Conflicts of Law in Product Liability Suits: Joint Maximization of States' Interests

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CONFLICTS OF LAW IN PRODUCT LIABILITY SUITS: JOINT MAXIMIZATION OF STATES' INTERESTS

Modern product liability suits commonly involve manufacturers that distribute their products nationwide. It is not unusual to find a product manufactured in one state and sold in another, which causes injury to a party in a third state. Because product liability laws vary from state to state, a product liability suit often gives rise to a choice of law question.¹

Choice of law methodology in the United States has evolved from the traditional “vested rights” rules of the Restatement of Conflict of Laws² to the currently used interest analysis.³ Under interest analysis, a court deciding which law to apply must first assess which states’ policy will be affected by the outcome of the case. To make such an assessment, a court must determine the states connected with the case, and then evaluate the relevant laws of those states and the policies furthered by those laws. A typical product liability case involves a diversity of contacts; hence, a court is confronted with a diversity of interested states, relevant substantive laws, and purposes attributable to the laws. These factors make it difficult to choose the single most interested state in product liability cases.

This Note examines the development and current state of solutions to the choice of law problems associated with product liability actions, and concludes the present approaches are unworkable. In formulating a new standard, this Note suggests that courts should develop substantive rules that will further the interests of all concerned states. To demonstrate the viability of this “joint maximization” theory, this Note will conclude by providing examples of such rules.

² Restatement of Conflict of Laws (1934). For a discussion of the “vested rights” theory, see infra text accompanying notes 10-34.
³ This Note uses the term “interest analysis” as a generic name for all modern choice of law approaches.
I. TORT CHOICE OF LAW THEORY: A BRIEF HISTORICAL OVERVIEW

The first known choice of law theorists were the Italian statutists who differentiated between "real" laws and "personal" laws. Real laws applied only in the territory governed by the enacting body. Personal laws followed an individual wherever they went. The statutists also developed a third legal category called "mixed" laws. When the statutists had to apply their choice of law theory, however, they could not decide among themselves which laws were personal, which were real, and which were "mixed." Moreover, problems were generated by disagreement over how "mixed" laws should be applied. These problems attending characterization led to the ultimate demise of the statutists' theory.

In the United States, courts and scholars developed choice of law rules that could be applied without regard to the particular content of the conflicting laws. These rules were incorporated in the first Restatement of Conflict of Laws, by Professor Beale. For example, in tort cases, section 378 of the first Restatement states that the law of the place of the wrong must govern. The place of the wrong is defined as the "state where the last event necessary to make an actor liable for an alleged tort takes place." Courts have defined the site of the "last event" in tort cases to mean the place of injury.

4. These scholars were called statutists because the local laws and customs were known as "statuta." D. Cavers, The Choice-of-Law Process 2 (1965). The first American conflict of law book was written by a statutist, Samuel Livemore. De Nova, The First American Book on Conflict of Laws, 8 AM. J. LEGAL HIsT. 136, 137 (1964).

In Yntema, The Historic Bases of Private International Law, 2 AM. J. COMp. L. 297, 300 (1953), the author tells of a choice of law rule discovered "in the wrappings of a crocodile mummy."

5. D. Cavers, supra note 4, at 2.
6. Id.
7. Id.
8. Id.
9. See id. at 2-3.
10. See, e.g., Alabama Great S.R.R. v. Carrol, 97 Ala. 126, 11 So. 803 (1892). "[W]hether a cause of action arose and existed at all, or not, must in all reason be determined by the law which obtained at the time and place when and where the fact which is relied on to justify a recovery transpired." Id. at 134, 11 So. at 806.
11. Professor Beale was the reporter of the Restatement.
12. Restatement of Conflict of Laws § 384 (1934) provides: "(1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states; (2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state."
13. Id. § 377.
The *Restatement* also provides rules for the solution of other conflict of laws situations. Thus, in contract cases, section 332 provides that, as a general matter, the law of the place of contracting governs.\(^{15}\)

The *Restatement* rules were based on the theory that in a choice of law case, the court's task was to enforce "vested rights."\(^{16}\) For example, in tort cases the rights of the parties vest at the time of injury. The role of the courts is to enforce the obligation that has been created at the time of injury.\(^{17}\) Thus, the applicable law of the place of injury governs the rights of the injured party.\(^{18}\) Justice Holmes summarized the theory by stating, "The liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done. . . . [t]hat and that alone is the foundation of their rights."\(^{19}\)

The *Restatement* approach was severely criticized for being "jurisdiction selecting."\(^{20}\) Courts faithful to the *Restatement* would

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\(^{15}\) See *Restatement of Conflict of Laws* § 377 Note 1 (1934).

\(^{16}\) *Restatement of Conflict of Laws* § 332 (1934) provides that "the law of the place of contracting determines the validity and effect of a promise with respect to: (a) capacity to make the contract; . . . (h) the absolute or conditional character of the promise." Matters concerning the performance of a contract are determined by the law of the place of performance. *Id.* §§ 355-72.

\(^{17}\) See 3 J. Beale, *Conflict of Laws* 1968 (1935).

\(^{18}\) *Id.* Under the "vested rights" theory, a court does not apply foreign law when it finds another jurisdiction's law applicable; rather, it enforces the rights of the parties which were created at the time of injury. See *Beach, Uniform Interstate Enforcement of Vested Rights*, 27 *Yale L.J.* 656, 663 (1918).

\(^{19}\) See *Restatement of Conflict of Laws* § 384 (1934).

\(^{20}\) See also Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904) (Holmes, J.)("The theory of the foreign suit is that . . . the act complained of . . . gave rise to an obligation . . . which, like other obligations, follows the person, and may be enforced wherever the person may be found."); Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir.), cert. denied, 352 U.S. 872 (1952). The court in *Walton* directed a verdict for defendant when the plaintiff failed to state in his complaint the pertinent law of the place of injury. The plaintiff argued that the court should apply forum law. The court held that since the rights of the plaintiff vested at the place of injury, the law of the place of injury is an essential element of his complaint. The court also held that it was not an abuse of discretion for the district judge to refuse to take judicial notice of the foreign law. The plaintiff did not state a cause of action when he failed to mention the applicable law in his complaint. *Id.* at 542, 544-45, 546. In *B. Currie, Selected Essays on the Conflict of Laws* 1-76 (1963), Professor Currie used *Walton* to illustrate the injustice of the vested rights approach.

search for a conflict of law rule to decide which jurisdiction's law applied. The content of the law became material only after the court decided which state's law would govern. Such a conflicts approach led to grossly unjust results.

A simple hypothetical will illustrate the inequities which result from application of the vested rights approach. Passengers domiciled in state A board a plane in state A to travel to state B. The plane is registered in state A and is owned by a citizen of state A. While en route, the plane crashes in state C. The passengers sue the owner of the plane in the courts of state A for wrongful death. States A and B have no wrongful death limitation. State C has a $50,000 wrongful death limitation. Under the vested rights rule the law of the place of injury applies; hence, the courts would apply a recovery limitation of $50,000. Such a result is unjust and irrational. The parties are both residents of a state that allows full recovery. The plaintiffs were traveling from a state that allows full recovery to a state that allows full recovery. Thus, they can rightfully expect to be permitted full recovery. The defendant is a resident of state A so he can expect its law to apply. State C's only connection to this lawsuit is the fortuitous occurrence of the accident within its territory. Such a connection should not be sufficient to disregard the expectations of the plaintiffs, and the interest of state A, the forum where all parties are residents.

Many courts tried to avoid unfair results without rejecting the vested rights approach by applying a characterization approach. Under the vested rights approach, the first question a court must ask in a conflict of laws dispute is how to characterize the facts at bar. If the issue is characterized as a tort issue, the law of the place of injury applies. If it is characterized as a contract issue, the law of the place of contracting applies. If it is characterized as a procedural issue, forum law applies. Courts would characterize tort is-

22. Id.
25. Id.
27. See RESTATEMENT OF CONFLICT OF LAWS § 384 (1934).
29. RESTATEMENT OF CONFLICT OF LAWS § 585 (1934). See also id. § 584, which pro-
sues as contract,\textsuperscript{30} and substantive issues as procedural,\textsuperscript{31} to circumvent the rigid "place of injury" rule.

Additionally, some courts developed a public policy exception to the tort "place of injury" rule.\textsuperscript{32} If the applicable place of injury law was contrary to the public policy of the forum, forum law applied.\textsuperscript{33} These courts were implicitly rejecting the vested rights approach. With the passage of time, courts began to reject categorically the vested rights approach, and today, a majority of jurisdictions have rejected this approach.\textsuperscript{34}

II. Modern Conflict of Law Approaches: A Critical Examination of Theories in the Product Liability Context

The most prevalent modern conflict of law approaches are Currie's interest analysis,\textsuperscript{35} the Restatement (Second)\textsuperscript{36} "most significant relationship" approach, and pro-plaintiff rules.\textsuperscript{37} All three approaches exhibit shortcomings when applied to choice of law questions in product liability suits.

vides that "[t]he court at the forum determines according to its own Conflict of Laws rule whether a given question is one of substance or procedure."

30. See, e.g., Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163 (1928) (vicarious liability issue characterized as contract). See Recent Cases, 42 HARV. L. REV. 433, 434 (1929) ("The purpose of the statute . . . was not to regulate contracts, but to create a new tort liability."); Recent Important Decisions, 27 MICH. L. REV. 462, 463 (1929) ("[T]he court has employed a mere fiction to justify its result, for the statutory liability was not . . . part of the contract."). Even those commentators who defended the court's decision in Levy wrote that "the result was sound regardless of the method whereby it was reached." G. STUMBBERG, PRINCIPLES OF CONFLICT OF LAWS 202-03 (3d ed. 1963) (emphasis added).

31. See, e.g., Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953) (survival of tort action rule characterized as procedural to apply forum law). In Sumner, Choice of Law Governing Survival of Actions, 9 HASTINGS L.J. 128 (1958), the author discussed Grant and noted that the characterization of survival of tort actions as procedural was against the overwhelming weight of authority in the United States. The court in Grant was "greatly influenced by the 'sympathy' factors in the case." Id. at 137.

32. See, e.g., Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 40, 172 N.E.2d 526, 528, 211 N.Y.S.2d 133, 136 (1961) (refusing to apply the place of injury law in a wrongful death action, the court stated that the law "is so completely contrary to our public policy that we should refuse to apply [it].").

33. Id.

34. A 1983 study found that only 16 states still followed the traditional approach. Of the 16 states, 9 considered and rejected adopting a modern theory. Five states left the matter open for future consideration. Two states applied the traditional approach without any discussion of other theories. Three other states have rejected the vested rights approach in special cases. Kay, Theory into Practice: Choice of Law in the Courts, 34 MERCER L. REV. 521, 582-83 (1983).

35. See B. CURRIE, supra note 19.


37. See infra note 112 and accompanying text.
A. Currie's Interest Analysis

Professor Currie asserted that in deciding choice of law cases, courts should consider the legitimate interests of the states involved in the choice of law controversy. Currie's theory involves a four-tier approach. First, even when there are foreign elements in a case, if the court is not asked to apply another jurisdiction's law, it should apply its own law. Second, when the court is asked to apply foreign law, the court should inquire into the policies expressed by the respective conflicting laws. If the court finds that the determination in this case will affect only one state's policies, that state has the only legitimate interest in the outcome of the suit, and its law should apply. Third, if the court finds that more than one state's policy will be affected by the outcome of this case, the court should re-examine the policies of the forum with a view toward finding a more restrained interpretation of forum policy. If upon reconsideration,
the court decides that only one state's policy will be affected, it should apply the law of the interested state. Fourth, if the court finds that a conflict cannot be avoided between the policies of the states involved in the case, it should apply forum law.\textsuperscript{43}

Currie's analysis is based upon the presumption that courts can ascertain the policies furthered by particular laws.\textsuperscript{44} In theory, Currie's presumption seems workable; in practice, however, this task is very difficult.\textsuperscript{45} Two New York Court of Appeals decisions concerning guest statutes demonstrate the difficulties courts have in ascertaining state policies.

In \textit{Dym v. Gordon},\textsuperscript{46} two New York domiciliaries were involved in a car accident in Colorado, while temporarily residing in that state. The plaintiff, a passenger in the car, sued the driver for negligence. Colorado had a guest statute which barred the guest in a car from recovering against the driver unless there was willful and wanton disregard of safety. Under New York law, the plaintiff only had to prove ordinary negligence. The plaintiff argued that the purpose of Colorado's guest statute was to protect local insurance companies from fraudulent claims. Thus, when the defendant is from New York and his car is insured by New York insurers, Colorado should not have an interest in having its law apply. The New York Court of Appeals applied Colorado law. The court reasoned that Colorado's guest statute was intended to give injured parties in other cars priority over the "ungrateful guest" in the assets of the negligent driver. In a Colorado accident where other local residents are injured, Colorado has an interest in having its guest statute apply.\textsuperscript{47}

In a later case, \textit{Tooker v. Lopez},\textsuperscript{48} the court admitted that it

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\item when weighing state interests after having interpreted the state policies. Currie, \textit{The Disinterested Third State}, 28 LAW & CONTEMP. PROBS. 754, 756-64 (1963). Currie, however, does not explain how interpreting state policy is different from weighing the state interests. See Cavers, \textit{supra} at 148. Professor Cavers criticized Currie's distinction, stating that the "'weighing' of interests after interpretation is condemned: 'weighing' of interests in interpretation, condemned, not to say encouraged." \textit{Id.} It is the same approach in a different guise.
\item 43. B. CURRIE, \textit{supra} note 19, at 119. In conflict literature this situation is called a true conflict. See Baxter, \textit{supra} note 41, at 9.
\item 44. See B. CURRIE, \textit{supra} note 19, at 183-84.
\item 45. See Rosenberg, \textit{Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals}, 67 COLUM. L. REV. 459, 464 (1967). "Searching for governmental interests presupposes that the purposes behind substantive rules are so clear, so singular, so unequivocal that we can hope to discover them with some certainty and some consensus. This is at odds with reality." \textit{Id.}
\item 46. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).
\item 47. \textit{Id.} at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.
\end{itemize}
had erred in *Dym*, and that the purpose of guest statutes is only to protect insurance companies from fraudulent claims. Therefore, the state has a legitimate interest in applying its guest statute only if the insurer is a local domiciliary.\(^49\)

The experience of the New York Court of Appeals with guest statutes underscores the uncertainty courts are faced with when they must determine the policies underlying particular laws. Without a clear indication of the purpose of relevant rules, the court either makes an arbitrary choice or bases its choice on the policy ideas of the forum. Such a practice is hardly consistent with the ground rules of interest analysis, which are to ascertain the policies underlying the relevant laws.\(^50\) Furthermore, some cases appear to have been decided in a conclusory manner, with the court fashioning the interest analysis to support a predetermined result.\(^51\) Professor Currie considered such an approach unacceptable.\(^52\)

In product liability suits, it is extremely difficult to ascertain with certainty the policy underlying a particular jurisdiction's product liability law. For example, a law favoring recovery can indicate a policy either to encourage manufacturers to produce defect-free products,\(^53\) or to compensate the injured party.\(^54\)

If the purpose of a pro-recovery rule is to compensate injured plaintiffs, the state would only have an interest in protecting its own

\(^49\) Id. at 574-75, 249 N.E.2d at 397, 301 N.Y.S.2d at 523-24.

\(^50\) See supra note 40.

\(^51\) See infra text accompanying notes 73-83.

\(^52\) B. CURRIE, supra note 19, at 105 ("I think it is clear that we cannot accept any conflict of laws method that proceeds on such premises.").

\(^53\) See, e.g., Roy v. Star Chopper Co., 584 F.2d 1124, 1129 (1st Cir. 1978) (Rhode Island has an interest "in promoting a high standard of care in the manufacture of goods by Rhode Island corporations."). In Baird v. Bell Helicopter Textron, 491 F. Supp. 1129, 1141 (N.D. Tex. 1980), the court reasoned that a state has an interest in promoting a higher standard of care by its local manufacturers because "the economic results of a safe product and a good reputation are directly and indirectly beneficial to the state." Id.

Upon closer analysis one can argue that applying strict liability per se in all suits against local manufacturers would damage the state's economic position. Strict liability raises the costs of manufacturing and, consequently, raises the cost of the product. Ultimately, local manufacturers become less competitive in the marketplace. Additionally, such a rule would deter manufacturers from conducting manufacturing operations in strict liability states. See Deemer v. Silk City Textile Mach. Co., 193 N.J. Super. 643, 651, 475 A.2d 648, 652 (1984).

Nevertheless, a state may have a legitimate interest in promoting a higher standard of care by local manufacturers because the safer the locally manufactured goods are, the less chance there is for a local resident to be injured by a defective product.

citizens. If the purpose of a pro-recovery rule is to penalize manufacturers to ensure that they manufacture safe products, however, the state’s interest is not limited to allowing recovery for local residents.

Similarly, the purpose of a pro-manufacturer rule can be either to protect manufacturers or to encourage consumers to be more cautious in buying and using products. If the purpose of the rule is to protect manufacturers, the state should only be interested in protecting local manufacturers. If the purpose of the rule is to encourage consumer vigilance, the state should be interested in preventing its consumers from recovering from any manufacturer.

The problem of ascertaining a state’s policy is multiplied by the number of territorial connections in a particular product liability case. A typical suit has numerous territorial connections; thus a number of interested states will be affected by the disposition of the case. States having an interest in the suit include the place of injury, place of manufacture, place of sale, place of the plaintiff’s domicile, and place of the defendant’s domicile. Furthermore, the defective product could be assembled from parts produced in many other states. All of the above-mentioned states may have a legitimate interest in the outcome of the case.

A sampling of product liability choice of law cases demonstrates the divergent state interests courts attribute to product liability rules. In ascertaining the policy underlying pro-recovery rules, some courts have held that the purpose is to ensure a defect-free

55. Id. at 649-51, 475 A.2d at 651-52.
59. For an analogous argument regarding a state’s desire to protect its consumers, see supra note 55 and accompanying text.
60. If the interest of the state is to encourage consumer vigilance, the focus of state interest is solely on the purchaser. It should not make a difference where the product was manufactured.
61. The number of contacts may be further multiplied, since it is very common for product liability suits to be brought as class action suits. See, e.g., In re “Agent Orange” Product Liability Litigation, 580 F. Supp. 690 (E.D.N.Y. 1984). In a given class action suit there are plaintiffs from many states. A court that applies interest analysis would have to ascertain the interests of all these states.
62. The cases analyzed below do not apply Currie’s interest analysis specifically. To the extent that they seek to ascertain the relevant interests of the states involved in each case, however, their approach is the same as Currie’s.
product, while other courts have suggested that the purpose is to ensure full compensation to the injured party. In *Roy v. Star Chopper Co.*, a Massachusetts plaintiff sued a Rhode Island corporation in Rhode Island for personal injuries caused by the defendant’s defective product. Rhode Island had a strict liability rule. Massachusetts had not yet clearly adopted strict liability. The Rhode Island court held that Rhode Island had an interest in applying its strict liability rule for the benefit of any plaintiff. The court reasoned that “Rhode Island has an interest in promoting a high standard of care in the manufacture of goods by Rhode Island corporations.” Thus, Rhode Island’s interest would be furthered by allowing recovery even to an out-of-state plaintiff.

In *Armstrong Cork Co. v. Drott Manufacturing Co.*, a Pennsylvania corporation sued a Wisconsin manufacturer in Pennsylvania on the theory of strict liability for the destruction of a logging machine in Georgia. Georgia’s product liability laws limited recovery based on strict liability to natural persons. Wisconsin law allowed recovery based on strict liability for purchaser corporations. The plaintiff argued that since Wisconsin is the place of manufacture, its pro-recovery rules should apply. The court stated that Wisconsin law was not applicable because the purpose of the Wisconsin pro-recovery law was only to protect Wisconsin consumers. Wisconsin, the court held, does not have an interest in protecting out-of-state consumers.

By simply assigning different policies to the pro-recovery rules of their respective states without explanation, the courts in *Roy* and *Armstrong Cork* reached different results. In *Roy*, the court held that Rhode Island’s interest in promoting a higher standard of care for manufacturers would be furthered by applying its law even to the benefit of an out-of-state plaintiff. Alternatively, the court in *Armstrong Cork* found that the purpose behind Wisconsin’s pro-recovery rule was to compensate Wisconsin consumers, not to benefit an out-

63. 584 F.2d 1124 (1st Cir. 1978).
64. Id. at 1129.
65. Id.
66. Id.
68. Id. at 416.
69. Id. at 415.
70. Id. at 417 (“[N]o Wisconsin purchaser-consumer, for whom the strict liability rule was fashioned to protect, has suffered damage in this case.”).
71. *Roy*, 584 F.2d at 1129.
of-state plaintiff. Thus, out-of-state plaintiffs were treated differently depending on the court's policy determination.

Some courts use interest analysis as a guise to reach a desired result. For example, in *Morgan v. Biro Manufacturing Co.*, a Kentucky resident sued an Ohio manufacturer in Ohio for injuries sustained in Kentucky. The injuries were caused by the manufacturer's defective grinder. The machine was twenty years old; its protective guard had been removed years before the incident and was never replaced. Kentucky law established a presumption that a product is not defective if the injury occurred more than eight years after the product's date of manufacture. Kentucky law further provided that a manufacturer should be liable only for the personal injury that would have occurred if the product had been used in its original, unaltered condition. Ohio law did not establish this presumption, nor would Ohio law limit the recovery of the plaintiff.

The *Morgan* court held Kentucky law applicable. In its analysis, the court acknowledged that Ohio has an interest in deterring manufacturers from producing defective products. It would seem that if deterrence is the underlying policy of Ohio's pro-recovery rule, then Ohio should have an interest in applying its law to any plaintiff, regardless of residence. Nevertheless, the court did not apply Ohio law. According to the court, "the mere fact that twenty-five years ago appellee manufactured a commercial meat grinder in Ohio and subsequently sold it to a Tennessee corporation with a protective guard in place which, in turn, was removed and a Kentucky resident was injured thereby, does not justify an application of Ohio law."

If Ohio has a policy to deter manufacturers from producing defective goods, then that policy would be furthered by allowing recov-

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72. *Armstrong Cork*, 433 F. Supp. at 417. Although the court points out that this case involved only economic injury, this factor should not be determinative when deciding whether the interest of the state is to protect consumers or to penalize manufacturers.

73. 15 Ohio St. 3d 339, 474 N.E.2d 286 (1984).

74. Id. at 339, 474 N.E.2d at 287.


77. Id. at 343, 474 N.E.2d at 289-90.

78. Id. at 343, 474 N.E.2d at 289.

79. See *Roy v. Star Chopper Co.*, 584 F.2d 1124 (1st Cir. 1978), and text accompanying note 56.

ery to a plaintiff from any state for an accident that occurred in any jurisdiction, provided that the product was produced in Ohio. It seems that the main factor the court considered in concluding that Ohio does not have an interest in applying its law was that that the defective product had been manufactured twenty-five years ago. Seemingly, the court was expressing its dissatisfaction with Ohio law, which allows a plaintiff to recover in full even twenty-five years after the manufacture of the goods. Had this been a purely domestic case, the court would have no choice but to follow the dictates of the state legislature. Yet in this interstate case, the court was able to disregard the law that it disfavored under the guise of interest analysis.

The difficulty in ascertaining with certainty the policies underlying a particular state's law leads to another problem with Currie's approach to conflict of law issues. When there is a "true conflict" between the policies of interested states, Currie's interest analysis provides that "the sensible and clearly constitutional thing for any court to do" is to apply forum law.

81. See Roy v. Star Chopper Co., 584 F.2d 1124 (1st Cir. 1978), and text accompanying note 56.
82. Morgan, at 339, 474 N.E.2d at 286. Perhaps the court felt it would not be furthering the deterrence policy by making a manufacturer pay for activities done 25 years before, since the manufacturer may have already discontinued the activity after such a long period of time. Even so, liability would encourage the manufacturer to take safety measures at the time of manufacture to ensure that the product will not injure anyone in the future. If a manufacturer knows that it can expect liability anytime its products injure anyone, the manufacturer will produce a safer product. For deterrence purposes, it should be irrelevant that the injury occurred 25 years after the manufacture of the product.
83. See supra note 43 and accompanying text.
84. B. Currie, supra note 19, at 119. In Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1, 9 (1963), the author suggests that a true conflict can be solved through a process called comparative impairment. The "[n]ormative resolution of real conflicts cases is possible where one of the assertedly applicable rules is more pertinent to the case than the competing rule." Id. at 9. Yet before courts can determine the scope of a rule, they must determine with certainty the purpose of the rule. In product liability suits, this task is extremely difficult. See supra notes 53-72 and accompanying text.

California's experience with comparative impairment demonstrates the weakness of the approach. In Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974), the California Supreme Court adopted the comparative impairment approach. In a later decision, Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978), the court said that comparative impairment should be used to resolve the true conflict. The court, however, went on to inquire whether the relevant laws were "archaic," or "no longer of pressing importance." Id. at 166, 583 P.2d at 726-27, 148 Cal. Rptr. at 872-73. This is hardly a comparative impairment analysis. It seems that the court realized that a "comparative impairment" analysis was not possible, and it settled for the "better rule" approach.
In product liability cases, where it is extremely difficult to determine the interests behind the substantive rules with certainty, applying forum law is not the only "sensible and constitutional"\(^8\) course of action. When the forum has a clear interest, there is no reason for it to sacrifice its interest to further a foreign state's interest. When the forum state's interest is less certain, however, the court should consider the foreign interest, rather than simply applying forum law.\(^8\)

B. The Restatement (Second) of Conflict of Laws' "Most Significant Relationship" Approach

Section 145 of the Restatement (Second) states the general principle that the "rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6."\(^8\) Section 6 lists seven factors relevant to the choice of applicable law.\(^8\)

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85. B. CURRIE, supra note 19, at 119.
86. Moreover, if Currie's approach that forum law prevails in any true conflict is applied to product liability cases, courts can almost always find a forum policy which will be furthered by applying forum law. This would result in forum law always being applied in product liability conflict of law suits. See D. CAVERS, supra note 58, at 300-03.
87. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). Section 145 reads in full:
The General Principle
(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.
These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id.
88. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). Section 6 reads in full:
Choice-of-Law Principles
(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of
These factors include the policies of the forum, the policies underlying the particular field of law, and the policies of other interested states. Subsection 2 of section 145 lists a series of contacts to be taken into account when applying the principles of section 6. Contacts that should be considered include place of injury, place of injury-causing conduct, the domicile, residence, nationality, and place of incorporation of the parties, and the center of any relationship between the parties.\(^8\)

The major problem with the Restatement (Second) approach is its failure to provide the court with guidance when the contacts and various factors of section 6 lead in different directions.\(^9\) This problem is especially acute in product liability cases where a diversity of potential contacts and policies exist. For example, a state X citizen is hurt in state Y by a product manufactured in state Z. Both state X and state Z have a pro-plaintiff rule. State Y has a pro-manufacturer rule. Section 145 does not provide any guidance in determining whose law should apply. Comments (c) and (e) of section 145\(^9\) suggest that a court should look into the purposes of the various laws and apply the law of the state whose policies will be affected by the outcome of the case. This raises the same difficulties in determining the state's purpose encountered by application of Currie's interest analysis.\(^9\) In addition, if state policies clash, the Restatement (Second) approach does not provide a basis for courts to decide which state's law should prevail.

Section 146 of the Restatement (Second) provides a presumption that the local law of the state of injury determines the rights and liabilities of the parties, unless some other state stands in a more significant relationship to the occurrence and to the parties.\(^9\) Thus, those states in determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Id.

89. See supra note 87.
90. In Juenger, Choice of Law in Interstate Torts, 118 U. PA. L. REV. 202, 213 (1969), the author writes that the Restatement (Second) formula is "the most poignant admission of unrestatability." In R. Crampton, D. Currie, & H. Kay, Conflict of Laws 307 (2d ed. 1975) the authors refer to the Restatement (Second) approach as being a "flabby, amorphous and sterile product."
91. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 comments c & e (1971).
92. See text accompanying notes 45-82.
93. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). Section 146 reads in full: Personal Injuries
when contacts and policies lead in divergent directions, and the court cannot determine which state has the most significant relationship to the occurrence and the parties, the law of the place of injury would apply.\textsuperscript{94}

The law of the state of injury is applied because it is presumed that the state of injury has the most significant relationship with the issue. Such a presumption is justified in tort cases, when the place of injury and the place of the defendant's conduct are the same. The state where the defendant's conduct occurred has a strong interest in deterring behavior that causes injuries within its territory. In a typical product liability case, however, the place of injury and the place of manufacture are two different states, and there is no basis for presuming that the place of injury has the most significant relationship.\textsuperscript{95}

Many courts have struggled in their attempt to use the \textit{Restatement (Second)} approach in product liability cases.\textsuperscript{96} For example, in

\begin{quote}
In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied. \textit{Id.}\textsuperscript{94}

\textit{Restatement (Second) of Conflict of Laws} § 146 (1971).

\textsuperscript{95} Apparently, this presumption stems from the discredited vested rights rules and is therefore subject to many of the same criticisms. \textit{See supra} note 20.

\textsuperscript{96} Many courts claiming to apply the \textit{Restatement (Second)} approach apply § 145 without reference to the policies in § 6. \textit{See}, e.g., Bruce v. Martin-Marietta Corp., 418 F. Supp. 837 (W.D. Okla. 1975), \textit{aff'd}, 544 F.2d 442 (10th Cir. 1976); Adams v. Buffalo Forge Co., 443 A.2d 932 (Me. 1982). These courts decided the choice of law question before they identified the relevant laws. Thus, they did not properly apply the \textit{Restatement (Second)} approach. Applying § 145 without reference to § 6 creates a jurisdiction-selecting approach and is therefore subject to many of the same criticisms as the vested rights rule. \textit{See supra} notes 21-23 and accompanying text. This problem can be traced to the original draft of § 145 of the \textit{Restate-ment (Second)} which did not include a reference to § 6. \textit{Restatement (Second) of Conflict of Laws} § 379 (Tent. Draft No. 9, 1964). This original draft was subject to much criticism. \textit{See}, e.g., \textit{Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws}, 63 \textit{COLUM. L. REV.} 1212, 1235 (1963) ("The question whether a particular 'contact' is significant is meaningless unless significance is judged in terms of the policies and interests of the states involved."). In the newer drafts, it is made clear that a court must evaluate § 145 contacts with reference to § 6 policies. Under § 6, a court must evaluate the relevant laws before deciding the choice of law question. \textit{See supra} note 88 for the text of § 6.

Additionally, some courts misconstrued § 6 of the \textit{Restatement (Second)}. For example, in Baird v. Bell Helicopter Textron, 491 F. Supp. 1129 (N.D. Tex. 1980), a British Columbia resident sued Bell Helicopter, a Texas corporation, in Texas on a theory of strict liability. Texas recognized a strict liability cause of action, while British Columbia did not. \textit{Id.} at 1140-41. Applying § 6, subsection (2)(g), \textit{ supra} note 88, the court found that "ease in the determination and application of the law to be applied" would be furthered by applying Texas law.

\end{quote}
In re Air Crash Disaster at Washington, D.C., the plaintiff sued the Boeing Corporation in the District of Columbia on a theory of strict liability. The case arose from the crash of a passenger jet in the District of Columbia. The jet was designed and manufactured by Boeing in the State of Washington. The plaintiff argued that Boeing was strictly liable for damages caused by inadequate instructions in Boeing's 737 Operating Manual. The District of Columbia would apply a strict liability standard for such a claim, while Washington State would apply a negligence standard.

The In re Air Crash court applied section 6 subsections (2)(b) and (c) of the Restatement (Second), which suggest that in deciding which state's law to apply, a court should consider the policies of the forum and the policies of other interested states. The court found that Washington State had an interest in applying its law to protect Boeing, a Washington manufacturer. The District of Columbia also had an interest in applying its anti-manufacturer rule in order to promote air safety at its airports. The court concluded that "the interest of Washington State... is not as great as the interest of the District of Columbia, and as the District of Columbia has the most significant relationship to this issue, its law shall control."

In In re Air Crash, the Restatement (Second) properly directed the court to inquire into which state had an interest in having its law apply. Once the court decided that both states had interests at stake and that these interests conflicted, however, the Restatement
(Second) did not give the court any guidance in determining which state's law to apply. The court simply decided that the pro-plaintiff interests of the District of Columbia are greater than the pro-manufacturer interests of Washington State. Advocates of strong product safety laws will argue that the court's ruling was just, while advocates of pro-manufacturer laws have good reason to argue that the decision in this case was unfair.

Professor Reese, a reporter of the Restatement (Second), recognized the limitations of his work. He defended the Restatement (Second) by saying that it was formulated only as a general approach, one which courts could use to develop specific rules for resolving conflict of law issues. Although the Restatement (Second) is over fifteen years old, courts still have not developed a comprehensive set of rules.

108. Id. The court discussed the Preamble of the Washington Products Liability Act of 1981, WASH. REV. CODE ANN. § 7.72.010 (Supp. 1986), which clearly stated that Washington is interested in protecting its manufacturers, but the court concluded that "the statements in the preamble to the Washington act have more to do with the denial of punitive damages than with the rule on the standard for products liability." In re Air Crash, 559 F. Supp. at 351.

Yet even without the "Preamble," it is very clear that Washington has an interest in establishing high standards of proof to protect its manufacturers.


110. Id. at 325.

111. The New York Court of Appeals is the only court to have developed a set of rules. Though derived in the context of traditional tort issues, these rules are equally applicable in product liability litigation. In Neumeier v. Kuehner, 31 N.Y.2d 121, 128, 286 N.E.2d 454, 457-58, 335 N.Y.S.2d 64, 70 (1972), a case dealing with New York's guest statute, the court set forth three rules:

1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.
3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.

Id. at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70.

In a recent decision, Schultz v. Boy Scouts of America, 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985), however, the court displayed a lack of commitment to implementing these rules. In Schulz, the parents of sexually abused children sued two charitable organiza-
C. Pro-Plaintiff Rules

Some scholars suggest that when a choice of law question arises

tions (Boy Scouts and the Franciscan Brothers) for damages on a theory of negligent hiring and supervision. The plaintiffs' children, New Jersey residents, were members of the New Jersey branch of the Boy Scouts of America. The Franciscan Brothers supplied scoutmasters to the Boy Scouts.

Edmund Coakeley was one of the scoutmasters supplied by the Franciscan Brothers. While on a scout trip to New York, Coakeley sexually molested the children. One of the children later committed suicide in New Jersey. The plaintiffs' parents claimed that the sexual attack caused their children severe psychological problems, and as a result, one of their children committed suicide. They charged that the defendants were negligent in assigning Coakeley to a position in which he could sexually molest children.

The Franciscan Brothers were incorporated in Ohio. New Jersey had a charitable immunity statute. Ohio recognized a similar doctrine subject to the exception of negligent hiring and supervision. New York had abolished charitable immunity.

The court applied New Jersey law in the suit against the Franciscan Brothers. *Id.* at 201-02, 480 N.E.2d at 687, 491 N.Y.S.2d at 98. The court recognized that the third *Neumeier* rule was applicable because the parties were domiciled in different jurisdictions and the tort occurred in a third jurisdiction. Under the third rule, the law of the place of tort will normally apply unless displacing it "will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants." *Neumeier*, 31 N.Y.2d at 128, 286 N.E.2d at 458, 335 N.Y.S.2d at 70.

The court found that applying New Jersey law "will enhance the smooth working of the multi-state system by actually reducing the incentive for forum shopping and it will provide certainty for the litigants . . . ." *Schultz*, 65 N.Y.2d at 201, 480 N.E.2d at 687, 491 N.Y.S.2d at 98. The court reasoned that New Jersey has an interest in promoting the continuation of defendant's charitable activities in the state. *Id.* at 200, 480 N.E.2d at 687, 491 N.Y.S.2d at 97. New Jersey's interest will be furthered by applying its charitable immunity statute to the defendant. Furthermore, New Jersey has an interest in subjecting its domiciliaries to accept the burdens as well as the benefits of its tort law. *Id.* New York, the court held, has no significant interest in applying its own law to this dispute. *Id.*

If the New York court is committed to applying a rule system, the exception to rule three should not apply unless it is very clear that the application of the law of a state other than the place of injury will advance the relevant substantive law policies of that state. If the court does not require a high standard, then rule three becomes meaningless, for the court can always circumvent the rule by applying interest analysis. This will hardly further "predictability and uniformity," which is New York's reason for adopting a rule system. *Neumeier* v. *Kuehner*, 31 N.Y.2d 121, 127-28, 286 N.E.2d 454, 457, 335 N.Y.S.2d 64, 69 (1972).

The dissent in the *Schultz* case argued that New York has a strong interest in having its law apply. A state has a strong interest in preventing injurious conduct from occurring within its borders regardless of the residency of the victims. *Schultz*, 65 N.Y.2d at 207-08, 480 N.E.2d at 691, 491 N.Y.S.2d at 102 (Jasen J., dissenting). New York abolished its charitable immunity statute in order to deter injurious activity. Although the majority opinion asserts that "the rule in conflict is loss-allocating rather than conduct-regulating," *id.* at 200, 480 N.E.2d at 686, 491 N.Y.S.2d at 97-98, in *Bing* v. *Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957), the case in which New York abolished its charitable immunity statute, the court made it clear that it was doing so to give "warning that justice and the law demand the exercise of care." *Id.* at 666, 483 N.E.2d at 8, 163 N.Y.S.2d at 11.

New York's interest in preventing the occurrence of misconduct within its borders clashes with New Jersey's policy of protecting charitable institutions. Both states have a strong interest in having their law apply. The application of the law of either state "will advance the
in a product liability suit, the court should apply the pro-plaintiff rule. Proponents of this view argue that a choice of law rule should further the policies underlying the substantive rules. According to these proponents, the underlying policy of product liability law is to obligate the manufacturer to compensate consumers injured by defective products. This policy is apparent in the past judicial trend in product liability suits favoring the extension of manufacturer’s liability.

The thesis of the pro-plaintiff approach does not comport with the present state of product liability law. When the courts first shifted from negligence to strict liability, the policy underlying product liability rules was pro-plaintiff. Today, however, courts handling product liability issues are more concerned with the limits to which they will stretch strict liability. Reacting to the concern generated by costly product liability judgments, the underlying policy has shifted from its pro-plaintiff bias. Courts and legislators have realized that rigidity in ruling for the plaintiff stifles productivity. As a result, many legislatures have already passed new product liability rules designed to limit the liability of manufacturers.


In Cousins v. Instrument Flyers, 44 N.Y.2d 698, 700, 376 N.E.2d 914, 915, 405 N.Y.S.2d 441, 443 (1978), the court’s assessment of the pro-plaintiff rule approach was that “[s]uch a rule, although facile of application, appears incongruous.”

113. See articles cited supra note 112.

114. See infra note 118.


(a) Sharply rising product liability insurance premiums have created serious problems in interstate commerce resulting in:

(1) Increased prices of consumer and industrial products;
(2) Disincentives to develop high-risk but potentially beneficial products;
(3) Businesses going without product liability insurance coverage, thus jeopardizing the availability of compensation to injured persons; and
(4) Panic “reform” efforts that would unreasonably curtail the rights of product users.

Id.

117. Id.

118. See, e.g., N.D. CENT. CODE § 28-01.1-01.(1) (Supp. 1985) (“product manufacturers are discouraged from continuing to provide and manufacture certain products because of
Similarly, the underlying policy of Professor Cavers' "Principles of Preference"\textsuperscript{110} approach is no longer valid. Professor Cavers' approach is based on the assumption that product liability policy is necessarily pro-plaintiff.\textsuperscript{120} According to Cavers, all states share an interest in protecting the consumer, and manufacturer protection is only a secondary interest. Therefore, he argues, in choice of law problems, courts should prefer pro-plaintiff rules.\textsuperscript{121} The basic flaw in Cavers' approach, and that of the other proponents of pro-plaintiff rules, is that manufacturer protection can no longer be considered a secondary concern. Today, an equal concern exists for both manufacturer and consumer protection,\textsuperscript{122} necessitating choice of law rules that further both policies.

III. Joint Maximization of States' Interests

A. The Theory

In multi-state product liability suits, where it is extremely diffi-

\textsuperscript{110} D. Cavers, supra note 58, at 315.
\textsuperscript{120} Id. at 310.
\textsuperscript{121} For a brief synopsis of Professor Cavers' conflict of law theory, see von Mehren, Choice of Law and the Problem of Justice, 41 LAW & CONTEMP. PROBS. 27, 37 (Spring 1977):

\textsuperscript{122} For a summary of Professor Cavers' principles of preference, see supra note 119, at 315. Consumer protection is society's primary concern. Manufacturer protection is only a secondary concern. See, e.g., Wash. Rev. Code Ann. § 7.72.010 preamble (Supp. 1986), "It is the intent of the legislature to treat the consuming public, the product seller, [and] the product manufacturer ... in a balanced fashion." Id.

cult to ascertain which single state is most interested in having its law applied, courts inevitably maximize the interests of one state while completely rejecting the interests of other states. Instead of narrowly promoting the interests of a single state, courts should adopt rules designed to further the interests of all concerned states. This entails establishing substantive product liability laws that will identify and maximize those policies that the involved states share.

In establishing these rules, courts should consider all possible policies attributable to each concerned state's relevant law. In a case with more than two interested states, courts should develop a rule that

123. The principle of applying special substantive rules in conflict of law cases is not new. In Jitta, La Substance des Obligations Dans le Droit International Privé 23 (1906), quoted in Lorenzen, Validity and Effects of Contracts in the Conflict of Laws, 30 Yale L.J. 655, 669 (1921). The author suggests that when courts are faced with a conflict of law they should apply "an independent provision which is derived from a consideration of the local public order and the universal public order." This approach was criticized for its failure to guide judges on how to establish such rules. Id.

124. In von Mehren, supra note 121, at 39-42, the author suggests that when a true conflict exists, courts should develop special substantive rules to compromise the clashing policies. In von Mehren, Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology, 88 Harv. L. Rev. 347, 366 (1974), the author gives an example: a dog owned by a resident of State A strays into State B, where it bites a resident of State B. State A allows recovery, but State B does not. Plaintiff would recover one-half of his actual damages under a rule compromising the differences of both states.

This rule of splitting the loaf does not further the interests of the anti-recovery state in any way. State B does not want recovery at all. If the plaintiff recovers fifty percent, the interests of State B are not furthered. See Twerski & Mayer, Toward A Pragmatic Solution of Choice-of-Law Problems—at the Interface of Substance and Procedure, 74 Nw. U. L. Rev. 781, 799 (1979). A substantive rule furthering policies of both states would, by definition, further State B's interests.

Twerski and Mayer suggest that multistate rules might fully advance the policies of all interested states at the same time. Id. at 783-84. Professor Sedler argues that it is impossible to develop rules that fully satisfy the policies of all interested states in a particular case. 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 (1979). This Note does not attempt to establish rules that further all policies of the interested states, but rather, advocates the establishment of rules that further the policies of the interested states as much as possible.

Nor does this Note suggest that courts adopt a "substantive super law." In Kozyris, Interest Analysis Facing its Critics—And, Incidentally, What Should Be Done About Choice of Law for Product Liability?, 46 Ohio St. L.J. 569, 571 (1985), the author criticizes those who suggest that courts adopt a "substantive super law." "[S]tates and nations have different perceptions on where to draw the line of justice . . . . The struggle then is not between good and evil, but between at least two goods or two lesser evils. By what authority . . . can a judge select one of these senses of justice over that which prevails in his own state?" Id. at 571.

This Note does not suggest that courts should develop the best substantive product liability law for application in product liability suits. Instead, this Note suggests that courts should consider the interests of all concerned states, and develop a substantive rule which will further all these interests to the greatest extent possible.
would maximize the joint interests of the polar views. Such a rule should, by definition, further the interests of the views in the middle.

Rules furthering the joint interests of all concerned states are possible in product liability cases because all states share a common interest in protecting both manufacturers and consumers.\textsuperscript{125} When a state establishes a product liability rule favoring consumers, it subordinates its pro-manufacturer interest in favor of a pro-plaintiff interest. Similarly, a state with a pro-manufacturer rule subordinates its pro-consumer interest. A rule maximizing the joint policies of pro-consumer and pro-manufacturer laws would foster both policies to the same extent.

In product liability cases, the adoption of rules that would maximize the joint interests of all concerned states would further most major choice of law policies.\textsuperscript{126} These policies are set forth below.

1. The Needs of the Interstate System. — Choice of law rules meet the needs of the interstate system when they are based on policies that “further harmonious relations between states.”\textsuperscript{127} Good will is enhanced when states consider the needs and policies of other states.\textsuperscript{128} By giving equal weight to local and foreign policies, joint maximization rules would further the needs of the interstate system.

2. The Relevant Policies of the Forum State and Other Interested States. — This policy directs a court to consider the relevant policies of all concerned states and to apply the law of the state whose interests will be most affected by the outcome of the case.\textsuperscript{129} Such an approach presupposes that courts can determine with reasonable certainty which single state will be most affected by the determination of the case. In a product liability case, however, where it is extremely difficult to determine this issue, courts should attempt to further the policies of all potentially affected states.

3. The Basic Policies Underlying a Particular Field of Law. — The two basic policies in product liability laws are protecting consumers from defective products and protecting manufacturers from overly burdensome costs.\textsuperscript{130} Both of these policies are given equal

\textsuperscript{125} When the interests of two states are fundamentally opposed such rules are impossible; for example, rules can not be developed for two states with opposing views concerning polygamy. See von Mehren, supra note 121, at 40.

\textsuperscript{126} These policies are listed in Restatement (Second) of Conflict of Laws § 6 comments d-k (1971).

\textsuperscript{127} Restatement (Second) of Conflict of Laws § 6 comment d (1971).

\textsuperscript{128} Id. comment k (discussing the need for reciprocity between states).

\textsuperscript{129} Id. comment f.

\textsuperscript{130} See supra text accompanying notes 112-22.
consideration by the joint maximization rules.

4. Ease in the Determination and Application of the Law to be Applied. — This policy is furthered by applying choice of law rules that are “simple and easy to apply.” Initially, courts may have difficulty establishing these rules. There are, however, a limited number of issues in the product liability field, and once courts establish precedent the rules will be easy to apply.

5. Predictability and Uniformity of Result. — Because both product liability laws and choice of law rules vary from state to state, different forums produce different results. Joint maximization rules would encourage uniform results among those states that adopt the theory. This choice of law rule would only be adopted by states truly interested in furthering the policies of all concerned states. If states did formulate different rules, the rule most successful in advancing the goals of joint maximization should ultimately be adopted by all states.

B. Application of the Theory

1. Example I—Subsequent Repair Rule. — Courts are split over whether evidence of subsequent repair should be admitted in strict liability suits. This issue arises when the manufacturer takes measures after an accident occurs which, if taken earlier, would have prevented the accident.

The policies for not admitting evidence of subsequent repair include a desire to encourage manufacturers to repair defective products. If the subsequent repair can be used as evidence against manufacturers, they will refrain from repairing defective products. Furthermore, subsequent repair evidence is highly prejudicial. Jurors

131. Restatement (Second) of Conflict of Laws § 6 comment j (1971).
132. For a discussion of how different forums can produce different results, see supra notes 62-72 and accompanying text.


Similarly, there is a split in the federal circuit courts on this issue. Compare Smyth v. Upjohn Co., 529 F.2d 803 (2d Cir. 1975) (refusing introduction of subsequent repair evidence), with Robbins v. Farmers Union Grain Terminal Ass’n, 552 F.2d 788 (8th Cir. 1977) (admitting subsequent repair evidence).
135. E.g., Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980).
may construe subsequent repair evidence as an admission of fault or product defect.\(^{136}\)

Some policies favor the admission of subsequent repair evidence. Without subsequent repair evidence, it would be extremely difficult for the plaintiff to prove his prima facie case.\(^{137}\) Even with strict liability, the plaintiff must prove that the product was defective. In a design defect suit, this entails providing the court with an alternative design that would have avoided the injury.\(^{138}\) Thus, the consumer plaintiff would have to hire experts to study the product and produce an alternative design. The costs of this process could preclude plaintiffs from pursuing their claims.\(^{139}\)

Additionally, strict liability often represents a policy decision that the manufacturer should bear the burden of injuries brought about by a defective product. Admitting subsequent repair evidence would further that policy.\(^{140}\)

Finally, admitting subsequent repair evidence in strict product liability cases will not deter manufacturers from repairing defective products.\(^{141}\) A typical mass-producer manufactures a large number of similar goods; if the manufacturer fails to remedy the defect in its products, it could face potentially harmful publicity and possibly debilitating law suits. A manufacturer would be working against its economic interest by not repairing a known defect.\(^{142}\)

A rule maximizing the joint interests of all states would admit the evidence of subsequent repair or redesign for the limited purpose of proving the feasibility of an alternative.\(^{143}\) This rule would not admit evidence of the subsequent repair for the purpose of proving


\(^{138}\) See, e.g., Lolie v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974).

\(^{139}\) See, e.g., Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 431, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237, (1978) ("[O]ne of the principle purposes behind the strict product liability doctrine is to relieve an injured plaintiff of the onerous evidentiary burdens.").


\(^{142}\) Id.

\(^{143}\) See Twerski, Post-Accident Design Modification Evidence in a Manufacturing Defect Setting: Strict Liability and Beyond, 4 J. PROD. LIAB. 143, 160-61 (1981).
that this particular manufacturer repaired its product. The manufacturer would be given the choice of either admitting that an alternative is feasible, or allowing the court to admit evidence that the manufacturer repaired the product. Manufacturer policies are furthered by not admitting evidence that the manufacturer subsequently repaired its product, thus eliminating the most prejudicial aspect of subsequent repair evidence. Pro-plaintiff policies are furthered by admitting the subsequent repair evidence to prove the feasibility of an alternative design, which greatly reduces the plaintiff’s burden of proving his prima facie case.

2. Example II—Failure to Warn: State of the Art Defense. — Courts are split on the issue of whether a state of the art defense should be allowed in cases involving a failure to warn. This issue arises when a manufacturer does not warn of a risk scientifically unknowable at the time of distribution, but known at the time of trial. Some courts hold that under these circumstances the manufacturer is liable for all injuries caused by its failure to warn. The majority of courts disagree.

A number of policies favor the imposition of liability on the manufacturer. One basis for imposing liability is the belief that as between innocent victims and producers of dangerous products, fairness dictates that the producers “should bear the unforeseen costs of the product.”

Other policies suggest that if courts impose liability on manufacturers based upon knowledge available at the time of trial, manufacturers will invest more in safety research to make sure that all possible dangers are eliminated.

Furthermore, courts will have great difficulty ascertaining whether or not the risk was scientifically knowable at the time of distribution. Plaintiff’s efforts to gather evidence could be easily frustrated where the evidence is under the exclusive control of the manu-

144. Id.
149. Id. at 206-07, 447 A.2d at 547-48.
facturer. Finally, the cost involved in determining this issue would be astronomical. Courts should avoid legal rules that would greatly add to the cost both sides incur in litigating a case.\textsuperscript{150}

Policies also exist that reject manufacturer's liability. If courts impose liability on manufacturers for scientifically unknowable risks, manufacturers will be very hesitant in placing new necessary products on the market.\textsuperscript{151} Moreover, it is unfair to subject the manufacturer to a standard scientifically unknowable at the time of production.\textsuperscript{152}

A rule maximizing the joint interests of all states would allow the plaintiff to establish his prima facie case by proving that the risk is known at the time of trial. Knowledge of the risk at the time of trial would create a presumption that the risk was scientifically knowable at the time of production. The manufacturer could rebut the presumption by proving that the risk was not scientifically knowable at the time of production.\textsuperscript{153}

This rule furthers the pro-manufacturer policies by allowing manufacturers to free themselves from liability by proving that the risk was scientifically unknowable at the time of production. Similarly, this rule furthers pro-plaintiff policies; by establishing a presumption that if a risk is known at the time of trial, the risk was known at the time of production, the plaintiff's task in proving his prima facie case is significantly reduced. Furthermore, the burden of proving that the risk was unknowable belongs to the manufacturer, who has better access to the evidence than does the plaintiff. Thus, this presumption significantly enhances the chances of the plaintiff to recover from the manufacturer.

IV. CONCLUSION

The existing choice of law approaches all fail when trying to meet the special needs of product liability suits. Currie's analysis assumes that courts can identify state interests, an extremely complicated endeavor in a product liability case with several states involved.\textsuperscript{154} Moreover, Currie's approach results in the application of

\textsuperscript{150} Id. at 207-08, 447 A.2d at 548.


\textsuperscript{152} Cf. Twerski & Weinstein, A Critique of the Uniform Product Liability Law—A Rush to Judgment, 28 Drake L. Rev. 221, 228 (1979).


\textsuperscript{154} See supra notes 53-72 and accompanying text.
forum law when the forum has an interest at stake. In product liability suits, this is unsatisfactory since the courts can invariably find some local interest that will be affected, thus effectively ignoring the legitimate interests of other states.\textsuperscript{165}

The Restatement (Second) is inadequate in providing guidance in dealing with the many variables of product liability cases.\textsuperscript{166} Nor does the place of injury presumption of the Restatement (Second) withstand logical scrutiny.\textsuperscript{167} Finally, the pro-plaintiff advocates, including Professor Cavers, are out of touch with the modern concern of protecting the interests of both manufacturers and consumers.\textsuperscript{168}

All of these approaches contain a common denominator: each approach solves choice of law problems by choosing one state's law over another. This produces an inequitable result. A joint maximization approach that seeks to further the interests of all concerned states would produce rational and fair results. As the examples indicate,\textsuperscript{169} it is possible to consider the interests of many states and produce a substantive rule beneficial to all.

The Ninth Circuit Court of Appeals once described conflicts of law suits as "the wilderness in which courts sometimes find themselves."\textsuperscript{170} Joint maximization of state interests may well be the path out of the wilderness.

\textit{Shimon A. Rosenfeld}

\begin{itemize}
\item \textsuperscript{155} See supra note 86.
\item \textsuperscript{156} See supra notes 87-111 and accompanying text.
\item \textsuperscript{157} See supra text accompanying notes 93-94.
\item \textsuperscript{158} See supra notes 112-22 and accompanying text.
\item \textsuperscript{159} See supra text accompanying notes 133-53.
\item \textsuperscript{160} Forsyth v. Cessna Aircraft Co., 520 F.2d 608, 609 (9th Cir. 1975).
\end{itemize}