Second) of Conflict of Laws (1971) approach, a significant-contacts approach, or other approaches that did not consider state interests. One case, Denman v. Snapper Division, was


118. 2002 WL 31814534, at *1.

119. See cases #37-41 supra tbl. 3.

120. See McKinnon v. F.H. Morgan & Co., 750 A.2d 1026 (Vt. 2000). In this case, the plaintiff, a Quebec domiciliary, was injured in Quebec while riding a bicycle sold and serviced by the defendant in Vermont. Id. at 1027. The plaintiff invoked Vermont’s pro-plaintiff law, but was apparently unp repaid to rebut the presumption of Restatement (Second) of Conflict of Laws section 146 (1971) in favor of the place of injury, Quebec. See id. at 1029. The court applied the law of Quebec because, in addition to being the place of injury, Quebec was also the plaintiff’s domicile and Vermont did not have more significant contacts. Id. at 1029-31.

121. See Land v. Yamaha Motor Corp., U.S.A., 272 F.3d 514, 516-17 (7th Cir. 2001) (applying Indiana’s significant-contacts approach). This case involved an action by an Indiana domiciliary injured in Indiana by a product manufactured in Japan by a Japanese manufacturer. Id. at 515-16. The product was sold through a Kentucky dealer to an Indiana domiciliary who, many years later, sold it to another Indiana domiciliary. Id. at 516. The court applied Indiana’s statute of repose, barring the action, because Indiana’s approach allowed departure from the lex loci delicti only when the locus delicti had an “insignificant” relationship to the lawsuit. Id. at 516-17. The court found that Indiana’s relationship was not insignificant because Indiana was the place of the injury, the domicile of the victim as well as of the product’s owner, and the place where the product had been used for more than a decade. Id. at 517.

decided under a presumptive *lex loci* rule. In this case, a Mississippi domiciliary purchased in Mississippi a lawn mower that he later lent to his son, who used it in North Carolina and was injured there. The plaintiff’s action in Mississippi was timely under that state’s statute of limitation, but was barred by North Carolina’s statute of repose. The court noted that under Mississippi conflicts law, “the law of the place of injury is presumed to apply unless another state has a more significant relationship.” The court concluded that the sale of the mower in Mississippi was “an insufficient basis for finding that Mississippi ha[d] a more significant relationship than North Carolina,” and that “the fact that the mower entered the stream of commerce in Mississippi [did] not tip the balance in favor of applying Mississippi law.”

Of the remaining 5 cases, 3 cases, *Magnant v. Medtronic, Inc.*, *Champlain Enterprises, Inc. v. United States*, and *Lewis-DeBoer v. Mooney Aircraft Corp.*, applied the pro-plaintiff law of the state with

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123. 131 F.3d 546, 547 (5th Cir. 1998).
124. Id. The defendant, a Georgia-based corporation, had manufactured the mower in Georgia, but neither party urged the application of Georgia law. See id. at 547-48.
125. Id. at 548.
126. Id. at 550.
128. 818 F. Supp. 204 (W.D. Mich. 1993). *Magnant* applied Minnesota’s pro-plaintiff strict-liability law to an action of a Michigan plaintiff against a Minnesota manufacturer for an injury sustained in Michigan and caused by a defect in one of defendant’s heart pacemakers designed, manufactured, and implanted in plaintiff in Minnesota. Id. at 207. The court noted that the defendant “cannot complain that application of Minnesota law is unfair or contrary to its expectations,” and that Michigan, which did not impose strict liability, would have no objections either “because [plaintiff] would receive more rights under Minnesota law than under Michigan law.” Id.
129. 945 F. Supp. 468, 471-74 (N.D.N.Y. 1996) (involving an action for recovery of pure economic loss filed by a New York plaintiff whose plane crashed in New York, against a Kansas defendant who manufactured the plane in Kansas; applying Kansas’ pro-plaintiff law, but holding for defendant on the merits; and noting that in cases involving mobile products, such as airplanes, the place of injury is fortuitous).
130. 728 F. Supp. 642, 643-45 (D. Colo. 1990) (considering an action by Colorado plaintiffs against the Texas manufacturer of a small airplane that crashed in Colorado, killing its Colorado passengers; aside from punitive damages, which were permitted in Texas but not in Colorado, Texas law was generally more generous to the plaintiff with regard to compensatory damages and the burden of proof; after dismissing as fortuitous the occurrence
the defendant-affiliating contacts. The *Lewis-DeBoer* court noted that the latter state had a greater interest in providing deterrence than the other state had in preventing a windfall to its citizens,\(^\text{131}\) while the *Magnant* court noted that the defendant could not complain against the application of the laws of its home state.\(^\text{132}\)

Finally, the last 2 cases, *Sanchez* ex rel. *Estate of Galvan v. Brownsville Sports Center, Inc.*\(^\text{133}\) and *Long v. Sears Roebuck & Co.*\(^\text{134}\) applied the pro-plaintiff law of the state in which the victim acquired the product, even though that state had no other contacts with the case. In *Sanchez*, the product in question, an all-terrain vehicle (ATV), was manufactured by the Japanese defendant in Japan, sold through a Texas dealer, and then resold secondhand to plaintiff in Mexico, nine years later.\(^\text{135}\) The plaintiffs’ child was killed while driving the vehicle in Mexico.\(^\text{136}\) The defendant argued for the application of Mexican law, which limited compensatory damages and favored the defendant in other respects, while the plaintiff invoked the law of Texas, which provided for strict liability and more generous compensatory damages.\(^\text{137}\)

Following sections 145 and 6 of the *Restatement (Second) of Conflict of Laws* (1971), the court held that Texas law should govern.\(^\text{138}\) The court implicitly concluded that Mexico’s interest in protecting defendants by limiting the amount of damages was attenuated in this case that involved non-Mexican defendants, at least when compared to Texas’ countervailing interest resulting from the fact that Texas was the place where the particular product was first introduced into the stream of commerce.\(^\text{139}\) The court reasoned that, by adopting strict products liability laws, Texas had “expressed a clear interest in protecting its consumers and in regulating the quality of products in its stream of commerce,” and that, although the ATV eventually ended up in Mexico, “the key factor is that the ATV was originally placed in the

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\(^{131}\) *Id.* at 646.

\(^{132}\) *See* discussion *supra* note 128.


\(^{135}\) *Sanchez*, 51 S.W.3d at 652.

\(^{136}\) *Id*.

\(^{137}\) *Id.* at 667-68.

\(^{138}\) *Id.* at 668.

\(^{139}\) *Id.* at 670.
stream of commerce in Texas. This gave Texas a “strong interest” to apply its law “as an incentive to encourage safer design and to induce corporations to control more carefully their manufacturing processes."

Long involved the same pattern and reached the same result. However, the case also involved the issue of punitive damages, and to that extent the outcome is more difficult to defend. In Long, the plaintiff was injured in his home state of Maryland by a lawn mower he bought from the defendant in the District of Columbia. As in Sanchez, the defendant invoked the pro-defendant law of the state of injury, Maryland, but not the law of the state of manufacture, South Carolina. The court concluded that Maryland law, which limited noneconomic damages and did not allow punitive damages, was not intended to protect foreign defendants who neither conducted business in Maryland nor engaged in conduct there. In contrast, said the court, the District of Columbia had an interest in deterring and punishing, through unlimited compensatory and punitive damages, defendants who engage in reprehensible conduct in the District by selling unsafe products there and misrepresenting the products’ safety features.

2. Victim’s Domicile and Product Acquisition

In nine cases, the injury occurred outside the victim’s home state but the product was acquired in that state. In these cases, the parties did not plead the law of the state with the defendant-affiliating contacts. Thus, the choice was confined between the law of the state of the plaintiff’s domicile and the product’s acquisition on the one hand, and the state of injury on the other.

Seven of the 9 cases applied the law of the former state. In the first 3, Etheredge v. Genie Industries, Inc., Alexander v. General Motors Corp., and Ford Motor Co. v. Aguiniga, that law favored

140. Id at 669-70.
141. Id at 670 (quoting Mitchell v. Lone Star Ammunition, Inc., 913 F.2d 242, 250 (5th Cir. 1990)).
143. Id at 10.
144. Id.
145. Id at 10-11.
146. Id at 11.
147. Id at 11-12.
148. See cases ## 47-55 supra tbl. 3.
149. 632 So. 2d 1324 ( Ala. 1994) (per curiam).
150. 478 S.E.2d 123 (Ga. 1996).
the plaintiff. Ironically, Etheredge and Alexander were decided in states following the *lex loci delicti* rule, which ordinarily would lead to the opposite result. Etheredge avoided the pro-defendant statute of repose of the *locus* state by characterizing it as procedural, thus freeing the court to apply the statute of limitation of the forum state. Alexander used the *ordre public* exception as the device for avoiding the pro-defendant negligence rule of the *locus* state of Virginia. Thus, the court was free to apply the pro-plaintiff strict-liability rule of the forum state of Georgia, which was also the plaintiff's domicile and the place where the plaintiff acquired the car that was later involved in the Virginia accident. A dissenting judge in the court of appeals offered affirmative and more realistic reasons for applying Georgia law, by pointing out that Georgia had an interest in protecting Georgia consumers who acquire in Georgia products marketed in that state. Since the defendant had made the car available for sale in Georgia, Georgia's "policy of placing the 'burden on the manufacturer who markets a new product to take responsibility for injury to members of the consuming public for whose use and/or consumption the product is made'" was implicated in this case, even though the actual injury had fortuitously occurred in Virginia.

In the next 4 cases, the law of the plaintiff's home state and place of acquisition favored the defendant, while the law of the state of injury favored the plaintiff. All 4 of these cases applied the law of the former state, and in 3 of them that law favored a foreign defendant at the expense of a forum victim.

151. 9 S.W.3d 252, 259-61 (Tex. App. 1999) (applying Texas's unlimited compensatory damages law to an action by Texas domiciliaries arising from a Mexico accident involving a car acquired by plaintiffs in Louisiana but inspected in Texas. The defendants invoked Mexico's ceiling on damages, but did not invoke the law of the state of manufacture, apparently because that law did not impose such a ceiling).

152. 632 So. 2d at 1326-27. In Etheredge, the plaintiff's domicile and place of acquisition were in Alabama, which had a statute of limitation favoring the plaintiff, while the place of injury was in North Carolina, which had a statute of repose favoring the defendant. *Id.* at 1325-27. The opinion does not disclose the place of manufacture or the defendant's principal place of business. See *id.* at 1324-27.


154. *Id.* at 124.


156. *Id.* at 608, 613 (quoting Robert F. Bullock, Inc. v. Thorpe, 353 S.E.2d 340, 841 (Ga. 1987)).

157. See cases ## 50-53 supra tbl. 3.

158. In the fourth case, Botti v. Ford Motor Co., 898 F. Supp. 391 (S.D. Miss. 1995), aff'd without opinion, 85 F.3d 625 (5th Cir. 1996), none of the states affiliated with either the plaintiff or the defendant had a pro-plaintiff law. The forum state of Mississippi had a pro-
In Maly v. Genmar Industries, Inc., an Illinois plaintiff was injured in Wisconsin by a product he purchased in Illinois.\textsuperscript{159} Unlike Wisconsin, the forum state of Illinois had a statute of repose barring the action.\textsuperscript{160} The manufacturer was a Florida corporation, but the court did not mention the place of manufacture, apparently because of the court’s conclusion that the critical conduct was “the placement of a defective product in the stream of commerce,” which occurred in Illinois.\textsuperscript{161} Confining its analysis to the policies of Illinois and Wisconsin, the court found them irreconcilable.\textsuperscript{162} Illinois’ policy was “pro business: to reduce the cost to manufacturers and distributors of doing business in Illinois by cutting legal costs caused by old strict liability lawsuits which are particularly difficult to defend due to loss of witnesses, poor record keeping, and changes in legal and technical standards on products.”\textsuperscript{163} Wisconsin’s policy, on the other hand, “favors consumers over manufacturers, and apparently does not view proliferating products liability litigation a sufficient reason to deny consumers a cause of action in strict liability for injuries resulting from defective old products.”\textsuperscript{164} After examining the contacts of the 2 states, the court concluded that Illinois had the most significant relationship, because “[t]he conduct complained of happened in Illinois to an Illinois resident and the relationship of the parties occurred in Illinois.”\textsuperscript{165} Thus, the court concluded, “[t]here is no reason to rank Illinois’ pro-business tort policy as less significant than Wisconsin’s pro-consumer policy.”\textsuperscript{166}

In Garcia v. General Motors Corp., the plaintiffs were Arizona domiciliaries who had an accident in Idaho while riding in a car they

\textsuperscript{159} No. 94 C 3611, 1996 WL 28473, at *1 (N.D. Ill. Jan. 23, 1996).
\textsuperscript{160} Id.
\textsuperscript{161} Id. at *2.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
rented in Arizona.\textsuperscript{167} The car was manufactured in Michigan by a Michigan defendant, but the parties did not plead Michigan law.\textsuperscript{168} Thus, the conflict was between the laws of Idaho, which did not allow evidence that the plaintiff was not wearing a seatbelt, and Arizona, which permitted such evidence.\textsuperscript{169} The court held that Arizona had an interest “in encouraging its residents to wear seatbelts even outside its borders, as injuries resulting from not using seatbelts may well require medical care upon the residents’ return to Arizona.”\textsuperscript{170} The court also reasoned that it would be “incongruous to allow Idaho’s desire to ‘fully’ compensate nonresident Arizona plaintiffs to control in an Arizona court, when Arizona courts would permit the jury to consider whether to reduce the recovery of Arizona plaintiffs who fail to wear seatbelts.”\textsuperscript{171}

Finally, 2 cases applied the law of the state of injury. One of these cases, \textit{Fitts v. Minnesota Mining & Manufacturing Co.}, was decided under the \textit{lex loci delicti} rule, and thus the outcome was entirely predictable.\textsuperscript{172} The other case, \textit{Martin v. Goodyear Tire & Rubber Co.}, was decided under the \textit{Restatement (Second) of Conflict of Laws} (1971).\textsuperscript{173} However, in \textit{Martin}, unlike most of the other cases in this Part, the fact that the product was acquired in the victim’s home state was totally coincidental.\textsuperscript{174} The acquirer was a truck driver unrelated to the victim, but domiciled in Oregon, the same state as the victim.\textsuperscript{175} The product was a wheel assembly that the truck driver

\begin{itemize}
\item \textsuperscript{167} 990 P.2d 1069, 1071-72 (Ariz. Ct. App. 1999).
\item \textsuperscript{168} \textit{Id.} at 1076.
\item \textsuperscript{169} \textit{Id.} at 1075.
\item \textsuperscript{170} \textit{Id.} at 1078.
\item \textsuperscript{171} \textit{Id.} In \textit{Thornton v. Sea Quest, Inc.}, the action was filed in Arkansas, transferred to Indiana, and decided under the conflicts law of both states. 999 F. Supp. 1219, 1220-21, 1227 (N.D. Ind. 1998). The victim, an Indiana domiciliary, bought scuba diving equipment that was manufactured in France and sold in Indiana by a California manufacturer and distributor. \textit{Id.} at 1200. The victim died in Arkansas while using the equipment. \textit{Id.} The issue was wrongful death recovery, and Arkansas law was more favorable to plaintiffs than Indiana law. \textit{See id.} at 1224. Neither party pleaded French or California law. The court held that Indiana law should govern because Indiana had a more significant relationship than Arkansas, as well as “a strong interest in preventing the sale of supposedly defective products within its borders.” \textit{Id.}
\item \textsuperscript{172} 581 So. 2d 819, 819-24 (Ala. 1991) (applying the pro-defendant law of Florida to a products liability action arising from the crash of a small airplane in Florida that caused the death of Alabama domiciliaries. The court did not mention the state of the manufacture of the airplane or of a suspect instrument).
\item \textsuperscript{173} 61 P.3d 1196, 1198-99 (Wash. Ct. App. 2003).
\item \textsuperscript{174} \textit{Id.} at 1199.
\item \textsuperscript{175} \textit{Id.}
\end{itemize}
installed on his truck in Oregon. While the truck was driven in the state of Washington, a metal ring separated from the assembly and struck and killed an Oregon domiciliary who was riding in another car. Oregon's, but not Washington's, statute of repose barred the plaintiff's action against the manufacturer of the assembly. The court applied the Washington statute. Noting that the Oregon statute was intended to protect Oregon defendants, the court concluded that "Washington's interest in protecting persons from injuries from defective products within its borders outweighs Oregon's interest in protecting a [non-Oregon] manufacturer whose product arrives in Oregon through the stream of commerce and subsequently causes injury to a third party in another state."

3. Injury and Product Acquisition

In 14 of the 80 cases, the injury occurred outside the plaintiff's home state, but the product was acquired in the state of injury, either by the victim's employer or by the victim while temporarily in that state. In most of these cases, the parties did not plead the laws of the states of manufacture or the manufacturers' principal place of business. Thus, the courts' choice was confined between the laws of the victim's home state, on the one hand, and the state of injury and the product's acquisition, on the other.

The first 10 of these cases applied the law of the former state. That law favored the plaintiff in 2 cases and the defendant in the remaining 8 cases. In Roll v. Tracor, Inc., the plaintiff, a New York serviceman, was injured at a military base in Nevada by countermeasure flares acquired by the base authorities in Nevada and

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176. Id.
177. Id. at 1197.
178. Id. at 1200.
179. Id. at 1202.
180. Id. at 1201.
181. See cases #56-69 supra tbl. 3.
182. See Roll v. Tracor, Inc., 140 F. Supp. 2d 1073 (D. Nev. 2001) (discussed infra note 183-190 and accompanying text); Johnson v. Ranch Steamboat Condo. Ass'n, No. 95 C 7562, 1999 WL 184068 (N.D. Ill. Feb. 2, 1999). In Johnson, a Kansas domiciliary was injured in Colorado by a product acquired in Colorado and manufactured in Illinois. 1999 WL 184068 at *1. Colorado law favored the plaintiff, and Illinois law favored the defendant. Id. at *1-*2. Following the Restatement (Second) of Conflict of Laws (1971), the court acknowledged Illinois' interest in protecting Illinois corporations that manufacture products in that state, but concluded that Colorado's interest in protecting consumers injured in that state by products sold there was more compelling. Id. at *2.
manufactured in Texas by a Texas manufacturer. The laws of these states differed on the issue of corporate successor liability, with Nevada and New York laws favoring the plaintiff and Texas law favoring the defendant. The court classified this as a true conflict between the law of Texas, on the one hand, and the laws of New York and Nevada on the other. Texas had an interest in applying its rule of successor nonliability, because both the defendant and its predecessor corporation had their principal place of business in Texas. However, New York had an equal interest in applying its successor-liability rule so as to provide a remedy to its injured domiciliary, while Nevada had a parallel interest in applying its successor-liability rule so as to provide a remedy to a person injured within its borders.

The court concluded that the defendant did not rebut the presumption in favor of the law of the place of injury because the occurrence of the injury in Nevada was not fortuitous and the contacts with Nevada were not insignificant. The plaintiff was stationed in Nevada for some time and, more important, the defendant’s products were used in Nevada’s multiple military bases for many years, thus making foreseeable the occurrence of the injury in that state and the application of that state’s law. The court reasoned:

It would be unreasonable for [defendant] to expect that Texas law would automatically shield it from successor liability in every state in the Union. It would be unjust to allow a corporation to escape liability and leave potential plaintiffs without a remedy by simply giving itself a reorganizational facelift, and at the same time carry on the same business and manufacture the same product while using the same name, the same plant, and the same personnel.

In the next 8 cases, the state of injury and place of the product’s acquisition had a pro-defendant law. All 8 cases applied that law, although in all but 1 of them (Cianfrani v. Kalmar-AC Handling Systems, Inc.), that law disfavored a forum victim and favored a

183. 140 F. Supp. 2d at 1075-76. This action, which was originally filed in New York and then transferred to Nevada, was decided under New York conflicts law. Id.
184. Id. at 1080-82.
185. See id. at 1080. The court also characterized the successor-liability issue as one of tort law and specifically as one pertaining to loss-allocation rather than conduct-regulation. Id. at 1079.
186. Id. at 1080-81.
187. Id. at 1082.
188. Id. at 1083.
189. Id.
190. Id.
191. See cases #58-65 supra tbl. 3.
nonforum defendant.\textsuperscript{192} In \textit{Romani v. Cramer, Inc.}, the victim was domiciled in Massachusetts, but was employed in Connecticut and was injured there while using a chair supplied by his employer.\textsuperscript{193} The chair had been manufactured by a Kansas corporation, apparently in Kansas, but neither party urged the application of Kansas law.\textsuperscript{194} Unlike Massachusetts, Connecticut had a statute of repose barring the plaintiff’s action.\textsuperscript{195} The court found that the victim’s domicile in Massachusetts did not give that state a sufficient interest “to override Connecticut’s superior interest on all other fronts.”\textsuperscript{196} Connecticut’s interest was superior because “Connecticut enacted its statute [of repose] to protect manufacturers from liability for products whose useful lives have expired . . . [and to] encourage[] manufacturers to freely sell products within its borders.”\textsuperscript{197} The court also noted that, as the place of the injury, Connecticut was the state whose law presumptively applied under \textit{Restatement (Second) of Conflict of Laws} section 146 (1971), unless another state had a more significant relationship.\textsuperscript{198} The court found that Massachusetts did not have such a relationship.\textsuperscript{199}

\textsuperscript{192} In addition to the cases discussed in the text, these cases are: \textit{Allison v. ITE Imperial Corp.}, 928 F.2d 137 (5th Cir. 1991) (applying Mississippi conflicts law, as well as Tennessee’s statute of repose, rather than Mississippi’s statute of limitation, and barring the action of a Mississippi plaintiff for a Tennessee injury caused by a defective electrical circuit breaker sold and installed in Tennessee, but manufactured by a Pennsylvania-based defendant in Pennsylvania. The court did not describe Pennsylvania law); \textit{Tanges v. Heidelberg North America, Inc.}, 687 N.Y.S.2d 604 (N.Y. 1999) (applying Connecticut’s statute of repose barring an action brought by a New York domiciliary injured by a printing press while working for his employer in Connecticut); \textit{Gadzinski v. Chrysler Corp.}, No. 00-C6229, 2001 WL 629336, at *2 (N.D. Ill. May 29, 2001) (applying Indiana’s pro-defendant law to an action by an Illinois plaintiff who was injured in Indiana by a product he purchased from an Indiana dealer); \textit{Schmidt v. Duo-Fast, Inc.}, CIV.A.No.94-6541, 1995 WL 422681, at *1 (E.D. Pa. July 11, 1995) (applying New Jersey pro-defendant law to the claim of a Pennsylvania worker injured in a New Jersey construction accident caused by a tool purchased from Pennsylvania but shipped directly to New Jersey: “[T]he accident happened in New Jersey and ‘departures from the territorial view of torts ought not to be lightly undertaken.’” (quoting Cipolla v. Shaposka, 267 A.2d 854, 857 (Pa. 1970))); and \textit{Calhoun v. Yamaha Motor Corp. U.S.A.}, 216 F.3d 338, 345-48 (3d Cir. 2000) (involving an action by Pennsylvania plaintiffs for injuries they sustained in Puerto Rico while using a rented Japanese-made watercraft and holding that plaintiffs’ claims for punitive damages were governed by Puerto Rico law (which does not allow such damages) because “Puerto Rico’s interest in regulating the activity that occurs in its territorial waters . . . is more dominant”).

\textsuperscript{194} \textit{Id.} at 78.
\textsuperscript{195} \textit{Id.} at 76.
\textsuperscript{196} \textit{Id.} at 79.
\textsuperscript{197} \textit{Id.} at 78.
\textsuperscript{198} \textit{Id.}
\textsuperscript{199} \textit{Id.} at 78-79.
In *LeJeune v. Bliss-Salem, Inc.*, a Pennsylvania court refused to apply the strict-liability law of the victim's home state of Pennsylvania, and applied instead the negligence law of Delaware, which was the place of the accident and the place of the product's acquisition.200 The court compared Pennsylvania's interest in "protect[ing] its citizens from defective products," with Delaware's interest in "encouraging economic activity in the state . . . and lowering costs to consumers."201 The court concluded that, because most of the conduct had occurred in Delaware and the occurrence of the injury in that state was not fortuitous, Delaware's contacts were "qualitatively" more important and thus "Delaware ha[d] the greater interest in having its law applied."202

Similarly, in *Cianfrani v. Kalmar-AC Handling Systems, Inc.*, a New Jersey court refused to apply the strict-liability law of Pennsylvania, the plaintiff's home state, and instead applied Delaware's negligence law to an action arising from an accident in the plaintiffs' Delaware employment site.203 The accident was caused by a defective forklift leased by plaintiff's employer in Delaware.204 Although recognizing Pennsylvania's interest in protecting its domiciliary plaintiff, the court held that, because this case involved a question of liability rather than damages, Delaware had a greater interest "in defining the circumstances under which people who do business in or ship goods to Delaware will be exposed to liability."205

*Beals v. Sicpa Securink Corp.*206 and *Cosme v. Whitin Machine Works, Inc.*207 did not apply the law of the state of injury and acquisition, apparently because all the other contacts, plaintiff's domicile, defendant's principal place of business and place of manufacture, were in one other state and the defendant pleaded the law of that state. In *Cosme*, the plaintiff, a Massachusetts domiciliary, was injured in Connecticut while using machinery that the defendant, a Massachusetts corporation, had manufactured in Massachusetts and had delivered to the plaintiff's employer in Connecticut.208

200. 85 F.3d 1069, 1071-72 (3d Cir. 1996).
201.  Id.
202.  Id.
204.  Id. at *2.
205.  Id. at *6.
207.  632 N.E.2d 832 (Mass. 1994).
208.  Id. at 833.
Connecticut's statute of repose barred the action, which was timely under Massachusetts' statute of limitation. The court concluded that, despite Connecticut's characterization of its repose statute as procedural, statutes of repose are substantive, and that Massachusetts had a more significant relationship and a greater interest in applying its law than did Connecticut. The court noted that Connecticut's characterization of its repose statute as procedural indicated that Connecticut had "a diminished expectation of having it apply in other jurisdictions."

The remaining 2 cases, Calhoun v. Yamaha Motor Corp., U.S.A. and La Plante v. American Honda Motor Co., applied the pro-plaintiff law of the state of injury. Calhoun is defensible in the sense that the same case applied the pro-defendant law of the state of injury to the issue of punitive damages which were much more consequential for the defendant. However, La Plante is entirely indefensible. In this case, which was decided under Rhode Island's better-law approach, a Rhode Island domiciliary who was stationed in Colorado was injured in Colorado by a Honda all-terrain vehicle he acquired in that state. Colorado, but not Rhode Island, limited compensatory damages to $250,000. The court assumed that the purpose of this limit was "to increase the affordability and availability of insurance by making the risk of insured entities more predictable . . . [and] improve the predictability of risks faced by insurance companies." However, said the court, "[t]he concern of an insurance company is the risk associated with insuring each individual insured, not with denying an injured person damages that may be paid by

209. Id. at 836.
210. Id.
211. Id.
212. 216 F.3d 338, 345-48 (3d Cir. 2000) (applying Pennsylvania's pro-plaintiff comparative negligence law to an action against a Japanese manufacturer arising from an accident in Puerto Rico that resulted in the death of a Pennsylvania child). The court also refused to award punitive damages, which were allowed by Pennsylvania but not Puerto Rico law. See discussion supra note 192.
213. 27 F.3d 731, 740-43 (1st Cir. 1994) (applying Rhode Island conflicts law).
214. See discussion supra notes 192, 212.
215. La Plante, 27 F.3d at 741-43. While stating that the better-law criterion did "not weigh heavily in either state's direction," the court opined that the Rhode Island Supreme Court would "undoubtedly favor a compensatory damage standard without limits." Id. at 743. The plaintiff acquired the vehicle in Colorado. Id. at 734. The vehicle had been designed and manufactured in Japan by a Japanese corporation. Id. at 741 n.6. The defendant did not plead the law of Japan, but did plead the law of Colorado. Id. at 740.
216. Id. at 740 n.5.
217. Id. at 743 (internal quotations omitted) (quoting Gen. Elec. Co. v. Niemel, 866 P.2d 1361, 1364 (Colo. 1994) (en banc)).
another insurance company or person." Consequentely, the court concluded, there was "no reason why the Colorado legislature would be concerned with the affordability of insurance to a multinational Japanese corporation." After noting that defendant sold its products in all 50 states, the court observed that "Colorado's damages law plays, at best, an insignificant role in setting [defendant's] insurance rates" and that defendant had not "ceased doing business in any state because of a failure by that state to limit the amount of damages a plaintiff may recover." The court applied Rhode Island law.

C. The Rest of the Cases

Of the remaining 11 cases, no 2 cases are alike. Most of these cases present the mixed conflict pattern in that the plaintiff-affiliating contacts were located in different states, some of which had a pro-plaintiff law while others had a pro-defendant law.

In the first 4 cases, the parties did not plead the law of the plaintiffs' domiciles and confined their arguments to either the laws of the state of injury on the one hand, or the defendant-affiliated states on the other. In both Torrington Co. v. Stutzman and Mitchell v. Lone Star Ammunition, Inc. the products were acquired in the state of manufacture, and both cases applied the pro-plaintiff law of that state. In Mitchell, the product was manufactured and sold in Texas by defendants who had their principal places of business in Maryland and California, respectively. The plaintiffs were the survivors of Kentucky and New Mexico servicemen who were killed in North Carolina by defendants' defective munitions. North Carolina, but not Texas, had a statute of repose barring the plaintiffs' actions. The court concluded that North Carolina did not have an interest in applying its statute to protect foreign manufacturers and to deprive of a remedy persons injured in that state. In contrast, the court concluded.

218. Id. (quoting Gen. Elec., 866 P.2d at 1365).
219. Id.
220. Id.
221. Id.
222. See cases 70-80 supra tbl. 3.
223. 46 S.W.3d 829, 848-50 (Tex. 2000) (applying Texas pro-plaintiff compensatory damages law to an action filed against a Texas-based corporation that manufactured a helicopter in Texas; the place of injury and the victims' domiciles were in 3 different states).
224. 913 F.2d 242 (5th Cir. 1990).
225. Id. at 249.
226. Id. at 244.
227. Id. at 249-50.
228. Id. at 250.
that Texas had a substantial interest in encouraging the manufacture of safe products. This interest was "particularly strong" in this case because "the defective product in question was manufactured and placed in the stream of commerce in the State of Texas."\(^2^2^9\)

In *Offshore Logistics, Inc. v. Bell Helicopter Textron*\(^2^3^0\) and *Jones v. Southeastern Pennsylvania Transportation Authority*,\(^2^3^1\) the place of the product's acquisition was not mentioned and the choice was confined between the laws of the state of manufacture and the state of injury. Both cases applied the law of the former state, which was also the manufacturer's principal place of business. Unlike *Offshore*, which was a very cursory opinion, *Jones* provided reasons for this choice. In *Jones*, the defendant-affiliating contacts (defendant's domicile and place of manufacture) were situated in Nebraska, the law of which favored the defendant, while the victim-affiliating contacts were split between Illinois (victim's domicile) and Pennsylvania (place of injury).\(^2^3^2\) The plaintiff invoked Pennsylvania law, which was favorable to him, but not Illinois law, which apparently was not favorable.\(^2^3^3\) The court found that Pennsylvania's interest in ensuring adequate compensation for persons injured within its borders was "less pronounced" because the plaintiff was not a Pennsylvania domiciliary.\(^2^3^4\) The court recognized that "Pennsylvania may have an interest in seeing that corporations whose products enter the stream of commerce and cause injury in the state not escape the liability that the state imposes on successor corporations."\(^2^3^5\) However, the court concluded that, in the absence of other contacts, "Pennsylvania's interest [was] more remote than Nebraska's interest in determining the tort liability of its successor corporations," and that Nebraska had "a more significant relationship . . . and a greater interest."\(^2^3^6\) The court noted that, as both corporations were from Nebraska and the succession agreement had been made in that state, the successor corporation "may have a justified expectation that Nebraska law of

\(^{2^2^9}\) *Id.* The decision also noted that Texas had a "substantial interest" in applying its pro-plaintiff law "as an incentive to encourage safer design and to induce corporations to control more carefully the manufacturing processes." *Id.*


\(^{2^3^3}\) *Id.* at *1-*2.

\(^{2^3^4}\) *Id.* at *6-*7.

\(^{2^3^5}\) *Id.* at *7.

\(^{2^3^6}\) *Id.* at *7-*8.
successor non-liability . . . will apply to it, even when an injury for which its predecessor . . . may have been liable occurred in another state.\footnote{Id. at \textsuperscript{*6}.}

In \textit{Mahoney v. Ronnie's Road Service}, the plaintiff did plead the law of his home state, Arizona.\footnote{468 S.E.2d 279, 280-81 (N.C. Ct. App. 1996).} But 3 of the other contacts were located in the same other state: the plaintiff was injured in North Carolina by a product that a North Carolina defendant manufactured in that state.\footnote{Id.} The court concluded that North Carolina had a more significant relationship and applied that state's statute of repose to bar an action that was timely under Arizona law.\footnote{Id. at 282.}

The remaining 6 cases\footnote{See cases \#\# 75-80 supra tbl. 3.} applied the pro-plaintiff law of the plaintiff's home state, even though that state did not have any other contacts with the case. However, in all but one of these cases, the 5 pertinent contacts were dispersed in 4 or 5 different states.\footnote{Johnson v. Ford Motor Co., No. 01 C 8882, 2003 WL 22317425 (N.D. Ill. Oct. 9, 2003), is the sole exception.} In 1 case, \textit{Huddy v. Fruehauf Corp.}, except for the state of the defendant's principal place of business, all other involved states had a pro-plaintiff law.\footnote{953 F.2d 955, 956-57 (5th Cir. 1992).} In 3 cases, \textit{Pollack v. Bridgestone/Firestone, Inc.},\footnote{939 F. Supp. 151, 152-53 (D. Conn. 1996) (applying Connecticut's pro-plaintiff liability law to an injury suffered by a Connecticut domiciliary in an Ohio accident caused by a tire manufactured in Illinois by an Ohio corporation).} \textit{MacDonald v. General Motors Corp.},\footnote{110 F.3d 337 (6th Cir. 1997) (decided under Tennessee's conflicts law).} and \textit{Danielson v. National Supply Co.},\footnote{670 N.W.2d 1, 4 (Minn. Ct. App. 2003).} the defendants pleaded only the laws of states with plaintiff-affiliating contacts. Thus, the courts' choices were confined between the laws of the victim's home state and the state of injury, as in \textit{Pollack}, or between the victim's home state and the state of the product's acquisition, as in \textit{MacDonald}.\footnote{Id. at 956.}

\textit{MacDonald} was a wrongful death action arising from a Tennessee traffic accident caused by a brake defect in a van manufactured by General Motors in Michigan and sold in Kansas to
the University of Kansas. The victim was a student from North Dakota who was a passenger in the van. Kansas, but not North Dakota, limited wrongful-death damages. Neither party argued for the application of Tennessee or Michigan law, and the court found the contacts of those states to be inconsequential. The court concluded that, as the domicile of the decedent and the plaintiffs, "North Dakota has the most significant relationship to the measure of damages," that its pro-plaintiff law reflected "a strong interest in assuring that next of kin are fully compensated for the tortious death of its domiciliaries," and that "applying the Kansas statute would frustrate North Dakota's policy of fully compensating its domiciliaries for their injuries." The court acknowledged that Kansas's ceiling on damages reflected an interest in protecting defendants from excessive jury verdicts, but concluded that this interest was not sufficiently compelling.

In Danielson, the laws of both the state of injury (Arizona) and the state of acquisition (Texas) favored the defendant retailer, but their connections with the case were rather transient. The plaintiff, a Minnesota domiciliary, was injured during his Arizona vacation while using a stepladder that he bought for his motor home while driving through Texas. At issue was the timeliness of the plaintiff's action, which was barred by the statutes of limitation of Texas and Arizona but allowed by Minnesota's statute. The court held that the Minnesota statute should govern, either because it was procedural or because Minnesota had a greater interest in providing a forum to its injured domiciliary than the other 2 states had in avoiding litigation of stale claims.

In Johnson v. Ford Motor Co., the defendant pleaded the law of the state of manufacture, Kentucky, which by coincidence was also the state of injury. The plaintiffs were injured in Kentucky while

247. 110 F.3d at 339.
248. Id.
249. Id. at 341.
250. Id. at 343-44.
251. Id. at 344-45 (quoting In re Air Crash Disaster at Boston, Mass. on July 31, 1973, 399 F. Supp. 1106, 1112 (D. Mass. 1975)).
252. Id. at 345.
253. Id.
254. 670 N.W.2d 1, 6-9 (Minn. Ct. App. 2003).
255. Id. at 3-4. The retailer who sold him the ladder had a similar store in Minnesota, and the plaintiff claimed that this was the reason for which he visited the particular store in Texas. Id.
256. Id. at 4.
257. Id. at 9.
returning from Florida to Illinois in a car they rented in Illinois. The court reasoned that, because of the fortuity of the accident’s locale, the fact that Kentucky had 2 contacts with the case did not give it any greater interest in applying its law to issues of compensatory damages than the plaintiff’s home state, which would bear the social consequences of nonrecovery. “It cannot be reasonably inferred,” said the court, “that Ford chose to manufacture vehicles in Kentucky to obtain the benefits of Kentucky tort laws.”

All of the above cases are easier to defend than Phillips v. General Motors Corp. Phillips was an action by the survivors of a Montana family who perished in an accident in Kansas while on a trip from their home state of Montana to North Carolina when their car exploded upon colliding with another car. The defendant, General Motors (GM), a Michigan-based corporation, manufactured the car in Michigan and sold it in North Carolina, where one of the victims purchased it while domiciled there. The defendant invoked the law of Kansas, which had a statute of repose that barred the action, allowed certain defenses not available to manufacturers elsewhere, and limited the amount of compensatory and punitive damages. The plaintiffs invoked the law of Montana, which had no statute of repose, disallowed the manufacturer’s defenses, and imposed no limits on compensatory or punitive damages.

The court held that Montana had a more significant relationship and that its law should govern all issues of liability and damages. The court found that the purpose of Kansas’s products liability law was “to regulate the sale of products in that state and to prevent injuries incurred by that state’s residents due to defective products,” and that this purpose “could not be implicated by the facts of this case as it involves neither a sale in Kansas nor an injury to a Kansas resident.”

Curiously, the court followed the same rationale even with regard to

259. Id.

260. Id. at *3-*5. The court held, however, that Kentucky law should govern issues of conduct regulation—specifically whether plaintiffs’ failure to wear seatbelts would reduce their recovery. Id. at *5.

261. Id. at *3.

262. 995 P.2d 1002 (Mont. 2000).

263. Id. at 1005.

264. Id.

265. Id. at 1007, 1009-10. The defendant also invoked the laws of North Carolina and Michigan, but did not adequately brief the court on the content of those laws. Id. at 1011.

266. Id. at 1012.

267. Id. at 1014-15.

268. Id. at 1009.
those rules of Kansas product-liability law that protected the manufacturer, such as its statute of repose or the state-of-the-art defense. The court concluded that these rules "were not enacted in order to grant a defense to a manufacturer when a non-Kansas resident is injured by a product not purchased in Kansas."

Regarding compensatory damages, the court concluded that Kansas's limitations on the amount of wrongful-death damages were intended "to alleviate a perceived crisis in the availability and affordability of liability insurance" and that, because no Kansas residents were involved in this case, Kansas had no interest in insisting on those limitations.

Finally, regarding punitive damages, the court focused more on the fact that Kansas law allowed such damages, rather than on the fact that it limited their amount to $5 million. Noting that the purpose of punitive damages is "to punish or deter conduct deemed wrongful when ... compensatory damages are considered an insufficient punishment or deterrence," the court concluded that Kansas was uninterested because the manufacturer's conduct did not occur in Kansas.

As to where the manufacturer's conduct occurred, the defendant pointed to both Michigan, where the car had been manufactured, and North Carolina, where the car had been introduced into the market and then resold to the victim. However, the defendant did not brief the court on the content of the laws of these states, and thus the court's discussion was "somewhat general in nature." In fact, North Carolina law was favorable to the defendant. However, using a renvoi-type syllogism, the court concluded that North Carolina had no

269. Id. at 1009-10.
270. Id. The court disposed in a similar manner of defendant's argument regarding plaintiff's contributory negligence, which would have reduced plaintiff's recovery under Kansas law. Id. at 1010. While noting that the record contained no evidence of plaintiff's contributory negligence or where such negligence occurred, the court concluded that Kansas's comparative negligence rule was loss-allocating rather than conduct-regulating and that Kansas had "no interest in allocating responsibility for the injuries suffered by Montana residents and caused by a product purchased in North Carolina." Id.
271. Id.
272. Id at 1010-11.
273. Id. at 1011.
274. Id.
275. Id.
claim to apply its law because, under the *lex loci delicti* rule followed in that state, a North Carolina court would have applied Kansas law.\textsuperscript{277} Thus, said the court, "any expectation General Motors had that the law of North Carolina would govern \ldots would not be justified."\textsuperscript{278}

The court used a similar *renvoi* syllogism to discount Michigan’s interest by relying on a similar case in which a Michigan court held that Michigan had “little interest in applying its law when its only contact with the dispute is the location of the manufacturer.”\textsuperscript{279} Even if Michigan had such an interest, the court reasoned, Michigan law should not be applied because its application “would tend to leave victims under compensated as states wishing to attract and hold manufacturing companies would raise the threshold of liability and reduce compensation.”\textsuperscript{280} This would allow a state with a high concentration of industry to capture all of the benefits of a high threshold of liability and a low level of compensation \ldots [by] attract[ing] and retain[ing] manufacturing firms \ldots within its borders while placing the costs of its legislative decision, in the form of less tort compensation, on the shoulders of nonresidents injured by its manufacturers’ products.\textsuperscript{281}

This, said this court, “seems inherently unfair.”\textsuperscript{282}

Thus, after discounting the interests of the states of injury, conduct, and the defendant’s home state, the court considered the interests of the victims’ home state, Montana, the law of which favored the victims on liability, as well as compensatory and punitive damages.\textsuperscript{283} The court held that Montana’s interests predominated in

\begin{footnotesize}
\begin{enumerate}
\item[277.] *Phillips*, 995 P.2d at 1013.
\item[278.] Id.
\item[279.] Id. at 1011 (citing Farrell v. Ford Motor Co., 501 N.W.2d 567, 572 (Mich. Ct. App. 1993)). *Farrell* is discussed supra note 76. While it is true that some Michigan cases have reached this result, see, e.g., Hall v. Gen. Motors Corp., 582 N.W.2d 866 (Mich. Ct. App. 1998) (applying North Carolina’s pro-manufacturer law, rather than Michigan’s pro-plaintiff law, to a product-liability action filed by a North Carolina victim against General Motors, which manufactured the car in Michigan) (discussed supra note 61), other cases reached the opposite result, see, e.g., Mahne v. Ford Motor Co., 900 F.2d 83, 89 (6th Cir. 1990) (applying Michigan’s pro-plaintiff law, rather than Florida’s pro-manufacturer law, to a product-liability action of a Florida domiciliary who was injured in a Florida accident) (discussed supra note 111). Moreover, in the Michigan cases that did not apply Michigan law, Michigan law favored a foreign victim at the expense of a Michigan manufacturer. Thus, those cases did not present the converse and more difficult true conflicts between the pro-plaintiff law of the plaintiff’s home state and the pro-manufacturer law of the state of manufacture.
\item[280.] *Phillips*, 995 P.2d at 1011-12.
\item[281.] Id. at 1012.
\item[282.] Id.
\item[283.] Id. at 1012-13.
\end{enumerate}
\end{footnotesize}
all respects.\textsuperscript{284} After noting that Montana adopted a strict liability standard "in order to afford 'maximum protection for consumers against dangerous defects in manufactured products with the focus on the condition of the product, and not on the manufacturer's conduct or knowledge,'" the court stated that "the focus of Montana law is not only on the regulation of products sold in Montana, but also on providing the maximum protection and compensation to Montana residents."\textsuperscript{285} The court reasoned that, because the victims in this case were Montana residents, the application of Montana's law of strict liability and full compensation "would further the purposes of Montana law by insuring that the costs to Montana residents due to injuries from defective products are fully borne by the responsible parties" and would have "the salutary effect of deterring future sales of defective products in Montana and encouraging manufacturers to warn Montana residents about defects in their products as quickly and as thoroughly as possible."\textsuperscript{286} The court reasoned that the application of Montana's punitive-damages law would serve the same policy of deterrence because "punitive damages serve to punish and deter conduct deemed wrongful—in this case, placing a defective product into the stream of commerce which subsequently injured a Montana resident."\textsuperscript{287} Thus, the court concluded, Montana had a more significant relationship than Kansas and this displaced the \textit{lex loci} presumption.\textsuperscript{288}

It is worth noting that, even under the most pro-plaintiff choice-of-law rules in the world, those of the Swiss, Italian, and Quebec codifications, \textit{Phillips} would have been decided in favor of the defendant.\textsuperscript{289} With regard to liability and compensatory damages, one can appreciate the \textit{Phillips} result: besides the equities of the case (a whole family perishing with only one minor child surviving), the 5 contacts were spread in 4 states, the occurrence of the injury in Kansas

\begin{itemize}
\item \textsuperscript{284} \textit{Id.}
\item \textsuperscript{285} \textit{Id.} at 1012 (quoting Sternhagen v. Dow Co., 935 P.2d 1139, 1144 (Mont. 1997) (emphasis omitted)).
\item \textsuperscript{286} \textit{Id.}
\item \textsuperscript{287} \textit{Id.}
\item \textsuperscript{288} \textit{Id.} at 1014.
\end{itemize}
was fortuitous, and the product, though purchased in North Carolina, was commercially available throughout the United States, including Montana. On the other hand, one cannot defend Phillips to the extent it imposed punitive damages, at least beyond the limits imposed by Kansas law.

III. GENERAL OBSERVATIONS

The cases discussed in this Article are sufficiently numerous, methodologically and substantively diverse, and geographically dispersed to permit one to draw some general conclusions. This Part of the Article attempts to do so, beginning with a brief discussion of the role played by state policies and factual contacts in the courts’ choice-of-law decisions.

A. The Role of State Policies and Interests

The 80 cases discussed here were decided under a variety of choice-of-law methodologies, including primarily the Restatement (Second) of Conflict of Laws (1971), a significant-contacts approach, interest analysis, Leflar’s better-law approach, as well as the traditional method. With the exception of cases decided under the traditional method, the majority of cases decided under the modern approaches subscribe to 2 basic premises: (1) that states do have an interest in the outcome of products-liability disputes between private parties; and (2) to properly resolve these disputes, one should take account of these interests, albeit not to the exclusion of other factors, such as factual contacts and party expectations. Because of this, a casual observer might conclude that Brainerd Currie’s interest analysis is still alive and well among the courts. However, such a conclusion would be inaccurate because the courts do not seem to subscribe to 2 essential ingredients of Currie’s analysis: (a) his “personal-law” principle and (b) the primacy of the lex fori.

The personal-law principle was Currie’s assertion that a state always has an interest in protecting its own domiciliaries but is rarely interested in protecting out-of-staters similarly situated. For example, when the forum state has a pro-plaintiff law but the plaintiff is not affiliated with that state, that state does not have an interest in applying its law, especially when that law works to the detriment of a local defendant. Yet, a perusal of the cases discussed here indicates that very few cases subscribe to this self-centered proposition. For example, several cases applied the forum’s pro-plaintiff law even
though that law favored a plaintiff who was not a forum domiciliary and dis favored a forum defendant. The same is true of cases in which the forum state has a pro-defendant law, but the defendant is not affiliated with that state. Notwithstanding Currie’s prescriptions to the contrary, many cases extended the benefit of the forum law to foreign defendants, and often to the detriment of forum plaintiffs.

Currie’s approach assigned a primary role to the *lex fori* because he argued that the law of the forum should govern, inter alia, in all true conflicts before an interested forum, and in all unprovided-for or no-interest cases. As will be explained later, the vast majority of the 80 cases fall into the one or the other of these 2 categories (called direct and inverse conflicts, respectively), yet only a bare majority of them (55%) applied the law of the forum.

For this reason, it is safe to conclude that, although many cases speak the language of interest analysis—or more accurately policy analysis—most cases do not subscribe to the most controversial specifics of the particular approach that Currie advocated. If anything, most courts seem to be more impressed with the number of factual contacts a state has with the case than with an advocate’s sophisticated analysis of state interests. The discussion now turns to an inevitably tedious, yet necessary, “contacts analysis” of all the cases.

B. A Contacts Analysis

This Part looks at the cases from 2 slightly different perspectives. Subpart (1) looks at how the pertinent contacts were congregated or dispersed among the involved states, with which frequency, and which state’s law the court applied. Subpart (2) focuses on the contacts of the state whose law the court applied.

1. Aggregation of Contacts and Law Applied

The reader who has the patience to count the cases depicted in Table 3 will notice the high number of cases in which all 3 plaintiff-affiliating contacts were situated in 1 state—the product was sold in the plaintiff’s home state and caused the injury in that state. More than
a third of the cases (33 out of 80, or 41%) fall in this category\textsuperscript{292} and more than two-thirds of them (26 out of 33, or 79%) applied the law of that state. That state was also the forum in 12 of those cases and had a pro-defendant law in 19 of the 26 cases, or 73%. Chart 1 and Table 4 depict these results.

Chart 1. Cases in which the injury and the product’s acquisition were in the victim’s home state.

In 16\% of the cases (13 out of 80), the injury occurred in the plaintiff’s home state, but the product was acquired outside that state.\textsuperscript{293} That state had a pro-plaintiff law in 3 cases and a pro-defendant law in 10 cases. Eight of the 13 cases, or 62\%, applied that state’s law.\textsuperscript{294}

In 11\% of the cases (9 out of 80), the product was acquired in the plaintiff’s home state, but the injury occurred elsewhere.\textsuperscript{295} That state had a pro-plaintiff law in 4 cases and a pro-defendant law in 5 cases. Seven of the 9 cases, or 78\%, applied that state’s law.\textsuperscript{296}

\begin{itemize}
\item \textsuperscript{292} See cases #1-33 supra tbl. 3. Eight of the 33 cases presented the direct conflict pattern because that state had a pro-plaintiff law, while the remaining 25 presented the inverse conflict pattern because that state had a pro-defendant law.
\item \textsuperscript{293} See cases #34-46 supra tbl. 3.
\item \textsuperscript{294} See infra tbl. 4.
\item \textsuperscript{295} See cases #47-55 supra tbl. 3.
\item \textsuperscript{296} See infra tbl. 4.
\end{itemize}
Table 4. Aggregation of Contacts and Law Applied

<table>
<thead>
<tr>
<th>Contacts</th>
<th>Cases and Law Applied</th>
<th>Forum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domicile, Injury, and Acquisition</td>
<td>All cases 33 (41%)</td>
<td>26 (79%)</td>
</tr>
<tr>
<td></td>
<td>Pro-P 8</td>
<td>7 (88%)</td>
</tr>
<tr>
<td></td>
<td>Pro-D 25</td>
<td>19 (76%)</td>
</tr>
<tr>
<td>Domicile and Injury</td>
<td>All cases 13 (16%)</td>
<td>8 (62%)</td>
</tr>
<tr>
<td></td>
<td>Pro-P 3</td>
<td>3 (100%)</td>
</tr>
<tr>
<td></td>
<td>Pro-D 10</td>
<td>5 (50%)</td>
</tr>
<tr>
<td>Domicile and Acquisition</td>
<td>All cases 9 (11%)</td>
<td>7 (78%)</td>
</tr>
<tr>
<td></td>
<td>Pro-P 4</td>
<td>3 (75%)</td>
</tr>
<tr>
<td></td>
<td>Pro-D 5</td>
<td>4 (80%)</td>
</tr>
<tr>
<td>Injury and Acquisition</td>
<td>All cases 14 (18%)</td>
<td>10 (71%)</td>
</tr>
<tr>
<td></td>
<td>Pro-P 2</td>
<td>2 (100%)</td>
</tr>
<tr>
<td></td>
<td>Pro-D 12</td>
<td>8 (67%)</td>
</tr>
<tr>
<td>The rest</td>
<td>11 (14%)</td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td>80 cases</td>
<td>100%</td>
</tr>
</tbody>
</table>

In 18% of the cases (14 out of 80), the injury and the place of the product’s acquisition were in the same state, but not the plaintiff’s home state. 297 The former state had a pro-plaintiff law in 2 cases and a pro-defendant law in 2 cases. Ten of the 14 cases, or 71%, applied the law of the former state, while the remaining 4 cases applied the law of the plaintiff’s home state, which in 2 of these cases was also the place of manufacture and the defendant’s principal place of business.

In the remaining 11 of the 80 cases, the 3 plaintiff-affiliating contacts were located in three different states, although in 5 of them the defendant-affiliating contacts were located in the same state. 298 The 5 cases applied the law of the state with the defendant-affiliating contacts, while the remaining 6 cases applied the law of the plaintiff’s home state, which did not have any other contact.

2. The Contacts of the State Whose Law the Court Applied

The following table focuses on the state whose law the court applied. The first column shows the number of cases and percentages in which a pattern occurred, and then the shaded cells show the number of cases in which the courts applied the laws of the states corresponding to those cells. The last 4 columns show the number of

297. See cases ## 56-69 supra tbl. 3.
298. See cases ## 70-80 supra tbl. 3.
cases in which the law applied was that of the forum state, and whether it favored the plaintiff or the defendant.

Table 5. The Contacts of the State whose Law Applied

<table>
<thead>
<tr>
<th>Occurrence cases &amp; %</th>
<th>P's Dom.</th>
<th>Injury</th>
<th>Acqu.</th>
<th>Mnfgr.</th>
<th>D's PPB</th>
<th>Forum</th>
<th>Non-Forum</th>
<th>Pro-P</th>
<th>Pro-D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Three Contacts (33 cases)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>33 (41%)</td>
<td>26 of 33 cases (79%)</td>
<td></td>
<td></td>
<td></td>
<td>12</td>
<td>14</td>
<td>7</td>
<td>19</td>
<td></td>
</tr>
<tr>
<td>4 (5%)</td>
<td></td>
<td>3 of 4 cases (75%)</td>
<td></td>
<td></td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>2 (3%)</td>
<td>2 of 2</td>
<td>2 of 2</td>
<td></td>
<td></td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>1 (1%)</td>
<td>1</td>
<td>1 of 1</td>
<td></td>
<td></td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>1 (1%)</td>
<td>1 of 1</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td></td>
</tr>
</tbody>
</table>

| Two Contacts Only (35 cases) |          |        |       |        |        |       |           |       |       |
| 13 (16%)              | 8 of 13 (62%) |       |       |        | 5      | 3     | 3        | 5     |
| 9 (11%)               | 7 of 9 (78%) | 7 of 9 (78%) |       |        | 6      | 1     | 3        | 4     |
| 13 (16%)              | 9 of 13 (69%) |       |       |        | 1      | 8     | 2        | 7     |
| 1 (1%)                | 1 of 1   | 10 of 50 (20%) |       |        | 1      | 0     | 1        | 0     |

| One Contact Only (12 cases) |          |        |       |        |        |       |           |       |       |
| --                       | 8 (10%)  |       |       |        | 7      | 1     | 8        | 0     |
| --                       | 2 (3%)   |       |       |        | 2      | 0     | 2        | 0     |
| --                       | 2 (3%)   |       |       |        | 1      | 1     | 1        |       |

<table>
<thead>
<tr>
<th>Cases</th>
<th>51</th>
<th>47</th>
<th>49</th>
<th>17</th>
<th>17</th>
<th>44</th>
<th>36</th>
<th>39</th>
<th>41</th>
</tr>
</thead>
<tbody>
<tr>
<td>%</td>
<td>64%</td>
<td>59%</td>
<td>61%</td>
<td>21%</td>
<td>21%</td>
<td>55%</td>
<td>45%</td>
<td>49%</td>
<td>51%</td>
</tr>
</tbody>
</table>

Three Contacts. As Table 5 indicates, 33 of the 80 cases, or 41%, applied the law of a state that had 3 of the 5 contacts identified as pertinent in this Article.299

In 26 of those cases, the 3 contacts were the plaintiff’s domicile, the place of injury, and the place of the product’s acquisition. In 12 of the 26 cases, that state was also the forum state. It had a pro-plaintiff law in 7 cases and a pro-defendant law in 19 cases.

In 3 of the 33 cases, the 3 contacts were the place of the product’s acquisition, the place of manufacture, and the defendant’s principal place of business. In all 3 cases, that state had a pro-plaintiff law, and in 2 of them it was also the forum state.

299. See shaded cells supra tbl. 5.
In the remaining 4 of the 33 cases, the 3 contacts were congegated as shown in Table 5.

Chart 2. Number of contacts of state whose law applied

Two Contacts. In 35 of the 80 cases, or 44%, the court applied the law of a state that had 2 contacts as follows: (a) the plaintiff’s domicile and the place of injury in 8 cases, 300 (b) the plaintiff’s domicile and the place of the product’s acquisition in 7 cases, 301 (c) the place of injury and the product’s acquisition in 9 cases, 302 (d) the defendant’s principal place of business and the place of manufacture in 10 cases, 303 and (e) the places of manufacture and acquisition in 1 case. 304

One Contact. Only 12 of the 80 cases, or 15%, applied the law of a state that had only one contact, and in 8 of those cases the 5 pertinent contacts were dispersed in 4 or 5 states. In 8 of the 11 cases, that state was the plaintiff’s home state and had a pro-plaintiff law, and in 7 cases it was also the forum state. In 2 cases, that state was the place of the product’s acquisition and also the forum state and possessed a pro-plaintiff law. In 2 cases, that state was the place of the injury; it had a pro-plaintiff law in 1 case and a pro-defendant law in the other.

300. In 5 of the 8 cases, that state was also the forum; in 3 cases it had a pro-plaintiff law; and in 5 cases it had a pro-defendant law.
301. In 6 of those cases, that state was also the forum, and in 3 cases it had a pro-plaintiff law.
302. In 1 of those cases, that state was also the forum, and in 2 cases it had a pro-plaintiff law.
303. In 6 of those cases, that state was also the forum and in 8 cases it had a pro-plaintiff law.
304. That state was also the forum and had a pro-plaintiff law.
a. Plaintiff-Affiliating Contacts and Laws

In 62 of the 80 cases, or 76%, the court applied the law of a state with plaintiff-affiliating contacts, but in 36 of those cases, or 58%, that state had a pro-defendant law. In 10 of the 80 cases, or 13%, the court applied the law of a state that had the 2 defendant-affiliating contacts, but in 8 of those cases that state had a proplaintiff law. In the remaining 8 cases, the court applied the law of a state that had both plaintiff- and defendant-affiliating contacts, and in 5 of those cases that state had a pro-plaintiff law.

In 26 of the cases, or 33%, the court applied the law of a state that had all 3 plaintiff-affiliating contacts, but in 19 of those cases, or 73%, that state had a pro-defendant law.

In 24 of the cases, or 30%, the court applied the law of a state that had 2 plaintiff-affiliating contacts, but in 16 of those cases, or 67%, that state had a pro-defendant law.

Twelve cases applied the law of a state that had only one plaintiff-affiliating contact, and in 11 of those cases that state had a pro-plaintiff law. Eight of the 12 cases applied the pro-plaintiff law of the plaintiff's home state, which in 7 of those cases was also the forum state. However, 7 other cases refused to apply the pro-plaintiff law of the plaintiff's home state under almost identical circumstances, although again in 6 of those cases that state was also the forum state.

*Plaintiff's Domicile.* In 51 of the 80 cases, or 64%, the court applied the law of a state in which the plaintiff was domiciled. However, in all but 8 of those cases, that state had one or 2 additional contacts. This is not a tilt towards the plaintiff because in more than half of those cases (29 cases out of 51, or 57%) that state had a pro-defendant law. In any event, the plaintiff's domicile, especially when coupled with another contact, appears to be an important contact in product liability conflicts.

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305. Two cases applied the pro-plaintiff law of the state of the product's acquisition, 1 case applied the pro-plaintiff law of the state of injury and another state the pro-defendant law of the state of injury.


307. It had 2 additional contacts in 28 cases, and 1 additional contact in 15 cases. See *infra* chart 3.
**Place of Injury.** In 47 of the 80 cases, or 59%, the court applied the law of the state in which the injury occurred.\textsuperscript{308} This does not entail a return to the *lex loci* rule. Although it suggests that the place of the injury remains an important contact, this is true only when the state of the injury has at least 1 additional contact. Indeed, in all but 2 of the 47 cases, the state of injury had one or two additional contacts.\textsuperscript{309} In any event, the application of the law of the state of injury favored defendants by a wide margin (34 of the 47 cases, or 72%).

**Place of Product’s Acquisition.** In 49 of the 80 cases, or 61%, the court applied the law of a state that was the place of the product’s acquisition, but in all but two of those cases that state had one or two additional contacts.\textsuperscript{310} Again, this is not a tilt toward the plaintiff, because in 31 of the 49 cases, or 63%, that state’s law favored the defendant. In any event, the place of acquisition has gradually gained in significance, although this significance varies considerably from case to case. As suggested at the beginning of the Article, this contact is more important in cases involving consumer goods and other similar

\textsuperscript{308} That law favored the plaintiff in 13 cases, and the defendant in 34 cases.

\textsuperscript{309} The state of injury had 2 additional contacts in 28 cases, and 1 additional contact in 17 cases.

\textsuperscript{310} The state of acquisition had 2 additional contacts in 30 cases, and 1 additional contact in 17 cases.
products acquired by the victim. It is less important in other cases involving other products, such as transportation means or machinery acquired by a third party.

b. Defendant-Affiliating Contacts and Laws

In 50 of the 80 cases, the 2 defendant-affiliating contacts—the place of manufacture and the defendant’s principal place of business—were in the same state. Yet, only 10 of the cases, or 13%, applied the law of a state that had only those contacts and no others.\(^{311}\) One reason for this low number is the fact that in most cases the defendants did not plead the law of that state (apparently because it was unfavorable) and instead relied on the more favorable law of a state with a plaintiff-affiliating contact. In many cases, it was the plaintiffs who invoked the law of the defendants’ state and in some cases the plaintiffs prevailed—in 8 of the 10 cases, that state had a pro-plaintiff law. The second reason for the low numbers is the relative insignificance of one of these 2 contacts—the defendant’s principal place of business—at least when compared to the other 4 contacts. This issue is discussed below.

State of Manufacture. Only 17 cases of the 80 cases, or 21%, applied the law of the state of manufacture, but in all of them that state had either 2 additional contacts (6 cases) or 1 additional contact (11 cases). In 13 of the 17 cases, or 76%, that state had a pro-plaintiff law.

Defendant’s Principal Place of Business. Only 17 of the 80 cases, or 21%, applied the law of the state of the defendant’s principal place of business, but in all of them that state had either 2 additional contacts (7 cases),\(^{312}\) or 1 additional contact (10 cases).\(^{313}\) Stated another way, no case applied the law of the manufacturer’s principal place of business as such. Of the 5 pertinent contacts, this appears to be the least significant, and appropriately so. In any event, in 12 of the 17 cases, or 71%, the state of the defendant’s principal place of business had a pro-plaintiff law.

C. Forum Shopping Is Neither Common nor Rewarding

The 80 cases of the survey period do not confirm the widespread impression that products-liability plaintiffs engage in rampant forum

\(^{311}\) Eight additional cases applied the law of a state that had one or both of those contacts and a plaintiff-affiliating contact

\(^{312}\) The 2 additional contacts were the places of manufacture and acquisition (3 cases), the place of manufacture and the plaintiff’s domicile (2 cases), the places of manufacture and injury (1 case), and the places of injury and acquisition (1 case).

\(^{313}\) In 10 cases the additional contact was the place of manufacture.
shopping. Obviously, the validity of this observation depends on one’s definition of forum shopping, as well as the size and nature of the sample examined. If one defines forum shopping as to include all cases in which the plaintiff sues in a state that has a favorable substantive law, then one may conclude that plaintiffs do engage in forum shopping inasmuch as in 61 of the 80 cases, or 76%, the forum state had a pro-plaintiff substantive law. However, a more precise definition of forum shopping should encompass only those cases in which a plaintiff unfairly exploits the jurisdictional rules to sue in a state that does not have relevant contacts other than the jurisdictional nexus with the defendant (e.g., doing business). Under this definition, only 4% of the cases (3 out of 80) involved forum shopping. Two of these cases were filed in Mississippi in order to take advantage of that state’s long statute of limitations, and the third case was filed in Minnesota to take advantage of that state’s better-law approach. Three additional cases might qualify as “borderline” forum-shopping cases in that the forum’s contacts were somewhat tenuous. Even if one adds these cases, the percentage of forum-shopping cases rises to only 8%. In any event, in none of these cases did the forum shopping pay off—all 6 cases applied the pro-defendant law of a state other than the forum.

315. This Article is confined to cases that resulted in a published choice-of-law decision. One could argue that, insofar as courts dispose of many forum-shopping suits without issuing such a decision, this sample is not representative enough with regard to this specific issue.
316. This includes 2 federal transfer cases, Roll v. Tracer, Inc., 140 F. Supp. 2d 1073 (D. Nev. 2001), and Thornton v. Cessna Aircraft Co., 886 F.2d 85 (4th Cir. 1989), in which the original forum (transferor) had a pro-plaintiff law.
317. See Fawcett, supra note 16, at 97 (“[T]he defendant may be greatly inconvenienced in having to defend in a forum with which the parties and the dispute have little or no connection.”).
320. These contacts were, respectively, the place of the product’s assembly, see Rutherford v. Goodyear Tire & Rubber Co., 943 F. Supp. 789, 791 (W.D. Ky. 1996), aff’d, 142 F.3d 436 (6th Cir. 1998), the principal place of business of a defendant who owned the defective equipment, see Cianfrani v. Kalmar-AC Handling Sys., Inc., No. Civ.A.No. 93-5640 (JEF), 1995 WL 563289, at *3 (D.N.J. Sept. 11, 1995), and the plaintiff’s bona fide domicile at the time of the action, though not at the time of the injury, see Normann v. Johns-Manville Corp., 593 A.2d 890, 894 (Pa. Super. Ct. 1991).
321. See infra chart 4.
On the other hand, when a plaintiff sues a defendant in a state with defendant-affiliating contacts (e.g., a state that is the manufacturer's principal place of business or the place of manufacture), the plaintiff does not unfairly exploit the jurisdictional rules since the defendant can hardly complain of being forced to litigate at home. More than one-fourth of the cases (22 out of 80) were filed in states with defendant-affiliating contacts. Although in 17 of the 22 cases the forum had a pro-plaintiff law, the court applied that law in only 9 cases.

Conversely, when the plaintiff sues in a state with plaintiff-affiliating contacts (i.e., places of domicile, injury, or acquisition), the defendant may be subject to a certain degree of inconvenience depending on remoteness and other factors. However, this inconvenience is a fair price to pay in exchange for selling products in the forum's market. When a consumer injured by one of these products exercises her right to sue in that state, the consumer is not necessarily engaging in inappropriate forum shopping, especially if that state has more than one of the above 5 contacts. In this context, one should note that (except for the 6 aforementioned cases of actual or suspected forum shopping) in all the other cases (55 out of 61) in which the forum had a pro-plaintiff law, that state had at least 1 additional contact—3 such contacts in 10 cases, 2 contacts in 18 cases, and 1 contact in 27 cases.

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322. See, e.g., Gantes v. Kason Corp., 679 A.2d 106, 113 (N.J. 1996) (discussed supra note 28) (rejecting the lower court's conclusion that a Georgia plaintiff who sued a New Jersey manufacturer for a Georgia injury caused by a product manufactured in New Jersey was engaging in forum shopping):

In essence, the policy against forum shopping is intended to ensure that New Jersey courts are not burdened with cases that have only 'slender ties' to New Jersey. . . . In this case, plaintiff does not seek to use New Jersey's court system to litigate a dispute that has only a slight link to New Jersey and where the only plausible reason to select this State is because it is a hospitable forum. This action is materially connected to New Jersey by the fact that the allegedly defective product was manufactured in and then shipped from this State by the defendant-manufacturer.

323. See infra chart 5.

324. Cf. Fawcett, supra note 16, at 97 ("The defendant has no . . . cause to complain if the forum is one which has a strong connection with the parties and the dispute.").

325. In 7 cases, these contacts were the plaintiff's domicile, place of injury, and place of acquisition; in 2 cases the defendant's principal place of business, place of manufacture and acquisition; and in 1 case the plaintiff's domicile, the defendant's principal place of business, and the place of manufacture.

326. These contacts were: (1) in 11 cases, the place of manufacture and the defendant's principal place of business; (2) in 3 cases, the plaintiff's domicile and place of manufacture.
More importantly, even if one adopts the broadest definition of forum shopping to include all cases in which plaintiffs sue in states that have pro-plaintiff laws, this strategy has a less than 50% chance of succeeding. Indeed, of the 61 cases in which the forum had a pro-plaintiff law, the court applied that law in only 30 cases, or 49%, which amounts to 38% of the 80 cases. In contrast, of the 18 cases in which the forum had a pro-defendant law, the court applied that law in 12 cases or 67%. Thus, while plaintiffs had less than a 50% chance of persuading the court to apply its pro-plaintiff law, defendants had a 2:1 chance of having the court apply the forum’s pro-defendant law.

327. This contact was: (1) the plaintiff’s domicile in 18 cases; (2) the place of acquisition in 3 cases; (3) the place of injury in 3 cases; (4) the defendant’s principal place of business in 2 cases; and (5) the place of manufacture in 1 case. See infra chart 4.

328. In addition, one of the federal transfer cases, Roll v. Tractor, Inc., 140 F. Supp. 2d 1073 (D. Nev. 2001), applied the law of the transferee state, which, however, was identical to the law of the transferor state.

329. See infra chart 5.
D. Plaintiffs Tend to Sue at Home or Close

Most products-liability plaintiffs tend to sue close to home. As stated previously, only 22 of the 80 cases were filed in defendant-affiliated states. This may be because of distance and inconvenience (more likely the attorney's) since the manufacturer-affiliated states do not seem to have pro-defendant laws. In fact, in almost two-thirds of the cases that provide information about the law of the state of manufacture (30 out of 46, or 65%), that state had a pro-plaintiff law.

330. In 18 cases, the forum state was both the defendant’s principal place of business and the place of manufacture. In 3 cases, the forum was the defendant’s principal place of business and in 1 case the place of manufacture. See infra chart 6. In all but 4 of the 22 cases, the forum state had a pro-plaintiff law, which the court applied in 9 cases. See infra chart 6.

331. These factors seem to play an even greater role in international conflicts. The assumption that American courts are a magnet for foreign products-liability plaintiffs is both widespread and plausible. Nevertheless, of the 80 cases of this period, only 6 cases (8%) were filed by foreign plaintiffs. In all 6 cases the plaintiffs were domiciliaries of neighboring countries—Mexico and Canada.
In more than half of the cases (43 out of 80, or 54%), the plaintiffs sued in their home states, and in more than half of those cases (23 out of 43) that state had either 1 additional contact (11 cases) or 2 additional contacts (12 cases). In 30 of the 43 cases, or 68%, in which the plaintiffs sued in their home state, that state had a pro-plaintiff law. The court applied that law in 20 of the 30 cases, or 67%. Perhaps more noteworthy are the remaining 13 of the 43 cases in which the plaintiffs sued in their home states even though their laws favored the defendants. Not surprisingly, 10 of those cases applied that state’s law.

Nine cases were filed in states with other plaintiff-affiliating contacts, such as the place of injury. The remaining 6 cases are the forum-shopping cases described earlier, which were filed in states that did not have any of the 5 contacts identified as pertinent in this Article.

E. No Pro-Plaintiff Bias

The 80 cases of this period refute another widely held assumption—that courts tend to favor plaintiffs. In fact, slightly more

332. Five cases were filed in the state of injury. Only 1 case, *Martin v. Goodyear Tire & Rubber Co.*, 61 P.3d 1196 (Wash. Ct. App. 2003), applied the law of that state. Three cases were filed in the state of the product’s acquisition. In all 3 cases, that state had a pro-plaintiff law, which the court applied in 2 cases. One case, *Beals v. Siapa Securink Corp.*, CIV. A. Nos. 92-1512, 92-2588, 93-0190, 1994 WL 236018 (D.D.C. May 12, 1994), was filed in a state that was both the place of injury and the product’s acquisition.
than half of the cases (41 cases or 51%) applied a law that favored the defendant.\footnote{333} Whether this is the outgrowth of the "tort reform" movement of the 1980s, or a series of conservative appointments to the federal bench during the same period, or a combination of these and other factors is unclear. What seems clear is that, at the beginning of the twenty-first century, products-liability plaintiffs encounter more difficulties in recovering from manufacturers than in previous decades. This is as true in multistate as in domestic products-liability litigation.\footnote{334}

Chart 7. Do courts favor plaintiffs?

Plaintiffs do enjoy a significant advantage in direct or true conflicts (18 out of 20), but this advantage is erased by the more numerous inverse conflicts or no-interest cases (13 pro-plaintiff and 24 pro-defendant) and the mixed conflicts (7 pro-plaintiff and 16 pro-

\footnote{333. See infra chart 7. Plaintiffs fared slightly better in state courts (57\% pro-plaintiff law) than in federal courts (46\% pro-plaintiff). See id.}

\footnote{334. According to Professor Reimann, "American products liability law has become distinctly more cautious in the 1980s and 1990s... [C]ourts have become significantly more conservative in practice. After favoring plaintiffs and pushing the boundaries of liability for decades, as of the 1980s, they began to protect defendants, refused to expand liability further, and in fact often retreated to earlier positions." Reimann, supra note 3, at 52.}
defendant). For example, although in 25 of the 37 inverse conflicts cases, or 68%, the forum had a pro-plaintiff law, 16 of those cases, or 64%, applied the law of another state that favored the defendant.

Looking at all the cases (61 out of 80) in which the forum had a pro-plaintiff law, more than half of those cases (31 out of 61) applied another law that favored the defendant. Thus, neither pro-plaintiff sympathy nor forum-law favoritism seemed to help the plaintiffs in the 1990s. They lost more than they won, even when suing in states with a pro-plaintiff law.

Thus, it is more accurate to say that most courts apply the law of a state or states that have plaintiff-affiliating contacts (domicile, injury, and acquisition), whether or not that law favors the plaintiff. Indeed, as noted earlier, 62 of the 80 cases, or 76%, applied the law of a state with plaintiff-affiliating contacts, but in 36 of those cases, or 58%, that state had a pro-defendant law.

F. No Favoritism Towards Forum Domiciliaries

Another surprising finding is the apparent lack of favoritism towards the local litigant (plaintiff or defendant). Only 32 of the 80 cases, or 40%, applied a law that favored the local litigant. Of these cases, 23 favored a local plaintiff and 9 favored a local defendant.}

335. See infra chart 8.
Even more surprising, almost the same number of cases, 31 of 80, or 39%, applied a law that disfavored the local litigant. Of these, 22 cases applied a law that disfavored a local plaintiff, and nine cases applied a law that disfavored a local defendant.

Of the remaining 17 cases, 15 cases applied a law that neither favored nor disfavored a local litigant, and 2 cases applied a law that was common to both litigants.

G. No Pro-Forum Law Bias

Another widely held assumption is that “courts employing the new [choice-of-law] theories have a very strong preference for forum law that frequently causes them to manipulate the theories so that they end up applying forum law.”\textsuperscript{336} The 80 cases of this period do not support this assumption. Although the cases that applied forum law outnumber the cases that applied foreign law, the margin is too narrow to justify the above assumption. Of the 80 cases of this period, 44, or

\textsuperscript{336} Sutherland v. Kennington Truck Svc., 562 N.W.2d 466, 469-70 (Mich. 1997).
55%, applied forum law, and 36, or 45%, applied foreign law. The margin is even narrower if one excludes the 3 federal-transfer cases that applied the law of the transferee forum. Moreover, in most of these cases, the forum state had significant aggregations of contacts that could justify the application of its law, even if it was not the forum, and regardless of the choice-of-law theory the court followed. As the following chart indicates, the forum state had 3 additional contacts in 15 cases, 2 additional contacts in 16 cases, and 1 additional contact in the remaining cases.

Chart 9. Forum’s law and contacts

These numbers also exhibit lack of judicial support for Brainerd Currie’s strong advocacy of the law of the forum. As noted earlier, Currie argued that the law of the forum should govern in all true conflicts in which the forum was one of the interested states and in all no-interest cases. According to Currie’s assumptions about state interests, 57 of the 80 cases fall within these 2 categories and thus all 57 cases should be governed by the law of the forum. Instead only 32 of the 57 cases, or 56%, applied forum law. Table 6 and Chart 10 shows the specifics.

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337. See infra chart 9. Federal courts applied forum law less frequently than state courts. Of the 50 cases decided by federal courts, 24 cases or 48% applied forum law. Of the 30 cases decided by state courts, 20 cases or 66.6% applied forum law.

338. The 3 cases are: Nelson v. Sandoz Pharmaceutical Corp., 228 F.3d 954 (7th Cir. 2002), Thornton v. Cessna Aircraft Co., 886 F.2d 85 (4th Cir. 1989), and Rolf v. Tracer, Inc., 140 F. Supp. 2d 1073 (D. Nev. 2001). It is unclear whether these cases should be counted in or outside the Currie column.
Table 6. Conflicts Patterns and Law Applied

<table>
<thead>
<tr>
<th>Pattern</th>
<th>Law Applied</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct Conflicts (True conflicts)</td>
<td>20</td>
</tr>
<tr>
<td>Forum</td>
<td>15 (75%)</td>
</tr>
<tr>
<td>Non-forum</td>
<td>5 (25%)</td>
</tr>
<tr>
<td>Inverse Conflicts (No-interest cases)</td>
<td>37</td>
</tr>
<tr>
<td>Forum</td>
<td>17 (46%)</td>
</tr>
<tr>
<td>Non-Forum</td>
<td>20 (54%)</td>
</tr>
<tr>
<td>Mixed Conflicts</td>
<td>23</td>
</tr>
<tr>
<td>Forum</td>
<td>15 (52%)</td>
</tr>
<tr>
<td>Non Forum</td>
<td>11 (48%)</td>
</tr>
<tr>
<td>Totals</td>
<td>80</td>
</tr>
<tr>
<td>Forum law</td>
<td>44 (55%)</td>
</tr>
<tr>
<td>Non-forum law</td>
<td>36 (45%)</td>
</tr>
</tbody>
</table>

**Direct or True Conflicts.** In 20 cases, the state with the plaintiff-affiliating contacts had a pro-plaintiff law and the state with the defendant-affiliating contacts had a pro-defendant law.\(^{339}\) Under Currie’s assumptions, these cases would qualify as true conflicts and all of them should be governed by the law of the forum. Indeed, 15 of those cases applied the law of the forum, but 5 cases did not.

**Inverse Conflicts or No-Interest Cases.** In 37 cases, the state with the plaintiff-affiliating contacts had a pro-defendant law and the state with the defendant-affiliating contacts had a pro-plaintiff law.\(^{340}\) Under Currie’s assumptions, these cases would fall into the no-interest category, and all of them should be governed by the law of the forum. In fact, only 17 of the 37 cases, or 46%, applied the law of the forum.

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\(^{339}\) See cases ## 1-8, 34-36, 56-57, 73, 75-80 supra tbl. 3.

\(^{340}\) See cases ## 9-33, 37-44, 67, 70-72 supra tbl. 3.
Mixed Conflicts. The remaining 23 cases fell within the mixed conflict pattern because at least one of the plaintiff-affiliating contacts was located in a state that had a pro-plaintiff law and at least one such contact was located in a state with a pro-defendant law. Under Currie's scheme, all these cases would fall either under the true conflict category or in the no-interest category, and thus all of them should be governed by the law of the forum. In fact, only 12 of the 23 cases, or 52%, applied forum law.

All together, only 44 of the 80 cases, or 55%, applied forum law, and this includes 2 cases that were decided under the traditional method, and 3 federal transfer cases. Thus, the cases do not support the impressionistic assertion that courts manipulate all modern choice-of-law approaches in looking for excuses to apply the law of the forum.

341. See cases #45-55, 58-66, 68-69, 74 supra tbl. 3.
342. See cases #47-49, 55, 58-65 supra tbl. 3.
343. See cases #45-46, 50-54, 66 supra tbl. 3.
345. See cases cited supra note 338.
H. No Surprise to Manufacturers

As said above, several cases applied the pro-plaintiff law of a state with plaintiff-affiliating contacts, and in a few of those cases that state had only one such contact (e.g., the plaintiff’s domicile). Yet in none of those cases, including the 7 cases involving non-U.S. manufacturers, nor in any of the other cases, did the defendants assert that the product was unavailable in that state through ordinary commercial channels.

I. The Cases, on the Whole

On the whole, the results of the cases appear pleasingly but suspiciously symmetrical: almost as many cases applied a pro-plaintiff law as applied a pro-defendant law (49% and 51%, respectively); almost as many cases applied a law that favored a local litigant as they applied a law that disfavored a local litigant (28% and 29%, respectively); and the cases that applied the law of the forum outnumber by only a slim margin the cases that applied foreign law (55% or 45%, respectively).

Does the symmetry of these numbers mean that the results are objectively good? Not necessarily. Suppose for example that several cases that, by some objective standard, should have applied a pro-plaintiff law applied a pro-defendant law, and that an equal number of cases that should have applied a pro-defendant law applied a pro-plaintiff law. In such a scenario, the fact that the “wrong” cases in the one group would cancel the “wrong” cases in the second group does not mean that the aggregate result is objectively good. For this reason, this Article does not contend that each and every one of the 80 cases has been “correctly” decided, nor that all cases together have been correctly decided. The sole contention of this Article is that, on the whole, the cases do not support certain widely held assumptions about the current state of American conflicts law, at least in products-liability conflicts: Courts do not favor plaintiffs as a class; courts do not favor local over non-local litigants; and courts do not unduly favor the law of the forum.

The next question, and arguably the more pertinent one, is whether these results—be they good or bad—could have been reached more quickly and efficiently. The balance of the Article addresses this question by examining first the extent to which any of the existing or proposed choice-of-law rules for products-liability
conflicts would have produced the same results. The Article concludes by proposing a new rule that seems to hold that promise.

IV. COMPARISON WITH RULES

Most of the above cases have been decided without the aid or the restraints of choice-of-law rules. 346 It might be helpful to inquire on how these cases would have been decided if American courts were bound by rules, such as those in force elsewhere in the world. This section undertakes a brief inquiry to this end, beginning with the 1972 Convention on the Law Applicable to Products Liability (Hague Convention or Convention), and including some recent civilian codifications.

A. The Hague Convention

The Hague Convention 347 provides that the law of the state of the victim’s habitual residence governs, if that state is also: (1) the defendant’s principal place of business or (2) the place where the victim acquired the product. 348 If these conditions are not met, then the law of the state of injury governs, if that state is also: (1) the victim’s habitual residence, or (2) the defendant’s principal place of business, or (3) the place where the victim acquired the product. 349 When none of the above conditions are met, the victim may choose between the law of the state of injury and the law of the defendant’s principal place of business. 350

If the Hague Convention had been adopted in the United States, it would have produced the same results in 70% of the cases (56 out of 80) as those the American courts reached. 351 This may come as a surprise to many considering the fact that the Convention is based on a

346. Only the Louisiana cases were decided under a statutory choice-of-law rule, La. CIV. CODE ANN. art. 3545 (West Supp. 2003).
349. Id. art. 4.
350. Id. art. 6. The defendant may prevent the application of the law of the place of injury or of the victim’s habitual residence by proving that he could not reasonably have foreseen that the product that caused the injury or his products of the same type would be made available in those states through commercial channels. Id. art. 7.
351. See infra chart 11.
straightforward quantitative approach that eschews policy analysis and all the complications that go with it.

This is not a brief for adopting the Hague Convention. However, whether or not one likes the Hague Convention or the results reached by the 80 cases, the fact remains that the Convention would have produced the same good or bad results in 70% of the cases, but with much less expenditure of judicial resources than in the actual cases. One might even predict that, had the Convention or a similar rule system been in force in the United States, many of these cases would have been settled without litigation, thus conserving even more judicial resources.

Nevertheless, it is appropriate to inquire as to how the Convention would have resolved the remaining 30%, or 24, of the cases. The answer is that in 19 of the 24 cases, the Convention would have changed the result from pro-plaintiff to pro-defendant, and in 2 cases it would have changed the result in the opposite direction.352 As result of these changes, the Convention would have produced a pro-defendant result in 75% of the cases (60 out of 80), as compared to the 51% rate (41 cases out of 80) in the actual cases.353 This is one reason the Convention will never enjoy the support, or even the neutrality, of American trial lawyers.

B. The Rome II Regulation

On July 22, 2003, the Commission of the European Communities submitted a “Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations” (known as Rome II) which, when it goes into effect on January 1, 2005, will unify the tort choice-of-law rules of the member states of the European Union.354 Article 4 of the current version of Rome II provides that noncontractual obligations arising from injury caused by a product are to be governed by the law of the country of the victim’s habitual residence.355

352. In cases ## 55, 78, and 79, see supra tbl. 3, the change cannot be determined because the cases do not provide sufficient information.
353. See infra chart 12.
355. See id. art. 4. Article 4 of Rome II also provides an exception if the defendant can show that the product was marketed in the victim’s home country without the defendant’s consent, in which case the law of the defendant’s habitual residence governs. Id. However, if the American experience is any indication, one can safely assume that in the vast majority of cases this exception will be inapplicable because the defendant will be unable to show such nonconsensual marketing.
However, article 4 applies "[w]ithout prejudice to Article 3(2) and (3)."356 The quoted phrase means that, in appropriate cases, a court may apply: (1) the law of the parties’ common habitual residence357 or (2) the law of a country that has a “manifestly closer connection” than the country or countries of either or both parties’ residence.358 If the American experience is any indication, very few cases will fall within the common-residence exception.359 Thus, for purposes of this comparison, one can assume that the basic rule of Rome II is the application of the law of the victim’s home state, subject to the “closer connection” exception, as well as some other general exceptions Rome II provides in other articles.360

If the 80 cases discussed in this Article were to be decided under such a rule, the result would have been the same in 52 cases, or 65%.361 As a result of the differences in the remaining 28 cases, this rule would lower the overall pro-plaintiff rate from 49% to 42% (from 39 to 34 cases), although it would not change the pro-defendant rate which would remain at 51% (41 cases).362

C. Civilian Codifications

Among recent private international law codifications, the Swiss and Italian codifications give the victim a choice between the laws of: (1) the state of the defendant’s place of business or, in the absence thereof, his habitual residence; or (2) the state in which the product was acquired, “unless the defendant proves that the product has been marketed in that state without his consent.”363 The Quebec codification gives the victim the same choices, but without the above quoted proviso.364

Of the 80 cases discussed in this Article, 28 cases do not provide sufficient information from which to determine how the victims would have exercised their choice. The application of the above codifications

356. Id.
357. Id. art. 3(2).
358. Id. art. 3(3).
359. For example, only 2 of the 80 cases discussed in this Article, see cases ## 66-67 supra tbl. 3, would fall within this exception.
360. For a discussion of these exceptions, see Symeon C. Symeonides, Tort Conflicts and Rome II: A View from Across, in FESTSCHRIFT FÜR ERIK JAYME (forthcoming 2004).
361. See infra chart 11.
362. The remaining 5 cases (6%) do not disclose the law of the plaintiff’s home state. Thus it is unknown whether the result would be different. See infra chart 12.
in the remaining 52 cases would have produced the same result in 54% of those cases (28 out of 52), and a different result in 46% of the cases (24 out of 52). As a result of the differences, these codifications would produce a pro-plaintiff result in 92% of these cases (48 out of 52). Even if one adds all of the 28 undeterminable cases to the pro-defendant column, the balance would be 60% in favor of the plaintiff (48 out of 80), as compared to a 49% ratio (39 cases out of 80) in the actual cases.

**D. Professor Cavers’s Rule**

Among academic commentators, the first to propose a choice-of-law rule for products liability was Professor Cavers. His proposed rule allows the plaintiff to choose from among the laws of: (1) the place of the product’s production or approval; or (2) the place of the plaintiff’s habitual residence, if that place coincides with either the place of injury or the place where the plaintiff had acquired the product; or (3) the place of acquisition if that place is also the place of injury.

Of the 80 cases discussed in this Article, 29 cases do not provide sufficient information from which to determine how the plaintiffs would have exercised their choice. The application of Cavers’s rule to the remaining 51 cases would produce the same result as in 55% of

365. See infra chart 11.

366. See infra chart 12.


368. See Cavers, supra note 367, at 728. However, the defendant may prevent the application of the laws of the states specified in (2) and (3) by showing that “he could not reasonably have foreseen the presence in those States of his product which caused harm to the claimant or his property.” Id. Professor Nygh’s proposed rule gives plaintiff a more expansive right to choose the forum and, with it, the applicable law. The plaintiff can choose from among the laws of (1) the defendant’s principal place of business; (2) the place of conduct; and (3) the place of injury (the latter subject to a foreseeability proviso). See Peter Nygh, The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort, 251 Recueil des Cours 269, 374-75 (1995).
these cases (28 out of 51), and a different result in 45% (23 out of 51). As a result of the differences, Cavers's rule would produce a pro-plaintiff result in 92% of these cases (47 out of 51), and a pro-defendant result in 8% of the cases (4 out of 51). Even if one adds all of the 29 undeterminable cases to the pro-defendant column, the balance would be 59% pro-plaintiff (47 out of 80), and 41% pro-defendant (33 out of 80), as compared to the 49% to 51% ratio in the actual cases.

E. Lex Loci, Lex Fori, Lex Domicilii

The above inquiry may increase one's curiosity on whether simpler, monodimensional rules, such as the lex loci delicti or the lex fori, would have come closer to approximating the results in the 80 cases. This question is addressed below.

If all the 80 cases had been decided under the lex loci rule (and assuming the locus delicti was deemed to be in the state of the injury), the result would have been the same in 47 or 59% of the cases. However, because most of the remaining 33 cases would have been decided in favor of the defendant, the lex loci rule would have raised the overall pro-defendant percentage from 51% to 72.5% (from 41 to 58 cases) and would have lowered the pro-plaintiff percentage from 49% to 25% (from 39 cases to 20 cases).

If all the 80 cases had been decided under the lex fori, the result would have been the same in 43 of the cases, or 54%. However, because in most of the remaining 37 cases the forum had a pro-plaintiff law, the lex fori rule would have raised the overall pro-plaintiff rate from 49% to 76% (from 39 to 61 cases) and would have lowered the pro-defendant rate from 51% to 23% (from 41 to 18 cases).

If all the 80 cases had been decided under the law of the plaintiff's home state (lex domicilii), the result would have been the

369. See infra chart 11.
370. See infra chart 12.
371. See infra chart 11.
372. The lex loci rule would change the result from pro-plaintiff to pro-defendant in 24 cases, and from pro-defendant to pro-plaintiff in 7 cases. In 2 cases, the result would remain the same, although the law of a different state would govern. Two cases do not disclose the law of the state of injury, so it is unknown whether the result would change.
373. Two cases that applied a pro-plaintiff law do not disclose the content of the lex loci. See infra chart 12.
374. See infra chart 11.
375. See infra chart 11. One case, MacDonald v. General Motors Corp., 110 F.3d 337 (6th Cir. 1997), does not disclose the law of the forum.
same in 52 cases, or 65%. As a result of the differences in the remaining 28 cases, this rule would lower the overall pro-plaintiff rate from 49% to 42% (from 39 to 34 cases), although it would not change the pro-defendant rate which would remain at 51% (41 cases).

Finally, if the 80 cases had been decided under the law of the state of the product's acquisition, the result would have been the same in 50 cases, or 62%. As a result of the differences in the remaining 30 cases, this rule would have raised slightly the pro-defendant percentage from 51% to 56% (from 41 to 45 cases), but would have lowered the overall pro-plaintiff percentage from 49% to 31% (from 39 cases to 25).

F. Comparing the Comparisons

The following charts depict the results that the rules discussed in the preceding paragraphs would produce in the 80 cases. Chart 11 shows the number of cases in which these rules would produce the same result, a different result, or an unknown result. As the chart indicates, the Hague Convention comes closer to approximating the results of the actual cases, insofar as it would lead to the application of the law of the same state in 56 of the 80 cases, or 70%.

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376. See infra chart 11.
377. See infra chart 12. The remaining 5 cases (6%) do not disclose the law of the plaintiff's home state. Thus it is unknown whether the result would be different.
378. See infra chart 11.
379. See infra chart 12. Ten cases do not disclose the law of the state of acquisition.
Chart 11. Comparing with rules (same law)

Chart 12 compares the results in terms of which rules would apply a law that favors the plaintiffs or the defendants. As the chart indicates, Rome II and the *lex domicilii* rule come closest to the results reached by the cases. The Hague Convention (followed closely by the *lex loci delicti* rule) would favor defendants more than any of the other rules. Predictably, a *lex fori* rule (followed by the 3 civilian codifications) would favor plaintiffs more than any of the other rules.
G. Articulating a Descriptive Rule

The above comparisons raise the question of whether a different, more complex rule would come closer to approximating the results of the actual cases. The short answer to this question is "yes, but not by much." Indeed, unlike other tort conflicts, the results produced by products-liability cases cannot be easily compressed into a rule that can accurately reflect these results and still be functionally defensible.

If one were to accept as proper the results reached by the 80 cases and then articulate a contacts-based descriptive rule that would produce the same results in the majority of those cases, that rule might resemble the following:

1. Apply the law of a state that has any 3 of the following contacts: (1) place of injury, (2) domicile of the injured party, (3) place of the product's acquisition, (4) place of

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380. In many tort conflicts other than those involving products liability, the case law has produced clear and surprisingly uniform decisional patterns that one can easily express into new choice-of-law rules. For the form and content of those rules, see Symeonides, supra note 1, §§ 162-165, 181, 193-95. For the feasibility and desirability of such rules, see id. §§ 323-333.
manufacture, or (5) defendant's principal place of business.

2. If 2 states have 2 of the above contacts each, apply the law of the state with the plaintiff-affiliating contacts.

3. If no state has 3 contacts, and only 1 state has 2 contacts, apply the law of that state.

The first paragraph of the rule covers a pattern that appeared in 42 of the 80 cases and produces the same result in 34, or 81%, of those cases. 381 The second paragraph covers a pattern that appeared in 22 cases and produces the same result in 16 or 73% of those cases. 382 The third paragraph covers a pattern that appeared in 14 cases and produces the same result in 9 of those cases, or 64%. 383 All in all, the above rule covers 98% of the cases (78 out of 80) 384 and would produce the same result in 74% of the cases (59 out of 80), and a different result in 26% of the cases (21 out of 80). Because of these changes, the overall results will become from 51% to 71% pro-defendant, and from 49% to 29% pro-plaintiff. Although these rates are slightly better than those of the Hague Convention, and although in many instances the results are more defensible than those in the actual cases, the improvement is only slight.

Frustrations like these often generate a nostalgia for the old lex loci rule. At least one court concluded that, because of its neutrality towards parties and substantive laws, the lex loci rule is the best alternative. In Ness v. Ford Motor Co., the court, after considering other options, concluded that "[s]ometimes an apparently arbitrary choice—like lex loci delicti—is a reasonable way of dealing with the problem of conflict of interest between states." 385 The court recognized that the plaintiff's home state had an interest in "seeing its citizens adequately compensated for their injuries," 386 but also noted that the

381. This rule would change the result from pro-plaintiff to pro-defendant in 6 cases (cases ## 28-33 supra tbl. 3), and from pro-defendant to pro-plaintiff in 2 cases (cases ## 8, 40 supra tbl. 3).

382. This rule would change the result from pro-plaintiff to pro-defendant in 7 cases (cases ## 44-46, 54, 65, 69, 78 supra tbl. 3).

383. This rule would change the result from pro-plaintiff to pro-defendant in 5 cases (cases ## 49, 76-77, 79, 80 supra tbl. 3).

384. The 2 cases not covered are cases ## 55 and 75 supra tbl. 3.


386. Id. The plaintiff was an Illinois resident who was injured in a single-car accident in Iowa, when the car in which he was a passenger rolled over. Id. at *1. The car was manufactured by defendant Ford in Michigan, and was registered and garaged in Illinois. Id. At the time of the accident, it was driven by another Illinois resident in a trip that began and was to end in Illinois. Id.
state of manufacture had an interest in “seeing that product-liability plaintiffs are not overcompensated, resulting in higher insurance premiums for [its] manufacturers, higher costs, and lost jobs.” A rule calling for the application of the law of the state of manufacture, said the court, “would tend to leave victims uncompensated as states wishing to attract and hold manufacturing companies would raise the threshold of liability and reduce compensation.” Likewise, a rule applying the law of the victim’s domicile “would permit a state with little manufacturing to endow its citizens with generous protection wherever they choose to travel without picking up any of the cost.”

After also rejecting the notion of applying the law of the place of the product’s acquisition (because products may be resold in other states, and because product liability does not require privity), the court concluded that “[t]he traditional rule of lex loci delicti appears less objectionable once it is understood that there is no alternative that will yield a rational and fair result in all cases.”

Indeed, is there no other alternative? Was the conflicts revolution just a circuitous march that was bound to end with a return to the lex loci rule? No, we have come too far to return to a simplistic, mechanical rule that is oblivious to the hard-earned lessons of the American experience. As for the alternative, the alternative is to stop groping for monodimensional, all-or-nothing rules based on single connecting factors like the ones the Ness court considered, and to start thinking about more comprehensive and flexible formulae for these inherently complex conflicts.

Attaining a consensus on the precise ingredients of these formulae will not be easy, but the debate should begin sooner rather than later. While nobody has a monopoly on good ideas, academic authors can do their part by putting forward their proposals of how these rules or formulae should look. The proposal described in the next Part is this author’s modest contribution to this end.

V. A PROPOSED RULE
A. Proposing a Forward-Looking Rule

Products-liability conflicts are inherently difficult, and so far nobody has put forward the prefect formula for resolving them. This
includes the undersigned author who, in the course of the last 15 years, has drafted 2 statutory rules for such conflicts and has proposed 2 other rules for the same purpose. The fact that each of those rules differs from the others serves as this author’s own admission that none of them are perfect. But the search for the better, if not the perfect, must continue. The rule proposed below is another attempt for the better.

1. Liability
   a. Liability for injury caused by a product is determined, at the choice of the injured party, by the law of a state that has any 2 of the following contacts: (1) the place of injury; (2) the domicile or habitual residence of the injured party; (3) the place in which the product was made; or (4) the place in which the product was delivered to the first acquirer and final user.

   The injured party’s choice shall be disregarded upon proof that neither the product that caused the injury nor the defendant’s products of the same type were available in the chosen state through ordinary commercial channels.

   b. If the injured party fails to make a choice under 1(a), the defendant may choose the law of a state that has any 3 of the contacts listed in 1(a).

   c. Cases not disposed of under 1(a) or 1(b) are governed by the law chosen by the court under . . . [the general rules or approach for tort conflicts].

2. Damages

   If the defendant is liable under 1, the injured party’s right to compensatory or punitive damages and the amount of such damages shall be determined by the court under the law chosen under the general rules or approach for tort conflicts.

B. General Features

Before discussing the application of this Rule to the actual cases, it might be helpful to discuss its general features, beginning with the fact that the Rule relies on 4 rather than 5 contacts.


392. See Symeonides, supra note 367, at 472-74; Symeonides, supra note 1, §§ 254-261.
1. Redefining the Pertinent Contacts
   
a. Defendant’s Principal Place of Business. The review of the cases indicates that, of the 5 contacts initially identified in this Article as pertinent for analyzing these cases, one contact—the defendant’s principal place of business—is the least pertinent. As noted earlier, no state has applied the law of the defendant’s principal place of business as such.\(^{393}\) This is hardly surprising. Most product producers are corporate entities with a multistate composition and multistate presence, but often without a real “home state” anywhere. Many of them engage in activities other than manufacturing and choose their principal place of business for reasons unrelated to this activity. For example, in 1 case involving the engines of a commercial airliner that crashed in Iowa, the court found that New York was General Electric’s principal place of business only because the company’s other holdings, unrelated to manufacture, were located in that state.\(^{394}\) The court disregarded this contact for this reason.\(^{395}\) In another case involving a helicopter engine manufactured by the same company, the company’s principal place of business was still in New York, but its headquarters were in Connecticut, its engine manufacturing division’s headquarters were in Ohio, and its engine design and manufacturing division was in Massachusetts.\(^{396}\) Thus, to the extent that the principal place of business can serve as a proxy for the place of the corporate decision making, the relevant decision making is often made elsewhere.

   To be sure, one could analogize with natural persons and argue that, like a person’s home state, the state of a corporation’s principal place of business will feel the financial impact of a court decision imposing or not imposing liability, or assessing large amounts of damages, especially punitive damages. However, the analogy can only go so far. While in some cases that state may feel the impact in terms of jobs or tax revenue losses, the fact remains that the major losers are the corporation’s shareholders, most of whom could well have their domiciles elsewhere.

   For these reasons, the Rule proposed here does not include the defendant’s principal place of business in its part that gives the parties a choice for determining liability. However, this contact remains available for consideration by the court in choosing the law governing

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393. See supra text accompanying notes 312-313.
395. Id.
liability in those cases that are not disposed of through a party choice under Rule 1, or the law governing damages in all cases under Rule 2.

b. Domicile and Injury. The review of the cases confirms that the remaining 4 contacts are all relevant. The plaintiff's domicile in a given state is relevant because that state will experience the social and economic impact of recovery or nonrecovery. The place of injury remains relevant because the injury is the very event that causes the dispute. The fact that this was the only contact that counted under the *lex loci delicti* regime does not mean that this contact should be discounted now.

c. Manufacture. Despite arguments to the contrary, the place of manufacture is relevant because—if the product is in fact defective—that is the place where the defect should have been detected. It is, in other words, the place of the critical act or omission that set in motion the chain of events that caused the injury. Admittedly, as noted earlier, the manufacture of a product often consists of several phases (design, testing, approval, assembly) which may occur in different states. By using the term “making” rather “manufacture,” the proposed Rule seeks to address some of these problems, but a more carefully drafted technical definition would be preferable.

d. Acquisition. This leaves the place of the product's acquisition. Although there is little doubt that this contact is pertinent, there are several questions about its precise meaning. For example, should it matter whether the acquirer was the victim, another party on the victim's behalf, or a third party unrelated to the victim? It would seem that the answer should be negative since this Rule is intended for tort actions for which privity is not required.

Should one distinguish between, say, consumer goods that are usually acquired by the victim in her home state, and goods like airplanes or other means of public transportation that are often acquired in a state other than the victim's home state? This distinction would be important if the place of acquisition alone would determine the applicable law. However, this is not the case under the Rule proposed above. Under this Rule, the contact becomes important only if the acquisition takes place in a state that has at least one other pertinent contact (in the case of a choice by the victim under Rule 1a) or 2 pertinent contacts (in the case of a choice by the defendant under

397. See *supra* note 22 and accompanying text.
398. See *supra* note 16 and accompanying text.
Rule 1b). As long as this requirement is met, the above distinction should be immaterial.

Another question involves sales across state lines, which are now becoming even more common with the advent of the internet. By using the term “delivery to the...acquirer” the proposed Rule seeks to reduce the artificiality of this contact or its manipulation by one party. Similarly, by using the rather inelegant phrase “first acquirer and final user,” the proposed Rule seeks to exclude sales to intermediaries and secondhand sales. To the extent that intermediaries, such as distributors or retailers, actually acquire a product (rather than holding it in consignment), they do so not for the purpose of using it as such, but rather for the purpose of selling it further. Consequently, for the purposes of this Rule, which deals with tort liability, the place of acquisition by such intermediaries is irrelevant. The critical acquisition is the one by the acquirer and user. Similarly, since the Rule deals with the liability of the producer rather than the liability of a nonprofessional seller, the critical acquisition is the one by the first acquirer and user, not the one to whom that party resells the product in used condition (secondhand sale).

2. The Content of the Conflicting Laws

As noted at the beginning, one of the lessons of the American choice-of-law revolution is the notion that one can resolve conflicts of laws more intelligently by considering the content of these laws and making that content a criterion in the final choice of the governing law. Thus, content-oriented law selection, as opposed to content-blind jurisdiction selection, has become a major article of faith and an integral part of all modern American choice-of-law approaches.

However, this does not mean that all choice-of-law rules should be content oriented. In some cases, the content of the conflicting laws should not affect the final choice. Perhaps the best example emerges from the experience of American courts in resolving generic tort conflicts in which the parties are domiciled in one state and the tort occurs in another. As documented in detail elsewhere, virtually all the 50 state supreme court cases involving this pattern (common domicile) and an issue of loss distribution (e.g., damages) as opposed

399. See supra note 26 and accompanying text.
400. See Symeonides, supra note 1, §§ 133, 164; Symeon C. Symeonides, Territoriality and Personality in Tort Conflicts, in INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETER NYGH 405 (T. Einhorn & K. Siehr eds., 2003).
to conduct regulation have applied the law of the common domicile, both when that law favored recovery and when it did not. From this experience, one could justifiably conclude that the law of the common domicile governs de facto, whether it favors or disfavors recovery, i.e., regardless of its content. The New York Court of Appeals has endorsed such a content-neutral rule, Louisiana has enacted it, and so have many European countries. Now, reasonable people may disagree on whether this rule should be content neutral. For example, while virtually no one disagrees with the application of the common-domicile law when it favors recovery more than the state of injury, some commentators disagree with the automatic application of that law to cases of the converse pattern, i.e., when that law does not favor recovery. These commentators then would prefer a content-oriented rule that applies common-domicile law when it helps, but not when it hurts the plaintiff. This is a legitimate viewpoint. On the other hand, those who do not subscribe to this differentiation prefer a content-neutral, common-domicile rule. They do so, not necessarily because they subscribe to jurisdiction selection but rather because, after examining the consequences of the rule in each pattern, they find it equally appropriate to both. The point then is that a choice-of-law rule that does not explicitly refer to the content of the conflicting laws can withstand the scrutiny of modern choice-of-law theory.

Secondly, a content-oriented choice need not be relegated to the judge in all cases. In some cases, this choice can be made in advance by the rule drafter after considering all possible permutations. When this is done—and it can be done—the resulting rule will have the appearance of a jurisdiction-selecting rule like the one proposed here, which on its surface does not make reference to the content of the conflicting laws. However, this rule does introduce content-oriented selection through the vehicle of party choice. The reason a party will choose the law of a state that has the required contacts is not because of any particular affection for that state nor because of its contacts. Rather it is because the content of that law is such as to be favorable to that party's case. Whether that choice is also a good choice from a systemic perspective is a separate question, but if it is, then the device of having a party rather than the court choose the law accomplishes the

403. See SCOLES, HAY, BORCHERS & SYMEONIDES, supra note 11, at 770-71.
objective of a content-oriented law selection while relieving the court from the burdens of an otherwise laborious choice-of-law analysis.

3. Party Choice

   a. Allowing Party Choice. Indeed, one general conclusion this author draws from the American experience in costly and unpredictable products-liability litigation, and the European experience in rule drafting, is that allowing the parties to choose the applicable law can be a very helpful, cost-saving tool in resolving these inherently complex conflicts. This tool helps conserve judicial resources by relieving courts from the burdens and risks of a laborious and often inconsistent judicial determination and evaluation of state policies and interests. It also helps foster predictability. If the parties know beforehand what the applicable law will be, they are more likely to make an intelligent decision as to whether to litigate. For these reasons, the Rule proposed here adopts the notion of party choice.

   b. Allowing Both Parties to Choose. However, unlike the other rules discussed above,404 the proposed Rule gives both parties a choice, albeit under different circumstances. Indeed, basic notions of evenhandedness dictate that the right to choose be given not only to the plaintiff, but also to the defendant.

       However, a bilateral choice need not be completely symmetrical. In fact it should not be. An asymmetrical right to choose that favors plaintiffs can help equalize their position with that of manufacturers. Thus, a tilt towards plaintiffs is not only permissible; it is also appropriate. The proposed Rule appears to favor plaintiffs in 2 ways: (1) by giving plaintiffs the first choice and (2) by allowing them to choose a state that has 2 contacts—and this would seem to be a more frequent occurrence than the 3 contacts required for the defendant’s choice. As explained below, however, if this Rule were to be applied to the 80 cases of this period, the Rule would not have favored plaintiffs more than defendants.

   c. Limiting the Plaintiff’s Choices. At the same time, compared to the previously discussed rules, the Rule proposed here is less generous to plaintiffs in that: (1) it gives them the right to choose

404. See sources cited supra notes 347-368 and accompanying text. To this author’s knowledge, Professor Weintraub was the first to propose giving defendants a choice. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 424-25 (4th ed. 2001); Russell J. Weintraub, A Proposed Choice-of-Law Standard for International Products Liability Disputes, 16 BROOK. J. INT’L L. 225, 238 (1990); see also Symeonides, supra note 367, at 450-51.
a law only for the question of liability, not damages; and (2) it limits their choices to states that have 2 pertinent contacts. The Rule also provides the defendant with the commercial unavailability defense stated in the second sentence of 1a, which is a standard feature in all similar rules. The availability of this defense is a necessary safeguard, even though, as noted earlier,\textsuperscript{405} no defendant invoked this type of defense in any of the 80 cases decided during the survey period.

4. Differentiating Between Liability and Damages

Even with these limitations, however, the notion of giving plaintiffs a first and broader right to choose the applicable law \textit{ex post facto} would seem to place them in control of the choice-of-law process to a degree unprecedented in the United States. To a lesser extent, the same would be true with regard to defendants in those cases in which plaintiffs will be unable to exercise their choices because the case lacks a favorable combination of contacts and laws. For this reason both sides’ right to choose should be limited to the question of liability and should not encompass compensatory or, especially, punitive damages. The choice of the law governing damages should remain with the court, which can use this power to guard against excesses and to reequalize the position of the parties as explained below. For example, if Rule 1 turns out to favor plaintiffs too much on liability, the court can use its power under Rule 2 to reduce the impact on the defendant with regard to damages.

C. Operation

1. Liability

a. Rule 1a. With regard to liability, Rule 1a gives plaintiffs the right to choose the law of a state that has any 2 of the 4 listed contacts. Both contacts must be in the \textit{same} state. It does not suffice if they are in different states that have the same law.\textsuperscript{406} Predictably, a plaintiff will

\textsuperscript{405} \textit{See supra} text accompanying notes 345-346.

\textsuperscript{406} This requirement calls for an explanation. Suppose for example that the 4 contacts are located in 4 different states, the first 3 of which have a pro-plaintiff law. One could argue that such a case is functionally analogous to case # 1 in Table 7, \textit{infra}, and thus the plaintiff should have the same choice of a pro-plaintiff law as in case # 1. The counter argument is that, even if the 2 cases are functionally analogous in terms of state policies, they are not analogous in terms of party reliance and expectations. In case # 1, a person is injured in her home state by a product she acquired in that state. In arguing on the victim’s behalf, one would be justified in saying that she was entitled to rely on the protection of that state’s
exercise this choice if the case presents a combination of contacts and laws that produce a favorable result, i.e., if at least 1 state has the requisite 2 contacts and a pro-plaintiff law. The following table shows all possible combinations.

<table>
<thead>
<tr>
<th>P’s domicile</th>
<th>Injury</th>
<th>Delivery</th>
<th>Making</th>
<th>Occurrences</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The Plaintiff’s Choices</strong></td>
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<tr>
<td>1</td>
<td>Pro-P</td>
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<td>2</td>
<td>Pro-D</td>
<td>Pro-P</td>
<td>Pro-P</td>
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<td>3</td>
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<td>Pro-D</td>
<td>Pro-P</td>
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<tr>
<td><strong>The Defendant’s Choices</strong></td>
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<tr>
<td>11</td>
<td>Pro-D</td>
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<td>12</td>
<td>Pro-P</td>
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<td>13</td>
<td>Pro-D</td>
<td>Pro-P</td>
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<td>14</td>
<td>Pro-D</td>
<td>Pro-D</td>
<td>Pro-P</td>
<td>Pro-D</td>
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</tbody>
</table>

Total Actual Choices: Plaintiff: 25; Defendant: 25

The first 10 patterns represent all the possible combinations that would favor the plaintiff. The last 4 patterns represent all the possible combinations that would favor the defendant.

The fact that 10 of the 14 possible combinations favor the plaintiff suggests that the proposed Rule is skewed towards the plaintiff. This is a distinct possibility, which one can defend on the merits as an attempt to bring some equilibrium to the otherwise unequal positions of manufacturers and consumers. Such a defense may not be necessary, however. For the fact that theoretically plaintiffs have a higher chance for a favorable combination of contacts and laws

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407. See shaded cells in rows 1-10 supra tbl. 7.
408. See white cells in rows 11-14 supra tbl. 7.
does not necessarily mean that plaintiffs have the same advantage in actuality. This would be true only if in real life each of the 14 patterns occurred with the same frequency. At least the 80 cases decided during the survey period suggest otherwise. Specifically: (1) of the 10 combinations theoretically available to plaintiffs, only 6 combinations actually occurred, for a combined total of 25 times; and (2) of the 4 combinations theoretically available to defendants, only one combination actually occurred, but it occurred a total of 25 times. The last column in Table 7 indicates these occurrences. Thus, in these particular 80 cases, the proposed Rule would favor plaintiffs with exactly the same frequency as it would favor defendants, no more and no less.

Again, these results are suspiciously symmetrical. Even if symmetry were an inherent virtue, however, one should not expect the same symmetry in all cases. At the same time, the fact that potential plaintiffs would not fare better than the plaintiffs in the above 80 cases suggests that plaintiffs in general will not fare significantly better in other cases.

b. Rule 1b. If the plaintiff does not choose a state under Rule 1a, for example because the case does not present any of the 10 favorable combinations, then Rule 1b would give the defendant the right to choose a state that has any 3 of the pertinent contacts. Again, the defendant will likely exercise this choice if the case presents any one of the last 4 combinations depicted through the nonshaded cells of Table 7.

c. Rule 1c. If the case is not resolved through either 1a or 1b, it will likely be because the case did not present the right combinations of contacts and laws to make it attractive for either party to choose the applicable law. As explained below, this would have occurred in 30 of the 80 cases discussed in this Article. These 30 cases will be resolved by the court under the general rule or approach the court follows in other tort conflicts.

2. Damages

If the defendant is not liable under the law chosen through Rule 1, the case will end there. If the defendant is found liable, then the court will address the question of compensatory and punitive damages,

409. Another possibility is that the defendant successfully invokes the commercial unavailability defense of Rule 1a.
if any, under the general choice-of-law rules or approach the court follows for tort conflicts.

Depending on the circumstances of the particular case, the court may choose the same law as the one that governs liability under Rule 1, or the court may choose a different law. In choosing the former, the court should guard against giving one side too much through the same law. In choosing the latter, the court should guard against the possibility of giving one side the best of both worlds through an inappropriate dépeçage. Maintaining a balance between these 2 conflicting goals will be a delicate task, and this is precisely why it should remain with the court rather than be entrusted to self-interested parties.

3. Applying the Rule to the Cases

If the 80 cases decided during the survey period were to be decided under the proposed Rule, the part of the Rule that allows party choice would quickly produce the same result in exactly half of them—40 cases. Table 8, below, shows these cases. The combination of contacts and laws is such as to enable the plaintiffs to choose the same pro-plaintiff law as in the actual cases in 21 cases and the defendants to do likewise in 19 cases.

Table 8. Cases in which the Proposed Rule will Produce the Same Result Through Party Choice
(40 cases or 50% out 80 cases)

<table>
<thead>
<tr>
<th>Case</th>
<th>Forum</th>
<th>Plaintiff-Affiliating Contacts</th>
<th>D-affiliating contacts</th>
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<tbody>
<tr>
<td></td>
<td></td>
<td>P’s domicile</td>
<td>Injury</td>
</tr>
<tr>
<td>A. Applying Pro-Plaintiff Law (21 cases or 52.5%)</td>
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<td>1 Custom</td>
<td>KY Pro-D</td>
<td>CAN Pro-P</td>
<td>CAN Pro-P</td>
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<tr>
<td>2 Kramer</td>
<td>N.Y.</td>
<td>N.Y.</td>
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410. For the criteria for distinguishing between permissible and impermissible dépeçage, see SYMENIDES, PERDUE & VON MEHREN, supra note 27, at 259-61.

411. This exercise is subject to a caveat stemming from the fact that the proposed Rule distinguishes between liability and damages and gives parties a choice only with regard to liability. The 80 cases, at least as represented in Table 3, do not always make this distinction. Some of the cases involved disputes on both liability and damages, while other cases involved a dispute only about damages because liability had been established or conceded. However, for the purposes of this exercise, it is assumed that in each of the 80 cases the involved states had the laws depicted in Table 3 on the issue of liability.

412. Table 8 is extracted from Table 3. Table 8 retains the same numbering of the cases as Table 3 so that the reader can track the cases.
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<td>N.J.</td>
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B. Applying Pro-D Law (19 cases or 47.5% of 40 cases)

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The proposed Rule will change the result in 10 cases. In 3 cases, the change will be from a pro-defendant to a pro-plaintiff law, and in 6 cases the change will be from a pro-plaintiff to a pro-defendant law. Table 9, below, depicts these cases. The shaded cells show the state whose law the court applied in the actual cases. The use of bold-face type indicates the law that would be chosen under proposed Rules 1a or 1b. Each of these changes can be defended as a change for the better, although space limitations do not allow for this discussion here.
Table 9. Cases in which the Proposed Rule will Change the Result (10 cases or 12.5%)

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By adding up the cases in Tables 8 and 9, one can see that, through the medium of party choice, Rules 1a and 1b will resolve quickly 50 of the 80 cases, or 62.5%. Rule 1a will produce a pro-plaintiff result in 25 of those cases (compared to 27 in the actual cases). Rule 1b will produce a pro-defendant result in 25 cases (compared to 23 in the actual cases). Thus, despite their pro-plaintiff appearance, Rules 1a and 1b will actually reduce slightly the percentage of pro-plaintiff cases from 54% to 50%.

413. See supra chart 13.
Chart 13. Effect of party choices under proposed rule

The remaining 30 of the 80 cases will not be resolved through the medium of party choice, because they do not present the right combinations of contacts and laws to make it attractive for either party to exercise the choices Rules 1a and 1b provide. The following table shows these cases.

Table 10. Cases the Proposed Rule Will Not Resolve Through Party Choice (30 cases or 37.5%)

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These cases will have to be resolved by the courts under the general choice-of-law approach the courts would normally follow for such cases. If these courts follow the same approaches as in the actual cases (and there is little reason to assume otherwise) then the courts would reach the same results as in the actual cases. If this is true, then the proposed Rule:

1. will produce the same result in a total of 70 (or 87.5%) of the 80 cases;
2. will change the result from pro-defendant to pro-plaintiff in 4 cases and from pro-plaintiff to pro-defendant in 6 cases; and
3. all together, the proposed Rule will lead to the application of a pro-plaintiff law in 37 of the cases, or 46% (compared to 39 or 49% of the actual cases), and a pro-defendant law in 43 or 54% of the cases (compared to 41 or 51% of the actual cases).  \[414\]

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Thus, the proposed rule comes much closer than any of the other rules discussed earlier in reproducing the results of the actual cases.\footnote{See supra chart 12.} Of course one could argue that the results of the cases are themselves bad and, to the extent the proposed Rule reproduces the same results, the Rule simply replicates a bad system. Even if this were true, however (and there is no reason to assume that it is), there is still much to be said about the benefits of having a rule that makes these results predictable, reduces litigation expenses, and lightens the courts’ choice-of-law burdens. Indeed, one could argue that if a rule like the proposed Rule 1 were in effect, it would have facilitated early settlements in most of these cases without resort to litigation, thus conserving precious judicial resources. Even if litigation is not avoided, Rule 1 will reduce the court’s choice-of-law burden, while Rule 2 will allow the court to remain in control on the question of damages.

VI. CONCLUSIONS

This Article provides a comprehensive review of American products-liability conflicts cases decided during the period of 1990 to 2003. Although this was not its goal, the review produced some surprising findings that dispute certain widely held assumptions about the current state of American conflicts law, especially in the area of tort conflicts. Among these findings are the following:

1. Although today’s products travel great distances, most multistate products-liability cases (71%) involve only 2 or 3 states. In a clear plurality of cases (41%), the victim’s domicile and injury, and the product’s acquisition were in the same state. The vast majority of those cases (79%) applied that state’s law, and in the majority of those cases (73%) that law favored the defendant;

2. Forum-shopping is neither as common nor as rewarding as critics assume. Only 4% of the cases involved actual forum shopping, and 4% involved borderline forum shopping. All of these cases applied the pro-defendant law of a state other than the forum;

3. Most products-liability plaintiffs tend to sue in their home state. They did so in 54% of the cases;

4. Most cases (76%) applied the law of a state with plaintiff-affiliating contacts, but in most of those cases (58%) that state had a pro-defendant law;
(5) Courts do not unduly favor plaintiffs as a class. In fact, slightly more than half of the cases (51%) applied a law that favored the defendant;

(6) Courts do not unduly favor the domiciliaries of the forum state (plaintiffs or defendants). In fact, more than half of the cases applied a law that did not favor the local litigant;

(7) Courts do not unduly favor the law of the forum. The percentage of cases that applied forum law was only 10% higher than the cases that applied foreign law, and the cases that exhibited undue forum-law favoritism are no more than a handful.

All in all, a review of the cases reveals that the record of American courts in handling these most difficult of conflicts is much better than one might assume from a selective reading of a few cases. Indeed, this is one of those situations in which the whole is better than any of its parts separately considered.

Nevertheless, this record comes at a high cost in litigation expenses for the parties, and a heavy utilization of judicial resources that are needed elsewhere. Long delays in resolving a conflict and high uncertainties regarding the final outcome commensurably reduce the value of even a good outcome. Predictability of outcomes is as important in this area of the law as it is elsewhere.

In an effort to reduce this uncertainty, this Article proposes a choice-of-law Rule that would produce mostly the same results as the actual cases, but much more quickly and at a much lower cost. In about two-thirds of the cases, the proposed Rule will enable the parties to know in advance which law will determine liability. This knowledge will increase the incentive for early negotiations on the question of damages and would increase the chances of early settlements without resort to litigation. In turn, this would benefit both parties and the system at large.