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MULTISTATE CHOICE-OF-LAW RULES: CONTINUING THE COLLOQUY WITH PROFESSORS TRAUTMAN AND SEDLER

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The choice-of-law revolution that made interest analysis dominant is well into its second decade.¹ Reflection on its accomplishments has characterized much of the choice-of-law scholarship over the last several years.² While some scholars exhibit a sense of satisfaction with the general flow of decisional law,³ others are dissatisfied with the chauvinistic simplicity that characterizes many leading interest-analysis decisions.⁴ The authors are among the disgruntled critics.⁵ We applaud the good sense of a policy-centered

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1. When the choice-of-law revolution occurred is not easily determined. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), signalled official judicial acceptance of the revolt against first *Restatement* territorialism. However, *Babcock* was by no means the first case to express dissatisfaction with first *Restatement* dogma. See, e.g., *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953); *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957); *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954); *Haumschild v. Continental Gas Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

2. See, e.g., Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975 (1977); Trautman, *The Relation Between American Choice of Law and Federal Common Law*, LAW & CONTEMP. PROB., Spring 1977, at 105 [hereinafter cited as Trautman, *American Choice of Law and Federal Common Law*]; Trautman, *Rule or Reason in Choice of Law: A Comment on Neumeier*, 1 VT. L. REV. 1 (1976) [hereinafter cited as Trautman, *Rule or Reason in Choice of Law*]; Von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927 (1975).

3. See, e.g., Leflar, *Choice of Law: A Well-Watered Plateau*, LAW & CONTEMP. PROB., Spring 1977, at 10, at 10; Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181, 183-90 (1977).

4. See, e.g., Cavers, *Cipolla and Conflicts Justice*, 9 DUQ. L. REV. 360 (1971); Trautman, *Rule or Reason in Choice of Law*, *supra* note 2; Von Mehren, *supra* note 2.

5. See Twerski, *Enlightened Territorialism and Professor Cavers—The*

approach⁶ to choice-of-law problems and reject attempts to turn the clock back to rigid territorialism when clear false-conflict cases⁷ were decided by applying the law of the state in which a preordained, isolated event occurred.⁸ On the other hand, there is much reason for dissatisfaction with the resolution of true-conflict cases and the approach taken to those false-conflict cases with a heavy territorial dimension.⁹ The interest-analysis theory used to resolve these cases is as dogmatic as first *Restatement* territorialism.¹⁰

Pennsylvania Method, 9 DUQ. L. REV. 373 (1971) [hereinafter cited as Twerski, *Enlightened Territorialism*]; Twerski, *Neumeier v. Kuehner: Where Are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104 (1973) [hereinafter cited as Twerski, *Neumeier v. Kuehner*]; Twerski, *Choice-of-Law in Contracts—Some Thoughts on the Weintraub Approach*, 57 IOWA L. REV. 1239 (1972) [hereinafter cited as Twerski, *Weintraub Approach*]; Twerski, *To Where Does One Attach the Horses?*, 61 KY. L.J. 393 (1973) [hereinafter cited as Twerski, *To Where Does One Attach the Horses?*]

6. See, e.g., Sedler, *Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUT.-CAM. L.J. 8 (1970).

7. The term "clear false conflict" is meant to encompass cases where interest analysis and neo-territorialism coincide and yield the same result. See, e.g., *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). See Twerski, *Enlightened Territorialism*, *supra* note 5. By our analysis *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969), would not be considered a false conflict even though it involved two New York residents in a guest-host accident in Michigan. See Twerski, *Neumeier v. Kuehner*, *supra* note 5, at 116; Twerski, *Book Review*, 61 CORNELL L. REV. 1045 (1976).

8. See 2 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS §§ 311.1, 378.2 (1935); RESTATEMENT OF CONFLICT OF LAWS §§ 311, 377 (1934); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 366 (1945). See, e.g., *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209, 214 (1922); *Alabama Great S. R.R. v. Carroll*, 97 Ala. 126, 131, 11 So. 803, 805 (1892); *Forbes v. Forbes*, 226 Wis. 477, 481, 277 N.W. 112, 114 (1938).

9. See, e.g., *Foster v. Leggett*, 484 S.W.2d 827, 828 (Ky. 1972); *Milkovich v. Saari*, 295 Minn. 155, 162, 203 N.W.2d 408, 412 (1973); *Tooker v. Lopez*, 24 N.Y.2d 569, 572, 249 N.E.2d 394, 395, 301 N.Y.S.2d 519, 521 (1969); *Lilienthal v. Kaufman*, 239 Or. 1, 16, 395 P.2d 543, 549 (1964); *Conklin v. Horner*, 38 Wis. 2d 468, 473, 157 N.W.2d 579, 581 (1968). Included on the list of cases that cause the authors concern are the "unprovided for" cases. See, e.g., *Hurtado v. Superior Court*, 11 Cal. 3d 574, 581, 522 P.2d 666, 670, 114 Cal. Rptr. 106, 110 (1974); *Neumeier v. Kuehner*, 31 N.Y.2d 121, 127, 286 N.E.2d 454, 457, 335 N.Y.S.2d 64, 69 (1972); *Erwin v. Thomas*, 264 Or. 454, 458, 506 P.2d 494, 496 (1973); *Labree v. Major*, 111 R.I. 657, 673, 306 A.2d 808, 817-18 (1973). They would find sensible resolution if our proposed multistate rules were utilized.

10. See Peterson, *Developments in American Conflict of Laws: Torts*, 1969 U. ILL. L.F. 289, 320; Twerski, *Neumeier v. Kuehner*, *supra* note 5, at 118; Twerski, *To Where Does One Attach the Horses?*, *supra* note 5, at 394; Von Mehren, *supra* note 2, at 938. Professor Sedler, a leading proponent of Professor Brainard Currie's theory of interest analysis, has recently categorized the actual holdings of courts that have adopted interest analysis and concludes that "not only do the courts of one state decide cases presenting the same fact-law patterns the same way, even when different sub-

In an article entitled *Toward a Pragmatic Solution of Choice-of-Law Problems—At the Interface of Substance and Procedure*,¹¹ the authors suggest that a significant percentage (perhaps a majority) of choice-of-law problems can be resolved in commonsense fashion by creating multistate rules¹² that address the interests of the concerned jurisdictions.¹³ These multistate rules would advance domestic interests without requiring total allegiance to the domestic rule. Such rules are particularly effective where the different liability standards are based on concerns that fraud and collusion may taint the judicial proceeding. Our multistate rules address these concerns by permitting recovery only on clear and convincing evidence, therefore reducing the chance that fraud and collusion will contaminate the result.¹⁴

We are gratified that Professors Donald Trautman and Robert Sedler found our suggestions worthy of comment and critique. Their thought-provoking and insightful articles¹⁵ raise important questions which deserve a forthright response. The two critiques

stantive laws are involved, but also the courts of different states, with only limited exceptions, tend to decide cases presenting the same fact-law patterns in the same way." Sedler, *supra* note 2, at 981.

11. Twerski & Mayer, *Toward a Pragmatic Solution of Choice-of-Law Problems—At the Interface of Substance and Procedure*, 74 NW. U.L. REV. 781 (1979).

12. The term "multistate substantive rule" has taken on special meaning. It is used to denote a substantive rule in a choice-of-law setting that differs from the substantive domestic rule in any of the concerned jurisdictions. See Trautman, *American Choice of Law and Federal Common Law*, *supra* note 2; Von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974); Von Mehren, *Choice of Law and the Problem of Justice*, LAW & CONTEMP. PROB., Spring, 1977, at 27; Weintraub, *Beyond Dépeçage: A "New Rule" Approach to Choice of Law in Consumer Credit Transactions and a Critique of the Territorial Application of the Uniform Consumer Credit Code*, 25 CASE W. RES. L. REV. 16 (1974). Professor Sedler labels our suggestion that burdens of proof be altered to accommodate conflicting interests a "multistate procedural rule." Sedler, *On Choice of Law and the Great Quest: A Critique of Special Multistate Solutions to Choice-of-Law Problems*, 7 HOFSTRA L. REV. 807, 822-23 (1979). In a sense he is correct since the mechanism for resolving the conflict is a procedural one. However, since two supposedly substantive rules are being accommodated, we prefer to have our proposal encompassed within the term "multistate substantive rule." For a general definition of "multistate rule," see Twerski & Mayer, *supra* note 11, at 793.

13. Twerski & Mayer, *supra* note 11, at 793.

14. *Id.* We have also raised the possibility of accomplishing these objectives by shifting the burden of proof. *Id.* at 783, 799.

15. Sedler, *supra* note 12; Trautman, *A Comment on Twerski and Mayer: A Pragmatic Step Towards Consensus As a Basis for Choice-of-Law Solutions*, 7 HOFSTRA L. REV. 833 (1979).

stem from fundamentally different perspectives. Professor Trautman suggests that there is a need for broader exploration of "multi-jurisdictional or shared policies" to resolve choice-of-law problems.¹⁶ He finds inherent in our suggested multistate rules an acceptance of the shared policy concept and wonders why we are reluctant to embrace the notion that a "common pool of ideas" binds states together and should become the focal point for choice-of-law analysis.¹⁷ Professor Sedler, a devotee of Professor Brainard Currie's interest-analysis theory,¹⁸ attacks our solution because he believes it requires a state to relinquish significant interests.

With some trepidation we accede to Professor Trautman's urgings to expand our horizons and apply our techniques outside the area of rules based on substantive-procedural considerations. However, we vehemently disagree with Professor Sedler's suggestion that multistate rules are antithetical to sound interest analysis. Before responding to our critics, a brief explication of our view that multistate rules are a workable solution to heretofore intractable choice-of-law problems is in order.

MULTISTATE SUBSTANTIVE RULES

In developing our proposed multistate rules, we noted an interesting phenomenon. A significant percentage of conflicts cases arise at the intersection of substance and procedure. Cases involving host-guest statutes¹⁹ and statutes of fraud²⁰ have provided

16. See generally A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 237-327 (1965); Trautman, *Kell v. Henderson: A Comment*, 67 COLUM. L. REV. 465 (1967); Trautman, *American Choice of Law and Federal Common Law*, *supra* note 2; Trautman, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 618 (1968); Trautman, *Rule or Reason in Choice of Law*, *supra* note 2.

17. Trautman, *supra* note 15, at 834-35, 838-41.

18. See Sedler, *Interstate Accident and the Unprovided for Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 125-26 (1973); Sedler, *supra* note 6, *passim*; Sedler, *supra* note 3, at 181-83.

19. See, e.g., *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972); *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973); *Towley v. King Arthur Rings, Inc.*, 40 N.Y.2d 129, 351 N.E.2d 728, 386 N.Y.S.2d 80 (1976); *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); *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

20. See, e.g., *Denny v. American Tobacco Co.*, 308 F. Supp. 219 (N.D. Cal. 1970); *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 248 N.E.2d 576,

the background for a substantial number of choice-of-law decisions. A common thread running through these cases is a fear that parties and witnesses may be involved in fraud, collusion, duress, or fabrication. The solution in many jurisdictions is to delimit sharply the underlying cause of action by circumscribing it with a tough limited-liability rule that protects courts and parties from unseemly results and difficult problems of proof.

There are two important points to be made about limited-liability rules. First, although these rules are couched in liability language, their origin and continued vitality²¹ come from a concern that such cases as a class are particularly prone to fraud.²² Second, limited-liability rules express not only a judgment that such cases are difficult to try, but also a concern about the burden on the

300 N.Y.S. 2d 817 (1969); *Pallavicini v. International Tel. & Tel. Corp.*, 41 A.D.2d 66, 341 N.Y.S.2d 281 (1st Dep't 1973).

21. It is difficult to determine whether the original motives that provided the impetus for adopting a statute or common law rule continue to be operative over the passage of time. Indeed, Professor Ratner has argued that state-interest analysis that focuses only on the policies that brought the rule into existence is too narrow. Ratner, *Choice of Law Interest Analysis and Cost-Contribution*, 47 S. CAL. L. REV. 817 (1974). He suggests the following definition of state interest:

Identification of such underlying policies focuses not on the motives or intentions of legislators who enacted the statute or of judges who developed the common law rule but on community purposes or goals as disclosed by the problems that evoked the rule, its function in the network of existing community arrangements, and the beneficial consequences to the community of its implementation. A community has an interest in the application of its rule to achieve the community benefits that flow from such application.

Id. at 819 (emphasis in original). *But see* Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 HASTINGS L.J. 255, 266 n.52 (1978); *See also* Twerski, *supra* note 7, at 1054-60.

There is no clear repository of authority to inform us whether the original motivation for a statute or common law policy is still the life blood of the rule. However, one can look to the application of the rule in its domestic setting and to choice-of-law decisions for guidance as to the continued vitality of the original statutory purpose. The cases in the conflicts area demonstrate beyond question that fear of fraud and collusion is still viewed as the primary reason for applying a limited liability rule. *See* text accompanying notes 13 & 14 *supra*. *See also* Twerski & Mayer, *supra* note 11.

22. *See, e.g.*, *Tooker v. Lopez*, 24 N.Y.2d 569, 575, 249 N.E.2d 394, 397, 301 N.Y.S.2d 519, 524 (1969) ("The only justification for discrimination between injured guests which can withstand logical as well as constitutional scrutiny is that the legitimate purpose of the statute—prevention of fraudulent claims against local insurers or the protection of local automobile owners—is furthered by increasing the guest's burden of proof." (citations omitted)); *Babcock v. Jackson*, 12 N.Y.2d 473, 482-83, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963). *But see* Baade, *The Case of the Disinterested Two States: Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 150 (1973) (guest-host statutes passed to lower insurance rates; prevention of fraud irrelevant).

courts of trying the fraud issue in the average host-guest case or contract action. These rules, therefore, are the result of decisions about a court's ability to discriminate effectively between genuine claims and fraudulent ones in enough instances to make a case-by-case determination both cost efficient and equitable. These rules of statistical justice²³ expressly sacrifice the individual case to a determination about the best way to resolve most cases.²⁴ If a judge were asked whether applying the rule to a totally domestic case advanced the state's interest, or even the cause of justice, the answer would probably be that the host-guest rule is not fact sensitive and does not speak to the state's interest in an individual case. Similarly, a court applying the proplaintiff rule of ordinary negligence or a statute that does not require a writing would not be oblivious to the danger of fraud. Admittedly, in any given case inadequate protection against fraud may exist, but proplaintiff states would contend that their rule of statistical justice ultimately leads to better results.

Utilizing these insights, we argued that when the policies of two states deserve consideration they can both be given effect by permitting the cause of action and by raising the burden of proof to clear and convincing evidence.²⁵ Thus, a guest could recover

23. This phrase is one we coined to describe the situation in which a jurisdiction creates rules to deal with the aggregate of cases based on overall probabilities and costs instead of the equities of individual cases decided on a case-by-case basis. See Twerski & Mayer, *supra* note 11, at 789-90.

24. An extreme example of this phenomenon is the application of the host-guest rule against an uninsured motorist. If the purpose of the host-guest rule is to prevent collusion between host and guest against the insurer, the rule should not apply in the case of an uninsured motorist. It is interesting that Professor Baade, in deciding whether the common-policy approach should be utilized in a case like *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), so as to change its characterization from an "unprovided for" case to a "false conflict" case, has argued that as long as Ontario extends the protection of its guest statute to uninsured motorists, it would be inappropriate for Ontario to accept the common-policy approach. Baade, *supra* note 22, at 162. We presume that Baade's rejection of the common-policy approach in this instance is based on the willingness of Ontario to apply its rule even in a case where the statutory purpose or state interest could not be furthered. The Ontario purpose in applying the rule across the board becomes one of the simplicity in administering its laws and clear promulgation to the populace of a flat rule not subject to exceptions.

25. Twerski & Mayer, *supra* note 11, at 793. We have also proposed accommodating the conflicting interests by shifting the burden of proof to the defendant. For example, differences between negligence and strict liability standards in products liability actions can be accommodated by shifting the burden of proof to the defendant to show an absence of negligence. *Id.* at 799.

against a host if he or she proved ordinary negligence by clear and convincing evidence, and a promisee could enforce an oral contract if its existence were proved by clear and convincing evidence. Under such a scheme each state would give effect not only to both states' mutual interest in enforcing contracts or providing compensation, but also to each state's desire to prevent fraud. Since statistical rules are not geared to achieving justice in individual cases, there is no serious intrusion into a state's legislative scheme when a different remedy is fashioned for the conflicts case;²⁶ especially when the solution pays attention to the underlying goals of both the primary state interest and the interest that is normally subordinated in the domestic setting. The intrusion on statistical policies is justified by the conflicts setting itself since resolving the conflict of rules requires an individualistic determination.

It is inappropriate to slavishly apply rules of statistical justice in a choice-of-law setting under the guise of fostering domestic interests. If interest analysis taught us anything, it is that choice-of-law problems require an assessment of interests as they affect particular facts at bar. Since statistical rules do not purport to accomplish a just result in any given case, they become highly suspect in a choice-of-law setting. Furthermore, the tension created by the opposing rules requires that any resolution at least take into account both policies. If the domestic interests in the case at bar are not fine-tuned to accomplishing the right result in an individual case, then it becomes more difficult to espouse a chauvinistic forum-oriented position.²⁷

In evaluating the theoretical soundness of our approach and its possible practical implementation, several factors should be noted: (1) Conflicting rules hovering at the intersection of substance and procedure are amenable to a resolution that gives effect to both primary and normally subordinated state interests; (2) the resolution is easy to apply since it only requires raising the

26. The question of whether a state's interest in the application of a domestic rule in a multistate case is of the same intensity as it is in a purely domestic case is a major point of contention between those scholars who are aligned with Professor Currie and those who believe accommodation and reasoned resolutions to choice-of-law problems are possible. See text accompanying notes 41-45 *infra* and text following note 48 *infra*.

27. Why a state should yield its interest remains an underlying fundamental question. Our only answer at this point is that tensions between two concerned jurisdictions require solutions that recognize, to the extent possible, the underlying policies of both states. Our proposed multistate rule does this in cases where the forfeited state interest is weak since it does not seek justice in the individual case.

standard of proof—a readily available judicial tool; and (3) the conflicting rules do not bring into play fundamental differences about the fairness or appropriateness of a particular result, but rather concern only the method of establishing liability so that the integrity of the decisionmaking process is assured.

PROFESSOR TRAUTMAN—MULTIJURISDICTIONAL POLICIES

Professor Trautman finds implicit in our proposed multistate rules a kindred spirit to his choice-of-law approach, which seeks to discover multijurisdictional or shared policies between states whose laws ostensibly conflict.²⁸ He questions our limiting multistate rules to problems arising from the interplay of substance and procedure and argues that if we admit to adopting multistate rules different from domestic rules, then other significant policies must come into play. These policies are perforce multistate in nature and should have sufficient weight to justify more than “procedural” accommodations.

Professor Trautman demonstrates how he would utilize multi-jurisdictional policies to resolve a conflict between a usury statute with an eight-percent interest rate limit and one with a six-percent limit. He suggests that:

Rules of alternative reference^[29] for usury could be built on shared interests in carrying out the intentions of the parties. The shared interests would prevail unless a considered departure from those shared interests had been taken in some concerned jurisdiction and that jurisdiction had a legitimate reason to insist on its diverging rule in the particular case. For example, if merchants of relatively equal bargaining strength negotiated a contract at arm's length calling for a rate of interest regarded as permissible by any of the concerned jurisdictions, their agreement would be accepted. No reason to interfere with their bargain would exist and much reason would exist to enable them to plan and order their affairs without falling into a trap that did not reflect important policy concerns but only the difficulties created by the existence of several legal orders with some claim to regulate.³⁰

28. See sources cited in note 16 *supra*.

29. “Rules of alternative reference” generally provide for validation of a transaction if either the parties or the transaction had contact with one of the reference states. See, e.g., *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927); *Crisafulli v. Childs*, 33 A.D.2d 293, 307 N.Y.S.2d 701 (4th Dep’t 1970); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 203, 269 (1971). See generally R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 170-77 (2d ed. 1975).

30. Trautman, *supra* note 15, at 839.

Note the steps that must be taken to conclude that the usurious rate should be enforced. (1) A shared interest in validating contracts must be identified; (2) a shared interest in fulfilling the parties' intent must be acknowledged; (3) a fact sensitive investigation into the equities of the particular cases must be undertaken to determine whether the parties were of equal bargaining power; (4) there must be some investigation into whether the lower maximum interest rate of one party's state was recognized as a real factor in the negotiations, or whether instead it sprung up like a trap to catch the unwary at a later point.

We first question whether the difference between six and eight percent is as insignificant as Professor Trautman would have us believe.³¹ For example, the availability of home mortgages is dramatically affected when a state sets its interest rate below the national level.³² Decisions about interest rates frequently reflect a number of policy decisions on a range of issues, including which areas of the economy need influxes of capital and the appropriate balance between consumer and lending interests. Thus, are there indeed shared values regarding different interest rates? Is it meaningful to talk of fulfilling the parties' intentions when the statute in question denies the right of the parties to enter into the kind of transaction under question? Admittedly general principles of contract law seek to foster the intent of the parties, but that principle provides little instruction when the statute in question is directed at subordinating that very policy.

When Professor Trautman's multijurisdictional approach in the usury case is contrasted with our own, it becomes evident why we are reluctant to broaden the inquiry to encompass his theory. Our multistate rules directly address the concern of both states for compensation by permitting recovery; the shared concern for fraud is recognized by requiring a more stringent standard of proof. Although our method heightens fact sensitivity, since the clear and convincing evidence rule requires a more careful examination of

31. See, e.g., *Crisafulli v. Childs*, 33 A.D.2d 293, 307 N.Y.S.2d 701 (4th Dep't 1970) (legal consequences of usury were very different in Pennsylvania (lender forfeits excess interest of \$165) than in New York (lender forfeits unpaid balance of \$15,000)), noted in R. CRAMTON, D. CURRIE & H. KAY, *supra* note 29, at 176; Twerski, *Weintraub Approach*, *supra* note 5, at 1244-46. *But cf.* Weintraub, *supra* note 12, at 28-38 (enforce neither borrower's nor lender's state law, but enforce repayments agreement in amount that accords with limits of borrower's state).

32. For example, New York's usury rate has frequently created extreme shortages of home mortgages.

the facts, our multistate rule would be applied across the board. Thus, the concerns of both jurisdictions are addressed in a manner that does not compel fashioning a different rule for each case. Compare this approach to Professor Trautman's. His resolution of the conflicts problem does not account for the concerns of both jurisdictions on the very issue in conflict. By taking account of the fairness of the bargain, he negates the domestic rule *and* the domestic interest since he has not alleviated the lower interest-rate state's concern that the higher interest rate is unfair.³³ The statute is not a rule of statistical justice but a legislative judgment as to the allowable rate of interest in the state. To undertake a fact-sensitive investigation into whether the lender was overreaching in a particular case may alleviate the problem somewhat; but interest rates reflect a number of other state concerns, including the availability of loans. Even if the point is conceded, however, the conflict is resolved only by splintering and complicating conflicts law. It lacks the clarity and sureness of a uniformly applied rule that establishes a general rule of law for deciding choice-of-law cases whenever fraud or collusion is at issue. The demands placed on judicial creativity by Professor Trautman's proposal may well be beyond most courts, especially at the trial level.³⁴

In short, the difficulty with applying Trautman's approach is that it asks: (1) Interest-analysis devotees to sacrifice clearly delineated state interests without directly addressing the issue in conflict;

33. For a comprehensive discussion of usury in conflict of laws, see Comment, *Usury in the Conflict of Laws: The Doctrine of Lex Debitoris*, 55 CALIF. L. REV. 123 (1967). Usury rates serve purposes other than merely protecting the lender from overreaching. It has been argued that the finance industry tends to be non-competitive and usury laws are necessary to restore competition. The argument is premised on the rationale that consumer loans are based on a one-to-one relationship and there is thus opportunity for price discrimination by lenders. Since there are a relatively small number of lenders compared with borrowers, lenders have greater market power and are in a position to demand excessive rates. Meeks, *Consumer Close-Ups* (Dep't of Consumer Econ. Pub. Policy Feb./Mar. 1977). The economic impact of fixed usury rates in certain kinds of transactions (*e.g.*, mortgage rates, small consumer loans) may drive investment capital away from those transactions to nonregulated areas of investment and lending. These results are often undesirable but at times the interest rate may be maintained because of its affect on the economy in such areas as unemployment and inflation. See L. RITTER & W. SIBLER, *MONEY*, 98-103 (1970).

It appears that an accommodation between states based on a rate of validation where overreaching can be avoided may not resolve the deep seated conflict that exists between states with differing interest rates.

34. See Rosenberg, *Two Views On Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 464 (1967).

(2) courts to define which values are shared and multijurisdictional in nature—a difficult task at best; and (3) the legal system to create a rule for each case based on factual nuances.

Having explained the difficulties in broadening our multistate rules, we concede Professor Trautman's point that a well-defined line of demarcation does not exist between our approach and his. Fundamental points of agreement bind us together. Both approaches begin with the premise that a state may give effect to substantial domestic interests without slavishly applying its domestic rules. We also share the belief that choice of law is a legitimate subject of inquiry and that the solutions should reflect multistate values. Our approaches differ in that we are more reluctant than Professor Trautman to suggest that a state should sacrifice a substantial interest without providing a clear mechanism for addressing the concerns of the domestic rule. The standard-of-proof mechanism utilized to reduce the concern expressed by a domestic antifraud, limited-recovery rule has particular appeal to the authors because the underlying domestic concerns are protected, and the only rules sacrificed are those designed to economize judicial decisionmaking. Splitting off these conflicts cases for special treatment seems to be a rational way of dealing with the problem. To the extent that one can argue that a blanket lower interest rate, which absolves the court from inquiring into the bona fides of every loan transaction, fits this model because the rule is one of statistical justice and not an expression of the state's view as to what a just result is, it may become possible to fashion a similar multistate rule. Where, however, an honest evaluation of state interest leads us to the conclusion that a true conflict does exist, we are less sanguine that shared policies or multijurisdictional values will resolve the battle.

PROFESSOR SEDLER AND INTEREST ANALYSIS

Professor Sedler's sharp critique of our proposed multistate rules reflects his deep commitment to interest analysis.³⁵ He argues that a state that denies recovery in host-guest litigation unless gross negligence is proved has created a rule of liability, not merely a higher standard of proof.³⁶ Professor Sedler contends that we err in stating that in the host-guest situation "the underlying

35. See Sedler, *supra* note 18; Sedler, *supra* note 6; Sedler, *supra* note 3.

36. Sedler, *supra* note 12, at 825-27.

substantive law is not in conflict; rather the conflict lies in the method by which the substantive rights may be established.'"³⁷ Under his analysis, the substantive law does conflict since one state requires a showing of only ordinary negligence, which the other requires a higher level of culpability, that of gross negligence. While it is possible that the concern for collusion could have been addressed by requiring clear and convincing proof of ordinary negligence, the guest-statute state has gone further by requiring, not a higher standard of proof, but a higher degree of culpability.³⁸

Our disagreement with Professor Sedler goes to the very heart of Currie interest analysis. The scope of inquiry in a choice-of-law problem is narrow if a state is bound to apply its own law once a legitimate interest is established and if it has no duty to examine and account for multistate policies.³⁹ Indeed, no choice-of-law problems exist once a legitimate state interest is established. Given this perspective, it is clear why Professor Sedler would find that the host-guest rule is a legitimate state interest, which should not be set aside no matter how enticing the resolution of the problem. After all, non-problems do not need resolving.

However, Professor Sedler's adherence to classic interest-analysis theory leads him to overlook a significant point that led to the formulation of our multistate rules. In constructing their theoretical foundation, we argued that it is improper to assign a substantial state interest to application of the host-guest liability rule in a choice-of-law case.⁴⁰ Even at a purely domestic level, the state interest is furthered only in the total aggregate of cases, and although a theoretical interest can be established in individual cases, it is difficult to make the jump from the general rule to a specific case. Since the general rule speaks only to a broad class of cases, it is inappropriate in a conflicts case.⁴¹ Professor Sedler sidesteps this argument by assuming that a strong domestic interest exists in the multistate case. That, however, begs the question. Pure interest analysis postulates that once a state interest is established it remains unaffected by the presence of another state's conflicting in-

37. *Id.* at 825-26 (quoting Twerski & Mayer, *supra* note 11, at 786).

38. *Id.* at 826.

39. For a summary of Professor Currie's position, see R. CRAMTON, D. CURRIE & H. KAY, *supra* note 29, at 221-22. See generally Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171; Sedler, *supra* note 3.

40. See Twerski & Mayer, *supra* note 11, at 790.

41. *Id.*

terest.⁴² Currie at one point conceded that a state might read its own interest in “moderate and restrained” fashion in light of another state’s interest,⁴³ but it is clear that this was never developed by Currie or any of his successors.⁴⁴ To have fully developed the idea would have legitimized the discipline of conflict of law—something that remains anathema to true interest-analysis devotees.⁴⁵ Professor Sedler’s annoyance with our suggestion that many of the conflicting rules are rules of statistical justice that do not speak directly to the multistate situation is understandable. We have gone to the heart of interest-analysis dogma. If rules of law, even at a domestic level, do not foster a state interest in each individual case, it becomes much easier to question the need to apply them in a conflicts setting. Such an investigation might lead to the conclusion that domestic interests are far less pressing when the fact pattern is multistate and the domestic rule nonfact sensitive.

Professor Sedler doubts whether a state with a host-guest statute would sacrifice its position prohibiting actions in all but the most grievous of negligence cases for assurances that in the case at bar collusion did not exist. He notes that the host-guest state could

42. See text accompanying note 39 *supra*.

43. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 757 (1963).

44. Two noted scholars, building on the Currie analysis, have developed the theory of “comparative impairment,” which bears close resemblance to the Currie approach of reading a state’s interest in a “moderate and restrained” fashion to avoid a conflict. See Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); Horowitz, *The Law of Choice of Law in California—A Restatement*, 21 U.C.L.A. L. REV. 719 (1974). This theory has now found judicial acceptance in California. See, e.g., *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978); *Bernhard v. Harrah’s Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976).

45. For a superb analysis contrasting the comparative-impairment theory with Currie’s “moderate and restrained” reading of state policy to avoid a conflict, see Kanowitz, *supra* note 21. Kanowitz concludes:

[I]t is clear that, when compared with Currie’s method for resolving true conflicts, [comparative impairment also] raises fundamental jurisprudential questions. Despite its proponents’ claims that the method is distinguishable from a weighing of governmental interests to find the better or worthier law, the method’s imprecision, its manipulability in according greater or lesser weight or significance to the respective interests, and its propensity to engage in interest-counting, all suggest that the claimed distinction is one without a difference. In short, the comparative-impairment method also appears to reflect natural-law premises, despite the professed adherence of its proponents to positivist assumptions.

Id. at 293.

have adopted a higher standard of proof but did not. He recognizes that a higher standard of proof would probably prevent collusion of the more overt type, but asserts that a gross negligence rule is established to prevent more subtle, "subliminal" forms of collusion.⁴⁶ Our reactions to this suggestion are several. First, they ring hollow coming from Professor Sedler, who has championed the cause of real interest rather than relying on hypothetical or less practically oriented interests.⁴⁷ Second, the suggestion confirms a long-held suspicion that interest analysis is a sport to be indulged in on long summer afternoons. One is inclined to say, "Come now, let's stop playing games and thinking up interests to fit the occasion." It is quite clear that in reality the only real reason for the host-guest rule is fear of collusive actions. The two states have conflicting policies that can be accommodated in the case at bar. Neither state's domestic policy will be significantly sacrificed if the state utilizes the proposed multistate rule. Whether one state gives a millimeter more or less based on such hypothetical interests as "subliminal collusion" cannot be viewed as a serious intrusion into either state's domestic policy.

Turning to the proposed multistate rule for resolving conflicts over the statute of frauds, we find Professor Sedler's arguments more plausible. He contends that a state that has enacted a statute of frauds is not merely concerned with protecting the parties from fraudulent claims. Rather, he argues that a state's statute of frauds

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 a result of the statute, some 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.⁴⁸

46. Sedler, *supra* note 12, at 826.

47. See Sedler, *Judicial Method is "Alive and Well": The Kentucky Approach to Choice of Law in Interstate Automobile Accidents*, 61 Ky. L.J. 378, 382-83 (1973); Sedler, *supra* note 3, at 222-33. It is interesting that Professor Sedler resurrects some of the more remote policy reasons that have been presented in support of host-guest liability for the purpose of critique. See Sedler, *supra* note 12, at 825 n.85.

48. Sedler, *supra* note 12, at 827-28 (footnote omitted).

It is interesting to note that Professor Sedler downplays the fraud protection aspect of the statute of frauds. A primary function of the statute has become regulating transactions. The fact that the reason for regulating the transaction is a fear of fraud is denigrated and regulating transactions takes on a life of its own.

It must be conceded that a plausible argument can be fashioned that gives semi-independent life to a statute of frauds apart from its fraud deterrent goal. What cannot be so quickly grasped is whether this transaction regulating goal is mandated in the multistate case. Again, this is a question that Professor Sedler does not seek to tackle. He assumes that if there is an interest in a domestic case there is a similar interest in a multistate case. But why must this be so? Could not a state that has its underlying concern about fraudulent contracts allayed by a rule that requires proof of the contract by clear and convincing evidence recognize that another state with a different transaction regulating rule has a role to play in this instance? Is the multistate case the place to make the point in favor of written contracts? Professor Sedler points to *Intercontinental Planning, Ltd. v. Daystrom, Inc.*,⁴⁹ as an instance in which the New York Court of Appeals held that it was important to make its transaction regulating statute of frauds operate in a choice-of-law setting. We believe that the argument by the New York court smacks of sophistry.⁵⁰ But, even if the argument has merit in the case of international brokerage contracts, it is clearly not applicable to other statute-of-frauds questions. The typical oral-contract-to-make-a-will case would not support a transaction regulating rationale.⁵¹ The general lack of sophistication among those entering into oral contracts undermines a finding that the statute's purpose is teaching parties in an interstate setting that their contracts must be in writing. In such an instance, only the fraud deterrent rationale has any plausibility.

We are unmoved by Professor Sedler's critique. It is built on the twin foundations of interest manipulation and total allegiance to domestic interests in an interstate setting. When those premises are questioned, the critique falls apart. In place, they provide no

49. 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969). See Sedler, *supra* note 12, at 828-31.

50. See Twerski, *Neumeier v. Kuehner*, *supra* note 5, at 112-15.

51. See, e.g., *Emery v. Burbank*, 163 Mass. 326, 39 N.E. 1026 (1895); *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 113 N.E.2d 424 (1953). See also D. CAVERS, *Oral Contracts to Provide by Will and the Choice-of-Law Process*, in PERSPECTIVES OF LAW 38 (1964).

breathing room for the development of multistate values and the choice-of-law process.

CONCLUSION

It can legitimately be questioned whether the adoption of multistate rules signals an abandonment of our territorialist views in choice-of-law theory.⁵² We believe that the emergence of these rules arises from the same fountainhead that has led us to a territorialist bias. The neo-territorialism⁵³ espoused by the authors stems from a profound sense that choice-of-law theory was detached from the real world. The cases began with mortals on earth and were being decided by pre-established, theoretical constructs that had to be made to fit. Neo-territorialism was not an attempt to eviscerate interest analysis, but rather to bring it down to earth. It injected such human values as expectancies, space-time, and law as an experimental human phenomenon. Our proposed multistate rules are another expression of this humanizing trend to choice of law.

52. See sources cited in note 5 *supra*.

53. See Twerski, *supra* note 7; Twerski, *Enlightened Territorialism*, *supra* note 5; Twerski, *To Where Does One Attach the Horses?*, *supra* note 5.