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ON CHOICE OF LAW
AND THE GREAT QUEST:
A CRITIQUE OF SPECIAL MULTISTATE SOLUTIONS TO
CHOICE-OF-LAW PROBLEMS

Robert Allen Sedler*

The clear majority of state courts now employ policy-centered approaches to resolve choice-of-law problems.¹ Experience with these approaches demonstrates that the results in actual cases are not likely to depend upon which particular policy-centered methodology a court formally adopts, or whether a court even commits itself to a specific policy-centered theory. As Professor Leflar notes,

Most of the current cases follow a pattern of multiple citation, seldom relying solely upon any single modern choice-of-law theory, but combining two or more of the theories to produce results which, interestingly, can be sustained under any or nearly all of the new non-mechanical approaches to conflicts law.²

In reality, however, policy-centered courts generally make choice-of-law decisions in accordance with the “Currie version” of interest

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¹ See Sedler, Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases, 44 TENN. L. REV. 975, 976 n.2 (1977) [hereinafter cited as Sedler, Rules of Choice of Law]. Now that Arkansas and Texas have abandoned the traditional approach, see Wallis v. Mrs. Smith’s Pie Co., 261 Ark. 622, 550 S.W.2d 453 (1977); Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979), the breakdown among the 50 states and the District of Columbia is as follows: 29 states have adopted a “modern” approach, 16 have adhered to the traditional approach, 6 have not yet passed on the question. See Sedler, Rules of Choice of Law, supra, at 976 n.2. The question almost invariably arises in the context of whether the court will continue to follow the place-of-the-wrong rule in torts cases. For discussion of the policy-centered approach, see Sedler, Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws, 56 KY. L.J. 27, 57-61 (1967). In practice, all courts that have abandoned the traditional approach make the choice-of-law decision with reference to considerations of policy and fairness to the parties.

analysis: They decide cases by referring to the policies and interests of the involved states and by considering the fairness to the parties of applying a particular state's law. This analysis almost invariably leads the forum state to apply its own law whenever there is a real interest in implementing its policies.

Modern academic commentary likewise seems less concerned


4. As I have explained elsewhere, the forum's real interest is determined by whether the policy behind the forum's rule will be significantly advanced by its application to a situation containing a foreign element. . . . [O]ther considerations [e.g., the "obvious interest" of another state or possible unfairness to the parties] are relevant only insofar as they assist in the resolution of this question.

Sedler, supra note 3, at 222-23 (emphasis added) (footnote omitted). See also id. at 222-27.

5. See Sedler, supra note 3, at 227-33.

Once the forum determines that it has a real interest in applying its law the court should apply it, without considering whether any other involved state also has a real interest in the application of its own law. The primary reason for my advocating such application of forum law is my view that in a conflicts case the proper function of a court is to advance its own policies and interests rather than to advance "multistate policies."

Id. at 227 (footnote omitted). Fairness to the parties is an independent choice-of-law consideration, of course, and the court will not apply its own law if to do so would be fundamentally unfair to one or both of the parties. Usually, however, interest and fairness coincide. Whenever the question has been raised, courts have found that application of their law was not unfair to the other party. See, e.g., Rosenthal v. Warren, 475 F.2d 438, 444-46 (2d Cir. 1973) (New York wrongful death statute, N.Y. Est., POWERS & TRUSTS LAW § 5-4.3 (McKinney 1967), embodying strong state policy against damage limitations held applicable in suit by estate of New York decedent for malpractice in Massachusetts); Miller v. Miller, 22 N.Y.2d 12, 19-22, 237 N.E.2d 877, 881-82, 290 N.Y.S.2d 734, 740-42 (1968) (Maine statute limiting wrongful death recovery held inapplicable to claim involving New York victim and New York defendant residing in Maine at time of Maine accident). In fact, the same factors that would produce even possible unfairness to one or both of the parties by application of a state's law often will indicate the lack of a real interest in applying that law. See Sedler, supra note 3, at 222-23. In the torts area, at least, it is possible to explain the results of the courts' decisions in terms of rules of choice of law. Choice-of-law rules are developed by decisions in actual cases through the normal workings of binding precedent and stare decisis in the common law tradition. See generally Sedler, Rules of Choice of Law, supra note 1. There is substantial agreement among the courts on the preferred solution in most conflicts-torts situations. See id. at 1032-41. I have identified nine rules of choice of law in the tort area. Id. There is agreement among the courts on six of these rules of choice of law, and the disagreement over the other three can be likened to majority-minority rules in other areas. Id.
with methodology than with results and preferred solutions to choice-of-law problems. On the assumption that choice-of-law decisions will generally be based on considerations of policy and fairness, commentators have focused on what policies should be considered, what results are fair and functionally sound, and, especially, how the conflicting interests of the involved states can be accommodated in the context of conflicts litigation.6

An obvious advantage of a policy-centered approach is that it simplifies identification of the "easy" case where the claims of one state's law to application are "plainly preponderant."7 These cases include both the classic "false conflict"8 and the "apparent conflict" that can be avoided by a "more moderate and restrained interpretation" of the policy or interest of one state.9 A considerable number of litigated cases fall into these categories,10 but many do not. It is the situation where both states have a real interest in applying


7. This phrase is taken from D. CAVERS, THE CHOICE-OF-LAW PROCESS 122 (1965).

8. A false conflict arises "[w]hen a consideration of the policies and interests of the involved states leads to the conclusion that one state has an interest in having its law applied on the point in issue while the other state does not." Sedler, supra note 3, at 186.

9. As to avoiding the "apparent conflict," see the discussion in Sedler, supra note 3, at 187-88. According to Currie's analysis, if each involved state has a possible interest, the court should reexamine the states' respective policies and interests and question whether a more moderate and restrained interpretation of one state's policies or interests would avoid the conflict. B. CURRIE, Notes on Methods and Objectives in the Conflict of Laws, in SELECTED ESSAYS, supra note 3, at 176, 186. In my view, this step in Currie's methodology is properly subsumed in the matter of determining the forum's real interest in applying its own law. See Sedler, supra, at 220-21. The comparative-impairment methodology, whereby a court resolves a true conflict by deciding which state's interest will be less impaired by nonapplication of its law, is also used in part to identify the situation where the claims of one state's law to application are "plainly preponderant." See Kanowitz, Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws, 30 HASTINGS L.J. 255, 266-76 (1978).

10. The most common situation is where two parties from a liability state are involved in an accident in a nonliability state. Beginning with Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), it is this situation that has been the impetus for courts to abandon the place-of-the-wrong rule in favor of a "modern approach" to choice of law. See generally Comment, False Conflicts, 55 CALIF. L. REV. 74 (1967).
their law on the point in issue—what Currie called the “true conflict”—that is now the focal point of academic concern.

Currie, of course, maintained that when a true conflict exists, the forum should apply its own law;14 as I have demonstrated elsewhere, this is what courts are generally doing in practice.15 I have also explained why I think that this is what courts should do, although my reasons differ to some extent from Currie’s.16 This solution, however, continues to be unacceptable to most academic commentators, and the “Great Quest” for solutions to the true conflict may be expected to continue.

Proposed solutions to the true conflict other than by the forum applying its own law generally have not involved “interest weighing,” but instead have been based on considerations of multistate interests, the nature of the laws involved, the parties’ expectations, and like concerns.19 The proponents of these solutions attack Currie’s forum-law approach because it precludes consideration of multistate concerns and any effort at accommodating conflicting state interests.20 I have attempted to answer these criticisms elsewhere; suffice it to say that experience shows that courts are not disposed to subordinate the real interests of their state to multistate concerns. Courts purporting to apply objective criteria

11. In practically every case, only two states are involved, so it is convenient to use the two-state example. In the exceedingly rare case where more than two states are involved, the forum would consider the policy and the interest of the third state in the same manner as it would consider the policy and interest of the second state.
18. For the meaning of “interest weighing,” see B. CURRIE, Notes on Methods and Objectives in the Conflict of Laws, in SELECTED ESSAYS, supra note 3, at 176, 182.
19. Sedler, supra note 3, at 217-18 & n.219. See also Weintraub, supra note 13. As to “interest weighing” in comparative-impairment methodology, see Kanowitz, supra note 9, at 274-78.
20. See, e.g., Von Mehren, Problem of Justice, supra note 6, at 33-34.
to resolve true conflicts are likely to skew the criteria in favor of their own law.\textsuperscript{22} There are very few cases in recent years where the forum did not apply its own law where it had a real interest in doing so.\textsuperscript{23} While commentators may continue to propose other solutions to the true conflict, it is unlikely that they will find much favor with the courts.

However, this does not mean that in any conflicts case the forum state will automatically apply its own law.\textsuperscript{24} Quite the contrary, courts have been very sensitive in conflicts cases to the existence of competing concerns and have generally determined their own interests and the scope of their own policy with restraint and moderation. They will not apply their own law if they conclude that the policy reflected in that law is not advanced significantly by its application in the circumstances presented.\textsuperscript{25} Courts have not followed a policy of "forum preference," but of advancing the forum's real interests.\textsuperscript{26} On the whole, this has produced functionally

\textsuperscript{22} See id. at 231-33. An excellent example of this skewing is the decision of the California Supreme Court in Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, cert. denied, 429 U.S. 859 (1976). For discussion of Bernhard, see text accompanying notes 42-53 infra. However, in the recent case of Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978), the California Supreme Court purported to resolve a true conflict between its interest and Louisiana's in favor of Louisiana by finding that its own interest would be "comparatively less impaired" if subordinated in the particular case. Id. at 164-70, 583 P.2d at 726-29, 148 Cal. Rptr. at 872-75. Although I seriously question whether the court's express and actual rationales are the same, I must postpone my analysis of this case. For an excellent discussion of the decision, see Kanowitz, supra note 9, at 294-300.

\textsuperscript{23} For discussion of these exceptions, see Sedler, supra note 3, at 228 n.259. Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978), must be added to the list, at least at this time. See note 22 supra.

\textsuperscript{24} See Sedler, supra note 3, at 222-27.

\textsuperscript{25} This principle is also illustrated by the false-conflict cases where suit is brought in the "disinterested state." See, e.g., Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968); Maffatone v. Woodson, 99 N.J. Super. 559, 240 A.2d 693 (App. Div. 1968). In the typical situation, "the plaintiff's home state is interested in applying its law allowing recovery, while the [disinterested state] generally has no interest in applying its law denying recovery in favor of a nonresident defendant." Sedler, Rules of Choice of Law, supra note 1, at 1034.

\textsuperscript{26} The one notable exception, in my view, is where two parties from a nonrecovery state are involved in an accident in a recovery state and the recovery state applies its own law to allow recovery. This is what the majority of the courts have done, and these decisions can be explained simply in terms of the forum's preference for its own "better law." See, e.g., Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973); Griggs v. Riley, 489 S.W.2d 469 (Mo. Ct. App. 1972); Gagne v. Berry, 112 N.H. 125, 290 A.2d 624 (1979). Some courts, however, have denied recovery here. See, e.g., Vick v. Cochran, 316 So. 2d 242 (Miss. 1975); Mager v. Mager, 197 N.W.2d 626 (N.D. 1972). See also
sound results.27

Cognizant perhaps of the forum’s unwillingness to displace its own law with that of another state whenever it has a real interest in applying its law to effectuate underlying policies, commentators have proposed yet another means of resolving the true conflict: special multistate solutions that accommodate conflicting interests in the particular case without requiring that either interest yield completely. Professor von Mehren and Professor Weintraub propose “substantive” multistate solutions, while Professor Twerkski and Ms. Mayer present a “procedural” one. The substantive solutions purportedly compromise the differing substantive rules, while the procedural solution purportedly accommodates the differing substantive interests through procedural techniques.

Both the substantive and procedural solutions assume that it is desirable to accommodate conflicting governmental interests, and that the forum should want to do so instead of advancing its own real interests. Professor von Mehren, for example, argues that multistate solutions can be formulated that “achieve decisional uniformity or other values of conflicts justice without requiring one state to sacrifice entirely its views respecting aptness,”28 and that “[b]y according roughly equal respect to the views of each legal order, a basis may be created for agreement upon a mutually acceptable governing rule.”29 The question still remains why the forum should want to sacrifice its views respecting aptness at all. Why should the forum want to subordinate its own interest, even in part, when (1) the reasons for applying its own law in the domestic


27. While I have always maintained that this is so, I am pleased to see that Professor Leflar is of the same opinion. See Leflar, supra note 2, passim. Indeed, while expressing disagreement with particular decisions by particular courts, and while often expressing disagreement with a particular rationale, most commentators probably would not dispute the contention that on the whole, courts have reached functionally sound results in the cases coming before them for decision.


29. Id. at 359.
30. See Sedler, supra note 3, at 227.
31. For constitutional purposes, a state may generally apply its own law whenever it has an interest in doing so and application of its own law is not fundamentally unfair to the other party, or that state has sufficient factual contacts with the transaction so that it is reasonable for it to apply its law to the transaction on the basis of those contacts despite its lack of interest in doing so. See, e.g., Clay v. Sun Insurance Co., 377 U.S. 179 (1964).
32. Sedler, supra note 3, at 227.
34. Insofar as state B's policy is also an admonitory one, it would have interest in applying its rule of strict liability whenever the harm occurred in state B,
Von Mehren’s solution is to allow the state B plaintiff to recover half the actual damages. As he explains: “The multistate rule proposed, unlike a domestic-rule solution, thus recognizes that both states have legitimate interests in the situation. If the resulting compromise is acceptable to both legal orders, the policies of aptness and decisional harmony would be effectively accommodated.”

Von Mehren gives other examples of splitting the difference in accident cases where more than one state has an interest. He refers to this solution as “giv[ing] half a loaf” to each state, and compromising the disagreement “with equal weight accorded to the views of each state.” He contends that to the extent that choice-of-law solutions advance the cause of equal treatment instead of merely advancing the forum’s interest, they promote “conflicts justice.”

Again leaving aside the question of whether the forum properly should sacrifice its own real interests to the cause of “conflicts justice,” the soundness of the proposed solution can be fairly considered on Von Mehren’s own terms: Is the resulting compromise “acceptable to both legal orders”? This question, it must be remembered, arises in the context of litigation between private persons. In the conflicts case, as in the domestic case, the court’s primary concern is achieving a sound and fair result between the parties. The accommodation of state interests, therefore, must be related to the private legal context in which the question arises.

While under interest analysis reference is made to the policies and interests of the involved states, it is for the purpose of resolving disputes between private parties.

Although a state may have a strong interest in the outcomes of private litigation, advancement of the state’s interest cannot be separated from its effect on the case before the court. The ultimate question, then, is whether accommodating conflicting state inter-

irrespective of the residence of the victim. It must also be assumed in this situation that the dog owner’s residence is sufficiently close to the state B line that it is reasonably foreseeable that the dog could stray into state B. See text accompanying notes 46 & 47 infra.

36. Id. at 367-70; Von Mehren, Problem of Justice, supra note 6, at 40-42.
38. Id. at 43.
40. Id. at 191-92. This is clearly so whenever the litigation involves regulatory or protective laws that are aimed at social engineering, and the state is relying on the private persons whose interests are affected by those laws to implement the social-engineering policy.
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ests in the manner proposed by Von Mehren will (1) effectively accommodate those interests in light of the conflicting policies reflected in the laws of the involved states, and (2) produce a sound and fair result between the parties.

Applying these criteria, first consider Von Mehren’s dogbite illustration from the perspective of state A. State A’s rule is that the dog owner should not be liable at all unless plaintiff can prove prior knowledge of the dog’s propensity to bite. The state has an interest in protecting state A dog owners from liability if they lack such knowledge, and its policy and interest is the same irrespective of where the dogbite occurs. Since state A’s hypothetical dog owner had no knowledge of his dog’s proclivity to bite, imposing any liability defeats state A’s policy; its policy is no less defeated by imposing liability and reducing the amount of damages. The conflict between state A law and state B law is over the circumstances in which liability should be imposed, not the amount of damages recoverable once liability has been found. Reducing the plaintiff’s damages by half, then, does not advance the defendant-protecting policy of state A, since the state A defendant is not shielded from liability in circumstances where state A has concluded that dogowners should be free from culpability.

Von Mehren’s proposed compromise requires less sacrifice by state B. Strict liability, the basis of state B’s policy, is imposed in favor of the state B plaintiff. But a state B court will find it irrational to reduce the recovery, and thus defeat its own award rationale, when to do so does not advance state A’s policy to protect the defendant from liability in these circumstances. The real beneficiary of the compromise is neither state A, whose policy is thwarted whenever liability is imposed in the absence of knowledge of the dog’s propensity to bite, nor state B, whose policy is thwarted by unnecessarily halving its plaintiff’s recovery, but the state A defendant and insurer, who end up paying less damages simply because the defendant is from a state that would not impose liability in the first place.

Von Mehren’s compromise thus fails to accommodate the conflicting interests of the involved states. Where differences in policy relate to when liability should be imposed, the conflicting policies

41. If, however, one state limited liability for damages for wrongful death to $50,000 and the other state allowed unlimited recovery, reducing the amount of recovery by half the difference between $50,000 and the amount of the award would advance the policies of both states with respect to the matter in issue.
are not accommodated in any rational way by imposing liability, but halving the damages. It is difficult to see how such a solution advances "conflicts justice," even in the abstract. Surely it will not appear to the courts of either state to produce a sound and fair result in the particular case.

To illustrate this point in a more realistic setting, consider Bernhard v. Harrah's Club, another situation where Von Mehren would split the difference. In this case the California forum applied its law and allowed a California victim to recover for an automobile accident in California caused by an intoxicated driver served liquor at a tavern in Nevada located near the California state line. California law imposed civil liability on tavernkeepers in these circumstances; Nevada law did not. Von Mehren agrees that if suit had been brought in Nevada, Nevada probably would have applied its law and denied recovery. He suggests that here it would be possible to strike a "mutually acceptable compromise" by imposing liability, but allowing the plaintiff to recover only half the damages. He states:

"Viewing the situation overall, the principle of advancement of values is as effectively served by compromise as it would be by a solution in terms of subordination; at the same time, a result is reached that might well prove acceptable to both Nevada and California and thus satisfy the principle of equal treatment."

As in the dogbite example, this result would be unacceptable to both states. The Nevada defendant suffers liability in circumstances where Nevada law precludes liability; Nevada's policy of protecting tavernkeepers from civil liability for serving liquor to intoxicated patrons is no less frustrated when the tavernkeeper is responsible for half, rather than full, damages. So, too, California will find it unpalatable to deny the California plaintiff full compensation solely because the tavernkeeper is from a state that would not impose liability in the first place.


43. CAL. BUS. & PROF. CODE § 25602 (West 1964 & Supp. 1979) (misdemeanor for tavernkeeper to serve intoxicated customers); CAL. EVID. CODE § 669 (West Supp. 1979) (negligence presumed when misdemeanor violated). While Nevada statutory and common law were silent on the question, the court proceeded on the assumption that a Nevada court would not impose liability in these circumstances. 16 Cal. 3d at 315, 546 P.2d at 721, 128 Cal. Rptr. at 217.

44. Von Mehren, Problem of Justice, supra note 6, at 41-42. Accord, Kanowitz, supra note 9, at 263-64.

45. Von Mehren, Problem of Justice, supra note 6, at 42.
At this juncture it is essential to pose the conflicts issue in *Bernhard* more precisely, as it would be seen from the perspective of a California court responsible for achieving a sound and fair result in the case before it. Two additional facts are important: The Nevada tavernkeeper actively solicited California customers, and the tavern was located sufficiently close to the California state line so that the tavernkeeper could foresee that serving liquor to an intoxicated person could cause harm in California. These factors make it reasonable, and hence constitutional, for California to exercise jurisdiction in this case under its long-arm act, as well as to apply its own law on the issue of the tavernkeeper’s civil liability to the California accident victim. The California plaintiff was injured in California by a force put in motion by a Nevada defendant that foreseeably could, and in fact did, cause harm in California. Imposing liability both advances the policy and interest of California and produces no unfairness to the Nevada defendant. The result, sound and fair as between the parties, promotes justice; if Von Mehren’s conception of “conflicts justice” requires a different result, then the justice of “conflicts justice” must be questioned.

From the perspective of a Nevada court, applying Nevada law to deny recovery would produce a sound and fair result. There is no need, however, to explore this alternative position: A suit arising out of this transaction would never be brought in Nevada. The plaintiff, weighing the tendency of the forum to apply its own law, would sue in California and obtain jurisdiction under the California long-arm act. Von Mehren argues that special multistate solutions will promote “decisional harmony” between the involved states while accommodating the “aptness” of their conflicting regulatory schemes. But there is no reason to search

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46. **CAL. CIV. PROC. CODE** § 410.10 (West 1973). It is interesting to note that the defendant apparently raised no challenge to the exercise of California’s jurisdiction in *Bernhard*. California courts are specifically authorized by statute to exercise jurisdiction within constitutional limits. *Id.*

47. The same factors that make it reasonable and constitutional for a state to exercise long-arm jurisdiction in a particular case also make it reasonable and constitutional for a state to apply its own substantive law in that case. See Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV. 1031, 1032 (1978).

48. Nevada has an interest in applying its law to protect the Nevada tavernkeeper who acted in Nevada, notwithstanding that his act created a foreseeable risk of harm in California; the result is not unfair to the California victim, who did not “rely” on California law before getting injured in the accident.

49. **CAL. CIV. PROC. CODE** § 410.10 (West 1973).

for solutions promoting "decisional harmony" between California and Nevada since it is purely academic how a Nevada court would have decided *Bernhard*. Von Mehren's concept of "decisional harmony," like "conflicts justice," is an abstraction unrelated to the usual realities of conflicts litigation. In a conflicts case the plaintiff will try to bring suit in the state whose "whole law" is more favorable to the plaintiff, since that state is more likely to make a choice-of-law decision that will enable the plaintiff to prevail. Assuming that both involved states employ a policy-centered approach to choice of law, and that both states can properly exercise jurisdiction, the plaintiff will sue in the state with the more favorable substantive law on the very reasonable supposition that it is much easier to persuade a court to apply its own law than it is to persuade the court to displace it.

Now that the constitutionality of jurisdiction is determined functionally by considering "minimum contacts and fundamental fairness," courts need not search for choice-of-law solutions that supposedly promote "decisional harmony." The realities of conflicts litigation—the forum's likely application of its own law and the plaintiff's likely choice of a forum with the most beneficial substantive law—indicate that conflicts jurisprudence should focus on where suit is likely to be brought, and whether the selected forum can permissibly exercise jurisdiction. In this realistic context, Von Mehren's reliance on a multistate proposal that purportedly advances "decisional harmony" by satisfying the policies of both interested states is doubly misplaced. In fact, the conflicting interests of the involved states are not harmonized; in theory, Von Mehren's goal to harmonize decisions is irrelevant since cases like *Bernhard* will never be brought in Nevada. Von Mehren's search for a decision acceptable to both California and Nevada courts is simply unnecessary. To avoid this misguided emphasis, conflicts scholars should strive to relate choice of law to judicial jurisdiction, and focus on the soundness of the solutions reached by the court of permissible jurisdiction. Thus, the determinative question in *Bernhard* should be whether the California court, justifiably

exercising jurisdiction over the case before it, reached a sound and fair result. The court's decision clearly satisfies that test.\textsuperscript{53}

Professor Weintraub, attempting a different multistate solution, proposes a "new rule" approach designed to "resolve a particular issue in a conflicts problem by applying law that is not the domestic law of any of the contact jurisdictions, but represents a new rule crafted to give maximum effect and to cause minimal impairment to the relevant and otherwise irreconcilable polices of the contact states."\textsuperscript{54} Weintraub's primary illustration of the "new rule" approach is the usurious interstate small-loan transaction,\textsuperscript{55} where he proposes a "new rule" that goes "beyond dépeçage" and combines the laws of involved states into a special multistate solution. He notes that when the transaction is connected with the borrower's home state, the law of that state is likely to be applied in a suit brought by the lender\textsuperscript{56}—at least, I would add, by the courts of that state.\textsuperscript{57} The more difficult situation, Weintraub asserts, arises when (1) the lender did not solicit the loan in the borrower's state; (2) the transaction is connected entirely with the lender's state; and (3) the transaction is completely valid under the law of the lender's state, but completely invalid under the law of the borrower's state. In other words, if the law of the borrower's state is applied, the stay-at-home lender—acting completely within a state that legitimizes the transaction—is not only unable to recover interest above the rate established by the borrower's state, but is not even able to enforce the contract as to the unpaid principal.

Weintraub reviews the arguments justifying application of the law of the borrower's or lender's home state, and concludes that while it would be unfair to the lender to apply the law of the borrower's state, the unfairness does not rise to constitutional di-

\textsuperscript{53} See notes 46 & 47 supra and accompanying text. See generally note 5 supra.


\textsuperscript{55} The states employ widely divergent sanctions to deal with usury, ranging from merely depriving the lender of excess interest to holding the contract completely unenforceable. The sanction employed will demonstrate the nature of the state's policy with respect to usury far more than the permissible rate of interest. See Sedler, The Contracts Provisions of the Restatement (Second): An Analysis and Critique, 72 COLUM. L. REV. 279, 315-21 (1972).

\textsuperscript{56} Weintraub, supra note 54, at 31.

\textsuperscript{57} See Sedler, supra note 55, at 321-23.
To further minimize the difficulties posed by this situation, he emphasizes that the lender's state would apply its law if suit were brought there, because of its interest in protecting its resident lender who acted entirely within the state. The lender could thus bring suit against the borrower in a favorable forum by using the long-arm act.\(^59\) Weintraub's real concern, however, is with the situation where the borrower sues the lender in the borrower's state, which he says would often be constitutionally permissible.\(^60\) Here, he maintains that the borrower's state should not apply its law fully. Instead, it should "enforce the repayment agreement but in an amount and manner that accords with the limits and requirements of the borrower's state."\(^61\) In other words, the borrower's state should apply its law on the permissible rate of interest, but should not void the contract entirely. Presumably, the lender could enforce the otherwise invalid contract to the extent of the unpaid principal and the interest permitted under the law of the borrower's state.\(^62\)

It is noteworthy that Weintraub does not suggest that the courts of the lender's state adopt this compromise solution. In his view, considerations of fairness dictate that courts in the borrower's state apply the validating law of the lender's state when the borrower seeks out the lender in the lender's state and the transaction is connected entirely with that state. Weintraub's special multistate rule, then, is not designed to accommodate the conflicting policies and interests of the involved states, but only to avoid what he characterizes as an unfair decision by the borrower's state in a particular factual setting. It is thus internally inconsistent: It forces the forum to sacrifice its borrower-protecting policy simply to minimize unfairness to a particular lender without attempting to recognize or effectuate the conflicting policy of the lender's state. If the borrower's state considers it unfair to apply its own law to a case, it will not do so; and the courts of the borrower's state, in the usury context, generally have not applied their own law where the impetus for the loan came from the borrower and the transaction was con-

58. Weintraub, supra note 54, at 32-36.
59. Id. at 36.
60. Id. at 36-37.
61. Id. at 37 (footnote omitted).
62. In effect, this is the "rule of validity" solution that is applied where the contract is usurious under the law of both states: The court enforces the contract in part by applying the least severe sanction. Here it is applied where the contract is usurious under the law of only one of the states, but the purpose is the same—to protect the lender from the more severe sanction. See Sedler, supra note 55, at 318-21.
nected entirely with the lender’s state. But the borrower’s state will apply its own law if it does not consider it fundamentally unfair to do so, or, more accurately, if it concludes that its interest in applying its own law to implement the policy reflected in that law outweighs any possible unfairness to the stay-at-home lender. And once it makes this self-interested determination, it will be indisposed—contrary to Weintraub’s theory—to mitigate the sanctions that are an integral part of its policy and which it imposes for the precise purpose of deterring what it considers to be victimization of its resident borrowers.

The internal inconsistency in Weintraub’s proposed multistate solution, then, is that it asks the forum, here the borrower’s state, to compromise its policy, not to accommodate the interests of the other involved state, but to minimize unfairness to the stay-at-home lender after the forum has rejected the view that fairness requires displacement of its own law. If the forum does not think that fairness requires displacement of its law in whole, it is difficult to see why it would think that fairness requires its displacement in part. Weintraub’s multistate solution is based on considerations of fairness rather than on accommodating conflicting state interests and thus does not do what it purports to do: It does not “give maximum effect and . . . cause minimal impairment to the relevant and otherwise irreconcilable policies of the contact states.” Quite the contrary, it seriously impairs the borrower-protecting policy of the borrower’s state by removing the


64. Cf. Oxford Consumer Discount Co. v. Stefanelli, 55 N.J. 489, 262 A.2d 874 (although loan transaction itself was connected entirely with Pennsylvania, loan was secured by mortgage on New Jersey realty, and New Jersey court applied its borrower-protecting law to that transaction), appeal dismissed, 400 U.S. 808 (1970). Following the decision in Stefanelli, the New Jersey Legislature specifically amended the statute to ensure that the same result would obtain in the future. See N.J. STAT. ANN. § 17:11A-57 (West Supp. 1978-1979). This and other statutes are discussed by Weintraub, who notes that they are generally inconsistent with his “new rule.” Weintraub, supra note 54, at 38-43.

65. Possible unfairness to the other party may be sufficient to persuade the forum that it has no real interest in applying its law on the point in issue. See Sedler, supra note 3, at 224-26. For discussion of the application of this proposition to the stay-at-home lender in the usury situation, see Sedler, supra note 55, at 324-25.

66. See note 55 supra.

67. For Weintraub’s discussion of this point, see Weintraub, supra note 54, at 37-38.

68. Id. at 18 (footnote omitted).
policy's most effective sanction—complete invalidation of the transaction. If the borrower's home state is persuaded that possible unfairness to the stay-at-home lender is more important than advancing its borrower-protecting policy in these circumstances—which it well may be—it will not apply its own law at all. But if it is not so persuaded, it will not displace its law in part by applying a special multistate solution, precisely because such application seriously impairs its borrower-protecting policy.

Thus, it is evident that the substantive multistate solutions proposed by Von Mehren and by Weintraub do not do what they purport to do. For this reason alone, both "solutions" should be, and will be, rejected by the courts.

PROCEDURAL SOLUTIONS

Professor Twerski and Ms. Mayer claim to have devised a "practical and realistic method of accommodating conflicting state policies" in cases where the clash is between "liability rules which stem from concern that the judicial process is inadequate to the task of arriving at truth." Their "procedural" approach establishes multistate rules that advance the interests of both involved states. They state:

The multistate rule differs in content from the domestic rule, but attempts to address the basic policy concerns that motivated the adoption of the domestic rule. It seeks accommodation with the rules of other concerned jurisdictions when such an accommodation reflects sensitivity to a state's own real interests, which have been subordinated in purely domestic litigation.

This accommodation can be achieved, Twerski and Mayer maintain, when substantive rules denying or sharply limiting a cause of action "are based on the inability of the courts to assure themselves that the parties and witnesses are not involved in fraud, duress, collusion, or fabrication." Here,

[b]y creating a multistate rule that raises or lowers the standard of proof required to establish a case, courts can accommodate

71. Id. at 783-84.
72. Id. at 786.
differing views. This accommodation is possible because the underlying substantive law is not in conflict; rather, the conflict lies in the method by which the substantive rights may be established.73

Unlike substantive compromises, where each state receives only "half a loaf," the "procedural" multistate solution, changing for both courts the burden of proof otherwise required to establish a case, "maximizes both conflicting policies."74

Twerski and Mayer illustrate this approach primarily with respect to guest statutes and the statute of frauds.75 To implement their multistate accommodation in the guest-statute situation, both states would permit recovery on the basis of ordinary negligence, but require its proof by clear and convincing evidence.76 Similarly, in the statute-of-frauds situation, they advocate permitting enforcement of the oral contract if its existence can be proved by clear and convincing evidence.77 They argue that "[b]y applying the multistate rule to a case in which, admittedly, a state cannot assure itself that justice will be done, even in a totally domestic setting, each state receives a full loaf by giving effect to its primary goal and the normally subordinated goal."78 I will examine whether the proposed solutions in these two situations actually achieve their objective of "maximizing both conflicting policies."

Turning first to the guest-statute situation, consider the case of a plaintiff from a nonguest-statute state who is injured while a passenger in an automobile operated by a defendant from a guest-statute state. In interest-analysis terms, this presents a true conflict irrespective of where the accident occurs. In practice, however, the result may differ depending on whether the accident occurred in plaintiff's or defendant's home state, since the situs of the accident may determine where suit can be brought. When the acci-

73. Id.
74. Id. at 794 (footnote omitted).
75. The authors note that there are certain areas where this solution will not work because "the policy differences between states raise a genuine conflict regarding the proper way to resolve a problem," such as dram shop act liability or gambling contracts. Id. at 801-02.
76. Id. at 793. This solution is not limited to the true conflict situation, but would apply to all guest-host litigation, except those cases that both present a false conflict in terms of interest analysis and are territorially dominated by one state. Id. at 800-01.
77. Id. at 795-97.
78. Id. at 793-94. The reference to "normally subordinated goal" is to the goal that is subordinated in the domestic context. See id. at 789-92.
dent occurs in the plaintiff's state, suit will be brought there, and that state will apply its law allowing recovery. If the accident occurs in the defendant's state, and suit is brought there, that state will apply its law denying recovery. But even though the accident occurs in the defendant's state, suit can sometimes be brought in the plaintiff's state, and in these cases it is likely that the plaintiff will prevail.

Twerski and Mayer would have both states apply the substantive standard of ordinary negligence, leveling the guest-statute state's higher standard of gross negligence, but would require that ordinary negligence be proved by clear and convincing evidence. Raising the standard of proof from a mere preponderance to clear and convincing purportedly preserves the safeguard against fraud and collusion embodied in the substantive standard of gross negligence. In support of their multistate accommodation, Twerski and Mayer argue that the substantive rules of both the recovery state and the guest-statute state are based on "statistical justice." The recovery state has made the judgment that while there is a danger of collusion in the guest-host suit, that concern should be subordinated in favor of compensation. The guest-statute state, on the other hand, has subordinated the concern for compensation in favor of preventing collusion. While each state's domestic rule is applied fully by the courts of that state in a domestic case, in an interstate case the courts should consider the subordinated policy as well. By considering the subordinated policy, this special multistate solution in effect merges the dominant and subordinated policies of both states. According to its proponents, this solution "would foster not only the shared interests of both states in preventing fraud and collusion and permitting legitimate recoveries, but would allow also for judicial control of those cases that were made suspect by use of the directed verdict."

Consider the soundness of this solution first from the guest-
statute state’s perspective. In a suit before its courts it is asked to allow recovery on the basis of ordinary negligence, even though the state legislature proscribed recovery unless gross negligence is shown. The justification for this deviation is that the court is still accomplishing the legislative objective by requiring a higher standard of proof: It would allow recovery only when satisfied by clear and convincing evidence that the host and guest were not engaged in collusion. The legislature, however, did not deal with the problem of collusive suits in the host-guest situation by requiring a higher standard of proof of ordinary negligence. If it believed that the problem of collusion could be solved by a higher standard of proof, it would have required such a standard. Rather, it dealt with the problem by imposing a substantively different standard of liability in such cases. While the line between gross negligence and ordinary negligence may be difficult to define conceptually, it is clear that gross negligence requires a showing of a level of culpability other than ordinary negligence. If that showing cannot be made, the court will direct a verdict for the defendant. Those cases where the plaintiff’s complaint was dismissed for failing to allege facts amounting to gross negligence illustrate that gross negligence is substantively different from ordinary negligence and requires a different level of culpability. No matter how clear and convincing the proof of ordinary negligence may be, it still does not rise to the level of gross negligence.

Twerski and Mayer are in error when they state that in the guest-statute situation, “the underlying substantive law is not in conflict; rather, the conflict lies in the method by which the sub-

85. Twerski and Mayer assume that the only purpose behind a guest statute is to prevent collusive suits. Accord, Tooker v. Lopez, 24 N.Y.2d 569, 575, 249 N.E.2d 394, 397, 301 N.Y.S.2d 519, 523-24 (1969). For purposes of interest analysis, however, a rule of substantive law should be presumed to reflect all legitimate policies that it could possibly serve. A guest statute can also serve the policies of protecting hosts from suits by ungrateful guests (not a very realistic policy, but certainly a legitimate one) and of excluding guest-passenger cases from the insurer’s liability, thereby possibly lowering insurance rates or increasing insurance companies’ profits. See Sedler, supra note 3, at 199-200. While only the defendant’s home state is interested in applying its law to implement any of these policies, id. at 200, the Twerski and Mayer solution is not fashioned with reference to these other policies.

86. See generally W. PROSSER, LAW OF TORTS § 34 (4th ed. 1971).

87. See, e.g., Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973); Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969). In most cases, the question arises in the context of a motion to dismiss the complaint for a failure to allege gross negligence or a motion to strike the guest-statute defense, which in turn is based on the plaintiff’s failure to allege gross negligence.
stantive rights may be established.”

The underlying substantive law is in conflict because one state requires a showing of only ordinary negligence while the other state requires a showing of greater culpability—gross negligence. While it may be argued that the concern for collusion could have been met by requiring a higher standard of proof of ordinary negligence, the guest-statute state goes further by requiring, not a higher standard of proof, but a different degree of culpability. Its reasons for having done so may relate to the possibility that the collusion it fears includes collusion at the subliminal level: Since the guest and the host are not really adverse, and the host wants the guest to recover, the host and the guest may see the host’s “routine driving behavior” as “negligent.” But unless they are willing to commit perjury, they cannot manufacture facts that did not happen. So even if the host and guest both cast the host’s driving in the worst possible light, it still may not rise to the level of culpability required for a showing of gross negligence.

In other words, by imposing a higher standard of liability the legislature made it almost impossible for the guest and the host to collude, consciously or unconsciously, to bring about recovery. The legislative policy is thwarted whenever the plaintiff can recover on a showing of ordinary negligence, no matter how clear and convincing its proof. Therefore, the policy of the guest-statute state is certainly not “maximized.” What Twerski and Mayer are proposing to the court of the guest-statute state is that it adopt a standard of proof that will enable it to decide whether there is collusion. However, the legislative policy is to prevent collusion, conscious or unconscious, by requiring a degree of culpability that, in its view, the host and the guest cannot collude to establish. Surely Twerski and Mayer’s solution will be unacceptable to the courts of the guest-statute state, and those courts will not, by the remotest stretch of the imagination, believe that it “maximizes” the policy of their state.

The recovery state, on the other hand, is not asked to sacrifice much. It is doubtful whether a jury can perceive any real difference between preponderance of the evidence and clear and convincing evidence. In the typical accident case, particularly where

88. Twerski & Mayer, supra note 70, at 786.
89. See Sedler, Rules of Choice of Law, supra note 1, at 1037-38.
90. As to the purported difference between these standards, see the discussion in McBaine, Burden of Proof: Degrees of Belief, 32 CALIF. L. REV. 242, 251-54 (1944).
the evidence on the driver's conduct is not sharply conflicting, the jury is not called upon to weigh evidence but to decide whether the driver's conduct reaches the required level of culpability. So long as the standard of culpability is ordinary negligence, the jury will probably be no more or less likely to find negligence if it is instructed in terms of the preponderance standard or the clear-and-convincing standard. If an interstate compact were proposed between guest-statute states and recovery states embodying the solution proposed by Twerski and Mayer, there can be no doubt that the recovery states would derive the greater benefit. But since there is no interstate compact, and since the question arises in the context of litigation between private parties where the court's responsibility is to achieve a sound and fair result in the case before it, it would make no sense to the recovery state to impose a higher burden of proof for the purpose of “maximizing conflicting policies” when this solution does not do so at all.

Since conflicting policies in the guest-statute situation are reflected in differing standards of liability, not in differing burdens of proof, these conflicting policies are not “maximized” by a multistate solution that leaves one state's standard of liability intact while imposing a higher burden of proof to establish that standard—especially when the burden will probably not make any practical difference anyway. Thus the “procedural” multistate solution does not accomplish what it purports to do with its “full loaf” any more than the “substantive” multistate solutions do with their “half loaf.”

Similarly, in the statute-of-frauds situation, Twerski and Mayer err when they assume that “the underlying substantive law is not in conflict; rather the conflict lies in the method by which the substantive rights may be established.”91 It is on this mistaken assumption that they base their solution of allowing the oral contract to be enforced if its existence can be proved by clear and convincing evidence.92 Although one purpose of the statute of frauds is to prevent fraudulent claims, it also embodies a transaction-regulating policy that enforces a state's view on how certain transactions should be conducted. The state insists that it will not enforce certain contracts unless they are in writing or unless a written memorandum satisfying the statute's requirements has been made. These requisites reflect a conscious value choice. The state knows that as

91. Twerski & Mayer, supra note 70, at 786.
92. See id. at 794-97.
a result of the statute some actual oral contracts will not be enforced; to that extent the statute enables some parties to perpetrate fraud. It has decided to pay that price to protect innocent parties from fraudulent claims, and, more importantly, to set standards of commercial behavior. In effect, the state tells parties wishing to enter into certain consensual transactions: “If you are really serious about your contract, put it in writing, or at least make a sufficient memorandum of it; otherwise, the contract will be unenforceable, no matter how much proof you can muster.” To the state with a statute of frauds, it does not matter that in a particular case the existence of an oral contract can be proved by clear and convincing evidence. Enforcing the contract thwarts the statute’s transaction-regulating policy.

The transaction-regulating purpose of the statute of frauds is most evident in a case such as Intercontinental Planning, Ltd. v. Daystrom, Inc., which involved the New York statute of frauds applicable to business brokerage contracts. In Daystrom, a New York broker made a claim for a finder’s fee against a New Jersey corporation. The plaintiff was engaged in bringing American and European firms together for the purpose of affiliation and merger. The parties had entered into a written agreement in which the defendant agreed to pay a finder’s fee if a relationship were established with a certain foreign firm. The proposed merger fell through when the foreign firm was acquired by a larger company. The latter, however, proceeded to merge with the defendant, and the plaintiff contended that the defendant’s president had orally agreed to extend the written agreement to cover this merger. While some negotiations took place in New Jersey, many occurred in New York; there had been an advertisement in a New York newspaper; and the principals were introduced in New York. The alleged oral agreement was unenforceable under the New York statute of frauds, but enforceable under New Jersey law.

The New York court treated the case as a false conflict, saying that it had an interest in applying its statute of frauds to bar the suit, while New Jersey had no interest in applying its law. The

93. Twerski and Mayer note that “much fraud is fostered by the statute of frauds.” Id. at 795. The state enacting a statute of frauds is aware of this as well.


95. Id. at 384-85, 248 N.E.2d at 583-84, 300 N.Y.S.2d at 827-28. Even if the New York court had found that a true conflict existed and that New Jersey had an interest in allowing recovery by a New York broker against a New Jersey principal, it would have preferred its own policy and interest. The forum will apply its own law.
court found that one policy behind the New York statute of frauds is the protection of principals engaged in the sale of businesses from finder’s fee claims unsupported by written evidence. Since New York is an international center for the purchase and sale of businesses, New York has an interest in applying its policy to protect foreign principals who utilize the services of New York brokers. Moreover, affording foreign principals the greatest degree of protection encourages the use of New York brokers and contributes to the economic development of the state.96

Commenting on Daystrom, Twerski and Mayer note that “[b]oth New Jersey and New York were sufficiently involved [with the transaction] to bring their policies on enforcement of [business] brokerage contracts into play.”97 This being so, they contend that the case was resolvable through their proposed multistate solution:

Instead of engaging in the all-or-nothing approach of interest analysis, which required interest manipulation, it would have been better for the court to apply a multistate substantive rule that would have permitted the enforcement of the contract upon proof of its existence and terms by clear and convincing evidence. Whether this exacting standard is met may be somewhat affected by the bias of the judiciary to issues raised under the statute of frauds. Nevertheless, applying the higher standard of proof would allow for the policies of both concerned states to find expression in a conflicts setting.98

This contention, however, indicates that Twerski and Mayer have misconceived the policy reflected in New York’s statute of frauds. Enforcement of this contract, even if its existence had been conclusively proved by the most clear and convincing evidence,99 thwarts New York’s policy on business brokerage contracts: Unless the parties have shown that they are sufficiently serious about the contract whenever it has a real interest in implementing that law’s policy if this is not fundamentally unfair to the other party. There is thus no reason in the context of conflicts litigation to distinguish between the false conflict where the forum is the only interested state and the true conflict where the forum is one of the interested states, since in both situations the forum will apply its own law. See Sedler, supra note 3, at 220-22.

97. Twerski & Mayer, supra note 70, at 797 (footnote omitted).
98. Id. (footnote omitted). For Twerski’s discussion of “interest manipulation” in Daystrom, see Twerski, Choice-Of-Law in Contracts—Some Thoughts on the Weintraub Approach, 57 Iowa L. Rev. 1239, 1242-43 (1972).
99. Assume, for example, that the defendant’s president admitted on the stand that the written agreement was extended to cover the subsequent acquisition.
to have embodied their understanding in written documents, the agreement is unenforceable.\textsuperscript{100} By regulating the conduct of parties engaging in business brokerage transactions, New York has put brokers on notice that oral brokerage contracts are unenforceable. The broker in \textit{Daystrom} was a New York resident and operated out of New York. Not only could he be expected to conform his conduct to the standard demanded by New York law, but he recognized the need to comply with that standard when he put the original brokerage agreement in writing.\textsuperscript{101} The defendant’s president may well have orally agreed to extend the written agreement to cover the subsequent transaction, but the plaintiff must have known that this would not satisfy the New York statute. To allow him to now enforce the oral agreement allows him to avoid New York’s regulatory policy in circumstances where New York is clearly interested in securing compliance.\textsuperscript{102} Surely enforcement of the contract, no matter how clear and convincing the evidence of its existence may be, will not “allow . . . the policies of [New York] to find expression in a conflicts setting.”\textsuperscript{103} It will thwart that policy entirely.

The New York statute of frauds also addresses principals, particularly foreign principals, who the state hopes will utilize New York brokers for their transactions. The statute in effect informs them: “You are free to enter into negotiations with New York brokers, but unless you commit your agreement to writing nothing you say will later be construed as an agreement to pay a finders fee.”\textsuperscript{104} If New York enforces an oral contract against a foreign

\textsuperscript{100} New York courts have strictly construed the statute-of-frauds’ requirements. See, \textit{e.g.}, Kobre v. Instrument Syss. Corp., 54 A.D.2d 625, 387 N.Y.S.2d 617 (1st Dep’t 1976), aff’d, 43 N.Y.2d 862, 374 N.E.2d 131, 403 N.Y.S.2d 220 (1978).

\textsuperscript{101} In \textit{Daystrom} Judge Fuld relied on this fact alone to sustain the defense of the statute of frauds. 24 N.Y.2d at 386-87, 248 N.E.2d at 584, 300 N.Y.S.2d at 828-29 (Fuld, C.J., concurring).

\textsuperscript{102} For discussion of New York's interest in having brokers comply with its regulatory policy when they are acting in New York, see Pallavicini v. International Tel. & Tel. Corp., 41 A.D.2d 66, 341 N.Y.S.2d 281 (1st Dep’t 1973) (New York law applied to bar claim for finder’s fee made by nonresident broker who conducted some negotiations in New York), aff’d, 34 N.Y.2d 913, 316 N.E.2d 722, 359 N.Y.S.2d 290 (1974).

\textsuperscript{103} Twerski & Mayer, \textit{supra} note 70, at 797 (footnote omitted).

\textsuperscript{104} Where the transaction does not satisfy the New York statute of frauds, the broker cannot even recover reasonable compensation on a quantum meruit theory. See Minichiello v. Royal Business Funds Corp., 18 N.Y.2d 521, 525, 223 N.E.2d 793, 795, 277 N.Y.S.2d 268, 270 (1966); accord, Denny v. American Tobacco Co., 308 F. Supp. 219 (N.D. Cal. 1970). In \textit{Denny} the court refused to apply California law to hold a New York corporation liable for reasonable compensation to a California resident who solicited a finder’s fee by sending a letter to an officer of the New York corporation advising him that a California-based company might be for sale and that
principal, then, again, no matter how clear and convincing the evidence of its existence, New York’s policy is defeated by denying the principal the security afforded by New York law. Doing so, it removes a primary incentive for the principal to utilize New York brokers.

As in the guest-statute situation, the conflicting statute-of-frauds policies do not relate to how the existence of liability should be proved, but to the underlying standards of liability. By enacting a statute of frauds, New York has not merely tried to prevent enforcement of fraudulent claims; it has imposed a standard of behavior for certain commercial transactions that demands that the parties show sufficient seriousness about the transaction to put it in writing. To coerce compliance with this standard, New York refuses to enforce any contract that does not measure up to it. Its policy will be defeated if it enforces such a contract, no matter how clear and convincing the proof of its existence may be.

Again, in the statute-of-frauds setting, as in the guest-statute situation, the “procedural” multistate solution does not do what it purports to do: It does not maximize the conflicting policies of the involved states.

CONCLUSION

All of the proposed special multistate solutions fail because they do not do what they purport to do. They do not accommodate the conflicting interests of the involved states, because the bases for solution, whether “substantive” or “procedural,” have nothing to do with the policies reflected in the conflicting laws. Von Mehren’s solutions are premised on reducing the amount of damages recoverable when the conflicting policies find their source in different standards of liability. The conflicting policies are not rationally accommodated, therefore, by imposing liability but reducing the amount of damages. Weintraub’s solution in the interstate small-loan situation combines the laws of the involved states to be fair to the stay-at-home lender. But if application of the borrower state’s statute is considered unfair, that law will not be applied at all; if its application is not considered unfair, there is no reason why it should only be applied in part. And the Twerski-Mayer “procedural” solutions are based on raising the burden of

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he should reply if interested. The officer did not reply, and although the New York corporation eventually did acquire the company, the court held that the corporation was entitled to take advantage of the New York statute of frauds in the circumstances presented. For further discussion of this case, see Sedler, supra note 3, at 225-26.
proof when the conflicting laws reflect differing standards of conduct and liability. All of the multistate solutions, then, turn out to be internally inconsistent and functionally unsound. The courts will not, and should not, apply them.

The “Great Quest” for solutions to the true conflict other than by applying the forum’s own law will probably continue. In the meantime, courts will continue to decide cases as they have been doing: generally applying their own law whenever they have a real interest in doing so and when its application is not fundamentally unfair to the other party. On the whole, they have reached functionally sound and fair results.

Professor Leflar observes:

The fact is that most American courts today are moving to what they call “the” new law of conflict of laws. It is a conglomerate, and not a bad one.

In terms of location, this body of law is being lifted up by the courts to a well-watered plateau high above the sinkhole it once occupied. No location lasts forever, and there are vistas beyond the plateau, but it is a rest-stop now.

It is precisely because conflicts law is at this plateau that we may properly be skeptical about “new solutions” that promise much, but deliver little. With all due respect to their proponents, I must conclude that special multistate solutions fall into this category.

107. See generally Leflar, supra note 2.
108. Id. at 26.