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CHOICE OF LAW AND PREDICTABILITY OF DECISIONS IN PRODUCTS LIABILITY CASES

*Michael Ena**

The tale of American choice of law principles has become the story of a thousand and one inconsistent tort cases.[1]

—Alan Reed

INTRODUCTION

The unique political landscape of the United States, where each state is a sovereign over its territory and can enact its laws within broad limits of the federal Constitution, leads to the lack of "uniformity in rules of law from state to state."[2] In cases that implicate the legal systems of two or more states, courts have to decide which law will govern the case, but the choice of law rules, as well as their application by different courts, are all but uniform.[3]

Choice of law questions often arise in products liability cases because the product in question was produced in one state, purchased in another state, and caused an injury in yet another state.[4] This presents a significant challenge to courts, especially in mass tort actions arising from a long-term exposure to harmful substances in many different states.[5]

Before a court can proceed on adjudicating the merits, it needs to decide which law to apply, and in many cases the court's choice of law decision may mean the difference between dismissing the

* J.D. Candidate, Fordham University School of Law, 2009. I would like to thank Professor George W. Conk for his valuable advice and guidance.

1. Alan Reed, *The Anglo-American Revolution in Tort Choice of Law Principles: Paradigm Shift or Pandora's Box?*, 18 ARIZ. J. INT'L & COMP. L. 867, 898 (2001).

2. Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451, 452 (2000) [hereinafter Southerland, *Value Judgments*].

3. *Id.*

4. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (German-manufactured car purchased in New York caused plaintiff's injury in Oklahoma); Trahan v. E.R. Squibb & Sons, Inc., 567 F. Supp. 505 (M.D. Tenn. 1983) (plaintiff sued a New York manufacturer of diethylstilbestrol (DES) after she was diagnosed with cervical cancer in Tennessee caused by her mother's ingestion of DES during her pregnancy in North Carolina).

5. *See, e.g.*, Philip Morris, Inc. v. Angeletti, 752 A.2d 200, 232 (Md. 2000) (vacating certification of two classes of plaintiffs and holding that Maryland choice of law principles required application of individualized choice of law analysis for each class member since the class member may have been exposed to tobacco in one state but experienced illness or was diagnosed with a disease in other states).

case on a certain motion and allowing the plaintiff to proceed with discovery and trial.[6] It is not surprising that in such cases parties vigorously litigate choice of law questions, and the appeals process often reaches the state high courts or even the Supreme Court of the United States.[7]

Lack of uniformity in the choice of law methodologies that American courts use, combined with differences in the rules of law among states, lead to highly inconsistent and often unpredictable decisions.[8] Even within a single state, courts often lack a coherent approach to choice of law issues because the state's choice of law methodology provides inadequate guidance to the courts.[9] While the certainty, predictability, and uniformity of results are generally less important in tort cases, in the products liability context, predictability of judicial decisions is an important factor in evaluating business risks associated with the marketing of a particular product.[10] A profusion of laws applicable to mass-produced and mass-

6. *See, e.g.*, Morgan v. Brio Mfg. Co., 474 N.E.2d 286, 289-90 (Ohio 1984) (affirming application of Kentucky law precluding recovery by a Kentucky plaintiff injured in Kentucky by a meat grinder produced by an Ohio manufacturer and the dismissal of the case on summary judgment). Ohio law was more favorable to the plaintiff and would have allowed him to attempt to prove that the product that caused the injury was defective. See Temple v. Wean United, Inc., 364 N.E.2d 267 (Ohio 1977) for a discussion of Ohio choice of law rules.

7. *See, e.g.*, Allstate Ins. Co. v. Hague, 450 U.S. 971 (1981) (upholding application of Minnesota law where the plaintiff, a Minnesota resident whose husband died from injuries suffered when a motorcycle on which he was a passenger was struck by an automobile in Wisconsin, argued for the application of a more favorable Minnesota law, while the defendant insurance company argued that Wisconsin law more favorable to the defendant should apply); Young v. Masci, 289 U.S. 253 (1933) (upholding constitutionality of the application of a New York statute over objections of a New Jersey defendant who gave permission to a third party to drive his car to New York where the third party injured the plaintiff).

8. *Compare* Rowe v. Hoffmann-La Roche Inc., 892 A.2d 694 (N.J. Super. Ct. App. Div. 2006), *with* Alli v. Eli Lilly & Co., 854 N.E.2d 372 (Ind. Ct. App. 2006) where the two courts reached opposite results on almost identical sets of facts. *See infra* Part II for a detailed discussion of these two decisions.

9. *See, e.g.*, Rowe v. Hoffmann-La Roche Inc., 892 A.2d 694 (N.J. Super. Ct. App. Div. 2006), *rev'd*, 917 A.2d 767 (N.J. 2007). The trial court held that Michigan law favorable to the defendant applied where a Michigan resident sued a New Jersey drug manufacturer for the injuries that allegedly resulted from inadequate labeling of the drug. *Rowe*, 892 A.2d at 669-70. The appellate division reversed. *Id.* at 709. The Supreme Court of New Jersey reversed again and remanded the case for the reinstatement of the trial court's order. *Rowe*, 917 A.2d at 776. *See supra* Part II for a detailed discussion of these cases.

10. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. b (1971) [hereinafter SECOND RESTATEMENT] ("[T]he values of certainty, predictability and uniformity of result are of lesser importance in torts than in areas where the parties and their lawyers are likely to give thought to the problem of the applicable law in planning their transactions.").

marketed undifferentiated products generates substantial costs of compliance and may lead to uncertainty and economic inefficiency.[11] The uncertainty may force manufacturers to forgo development, production, and marketing of otherwise valuable products that might expose them to unpredictable risk.[12] This risk, in turn, may negatively affect the variety of products available to consumers.[13] The utility of products, however, has to be balanced with the need to make products reasonably safe, which prevents manufacturers from externalizing their costs at the expense of consumers.[14]

This Comment proposes that it is unrealistic to expect a comprehensive solution to the consistency and predictability of court decisions in the products liability area. Value judgments and policy considerations that underlie court decisions, combined with the wide discretion that modern choice of law methodologies provide, make the uniformity of decisions practically impossible.[15]

Part I analyzes the relevant historical background and development of the two prevailing choice of law methodologies for tort cases—the traditional rule of *lex loci delicti* of the First Restatement of Conflict of Laws[16] and the "most significant relationship" rule of the Second Restatement of Conflict of Laws.[17] It shows how the evolution of American society led to changes in choice of law methodologies that sacrificed the need for consistent and predictable choice of law decisions in favor of flexibility and fairness.

11. Michael I. Krauss, *Product Liability and Game Theory: One More Trip to the Choice-of-Law Well*, 2002 BYU L. REV. 759, 775-76 (2002).

12. *Id.* at 767-69.

13. *Id.*

14. *Cf., e.g.*, Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1212 (2002) (noting that the limited liability of corporations serves as an investment subsidy "permitting companies to externalize costs for which they would otherwise be compelled to pay tort damages"); Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209, 253 (2002) ("Tort law is the major form of private law that attempts to address regulatory gaps by permitting affected individuals to sue actors that seek to externalize costs onto others.").

15. Andrew J. Walker, *Conflict of Laws Analyses for the Era of Free Trade*, 20 AM. U. INT'L L. REV. 1147, 1206 (2005) ("[A]bsent an unusually clear fact scenario . . . the value judgments implicit in the analyses required by law make it virtually impossible for courts to apply the necessary analyses with uniformity of results.").

16. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (1934) [hereinafter FIRST RESTATEMENT] ("The law of the place of wrong determines whether a person has sustained a legal injury.").

17. SECOND RESTATEMENT, *supra* note 10, § 145 ("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 . . . .").

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Part II closely examines the two leading choice of law methodologies and shows how courts in New Jersey and Indiana apply them in tort cases. While New Jersey adopted the Second Restatement approach, Indiana courts still adhere to the *lex loci delicti* rule.[18] The discussion compares and contrasts the analytic frameworks used in the two states and their application to products liability cases. The comparison is illustrated by a detailed discussion of two recent New Jersey and Indiana cases where out-of-state plaintiffs sued in-state manufacturers of pharmaceutical products and where the courts reached opposite results on almost identical fact patterns.[19] The discussion reveals problems that arise from the choice of law methodologies applied by the two states, including inconsistency and unpredictability of court decisions concerning nationally marketed products.

Part III uses historical analysis from Part II to argue for changes in the choice of law approaches, especially in products liability cases. Part III also contains a critical discussion of *lex loci delicti*, the Second Restatement, and several proposals aimed at improving the current state of affairs in the choice of law area.

The Comment concludes that an approach that combines enhancements to the Second Restatement with federal preemption for certain types of products may be a more realistic answer to the question of consistency and predictability of court decisions in products liability cases.

I. Choice of Law in Tort Cases: Historical Development and Modern Approaches

A. Lex loci delicti: Law of the Place of Injury and the First Restatement

Traditionally, in tort cases, American courts applied the law of the place where the tort was committed, or *lex loci delicti*.[20] The doctrine, to a significant extent, originated from the works of a Harvard Law School Professor and United States Supreme Court Justice Joseph Story, whose treatise *Commentaries on the Conflict*

18. *See infra* Parts II.A, II.B.

19. *See* Rowe v. Hoffmann-La Roche, Inc., 892 A.2d 694 (N.J. Super. Ct. App. Div. 2006), *rev'd*, 917 A.2d 767 (N.J. 2007); Alli v. Eli Lilly & Co., 854 N.E.2d 372 (Ind. Ct. App. 2006). *See infra* Part II for a detailed discussion and analysis.

20. *See, e.g.*, Lea Brilmayer, Conflicts of Laws: Foundations and Future Directions 11-12 (Little Brown & Co. ed., 1991).

of Laws, published in 1834,[21] provided a comprehensive view of the subject and was very influential in guiding courts on the issue of conflict of laws.[22] That every nation had exclusive sovereignty over its territory served as one of Story's main premises.[23] In Story's view, a sovereign did not have to recognize laws of other sovereigns, although it could voluntarily choose to do so, guided by the spirit of comity and considerations of utility and mutual convenience.[24]

Court decisions of that time reflected Story's territorial view of conflict of laws. For example, in 1843, during Story's tenure as a Supreme Court Justice, the Court held that British statutes should apply in a case where two American ships collided in the British port of Liverpool.[25]

Radical improvements in transportation, especially the construction of new railroads that accompanied the industrial revolution in the late Nineteenth and early Twentieth Centuries, resulted in courts more often having to decide which law governed the existence of liability and the measure of recovery in a particular tort action.[26] Supreme Court decisions of that period confirmed the Court's adherence to the theory that the right to recover in tort owes its creation and extent solely to the law of the jurisdiction where the injury occurred.[27] For example, in 1904 the Court considered a wrongful death action brought by Texas survivors of an

21. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834) [hereinafter STORY, COMMENTARIES].

22. *See, e.g.*, Scott v. Sandford, 60 U.S. 393, 466-67 (1856) (citing Story's treatise on conflict of laws as an opinion of one "of the most eminent jurists of the country"); Polydore v. Prince, 19 F. Cas. 950, 951 (D. Me. 1837) (No. 11,257) ("The whole subject is examined with all the learning which belongs to it by Mr. Justice Story, in his very learned and profound treatise on the Conflict of Laws . . . .").

23. STORY, COMMENTARIES, *supra* note 21, at 19. **R**

24. *Id.* at 34-37. Story pointed out that in a case of a conflict "the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return." *Id.* at 34.

25. Smith v. Condry, 42 U.S. 28, 33 (1843) ("The collision having taken place in the port of Liverpool, the rights of the parties depend upon the provisions of the British statutes, then in force; and if doubts exist as to their true construction, we must of course adopt that which is sanctioned by their own courts.").

26. *See, e.g.*, Cuba R.R. Co. v. Crosby, 222 U.S. 473, 478 (1912) (personal injury action brought by an American employee of a New Jersey corporation who was injured by defective machinery while performing his job duties in Cuba); Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120 (1904) (wrongful death action brought by the survivors of a Texas employee of a Colorado railroad company killed while coupling railroad cars in Mexico).

27. *See, e.g.*, *Cuba R.R. Co.*, 222 U.S. at 478 ("[W]hen an action is brought upon a cause arising outside of the jurisdiction . . . the duty of the court is not to administer

employee of a Colorado corporation that operated a railroad from Texas to Mexico City.[28] In the opinion delivered by Justice Holmes, the Court held that Mexican law should govern since the employee was killed while coupling two freight cars in Mexico.[29]

State courts of that time scrupulously adhered to the territorial rule restricting the effects of their state laws to their state boundaries.[30] As the Alabama Supreme Court explained in the famous case *Alabama Great Southern Railroad Co. v. Carroll*, courts could not impose liability on the defendant unless the law of the place of injury provided a cause of action to the plaintiff.[31]

By the end of the Nineteenth Century, the approach to choice of law issues became more rigid and formal than the one that Story originally envisioned.[32] In some cases, courts applied foreign laws that clearly contradicted their own state's public policy. As illustrated in *Carroll*, the court denied recovery on the basis of territorial restrictions to an Alabama worker of an Alabama railroad company for injuries sustained while servicing a train in Mississippi that resulted from a negligent train inspection in Alabama.[33] The worker sought recovery under the Alabama Employers' Liability Act that abolished the harsh fellow servant rule and allowed a worker to recover from the employer for injuries caused by the negligence of a fellow worker.[34] But the court denied recovery under the Act holding that it had no effect beyond Alabama borders.[35]

One of the major proponents of the territorial approach was Harvard Law School Professor Joseph Beale, the Reporter for the First Restatement of Conflict of Laws published by the American

its notion of justice, but to enforce an obligation that has been created by a different law.").

28. *Slater*, 194 U.S. at 126.

29. *Id.*

30. *See, e.g.*, BRILMAYER, *supra* note 20, at 11-12.

31. 11 So. 803, 808 (Ala. 1893).

32. *Cf., e.g.*, Eric T. Dean, Jr., *Reassessing Dred Scott: The Possibilities of Federal Power in the Antebellum Context*, 60 U. CIN. L. REV. 713, 740 (1992) (noting that Story's work combined territorial approach with the elements of supranational laws that jurisdictions presumably accepted unless they had taken affirmative steps to exclude such laws); Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 962 (1983) (pointing at overbreadth and rigidity of the choice of law rules in tort cases during the heyday of territorialist thinking at the beginning of the Twentieth Century).

33. *Carroll*, 11 So. at 803-05.

34. *Id.* at 805.

35. *Id.* at 806-07.

Law Institute in 1934.[36] Like Joseph Story's works in the Nineteenth Century, Professor Beale's treatise on conflict of laws influenced courts' decisions in the first half of the Twentieth Century.[37] According to Beale, the purpose of choice of law was to find the jurisdiction whose substantive law would govern adjudication of the case.[38]

This approach was firmly rooted in the case law of that time.[39] For example, in *Young v. Masci*, the United States Supreme Court affirmed the application of New York law by a New Jersey court in the case brought by a New York resident injured in New York by a New Jersey motorist, holding that liability in tort was determined by the law of the place of injury.[40]

The First Restatement incorporated Beale's doctrinal views and stated that in tort cases, "[t]he place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."[41] Although the First Restatement faced harsh criticism as soon as it was published, as a practical matter, *lex loci delicti* led to predictable results, prevented forum shopping, and was relatively easy to apply in most of the cases.[42] Its territorial approach yielded acceptable results and served as a natural analytical basis for resolving choice of law issues in the Nineteenth and early Twentieth Centuries when state boundaries were much more than mere lines on the map.[43] The socio-economic progress of the Twentieth Century changed that.[44] The growing role of the federal

36. *See* Reed, *supra* note 1, at 879. Under this territorial approach, also known as the doctrine of vested rights, courts enforced rights vested in the plaintiff under the law of a particular jurisdiction but refused to enforce penal statutes of other jurisdictions. *See, e.g.*, Loucks v. Standard Oil Co., 120 N.E. 198, 198 (N.Y. 1918). For a modern treatment of the issue, see Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987).

37. *See, e.g.*, *Loucks*, 120 N.E. at 200-201. Judge Cardozo relied on Professor Beale's treatise in holding that the Massachusetts wrongful death statute applies where a New York resident, while traveling on a highway in Massachusetts, was run down and killed through the alleged negligence of employees engaged in their business. *Id.*

38. JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 275 (1935).

39. *See, e.g.*, Young v. Masci, 289 U.S. 253, 258 (1933); *see also* Bert J. Miano, *Abandoning the "Toothless Old Dog" of Lex Loci Delicti in Tort Actions*, 20 AM. J. TRIAL ADVOC. 443, 443 (1997) (noting that *lex loci* was the dominant choice of law methodology in the first half of the Twentieth Century).

40. 289 U.S. at 258.

41. FIRST RESTATEMENT, *supra* note 16, § 377. R

42. *See, e.g.*, Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1282-83 (1989).

43. *See* Southerland, *Value Judgments*, *supra* note 2, at 466. R

44. *Id.* at 470-73.

government, the advancements in science and technology, and the rapid economic changes increased mobility of people and goods across state lines within the much more unified and integrated nation.[45] In this new socio-economic environment, *lex loci delicti* more often than before produced results that, like the denial of recovery in *Carroll*, offended the basic notions of fairness and substantial justice.[46]

The outcome often depended on entirely fortuitous events. Returning to *Carroll*, there the decision depended on whether the injury occurred before or after the train crossed the Alabama state lines on its way to Meridian, Mississippi.[47] Likewise, in *Carter v. Tillery*, recovery depended on the fact that an aircraft on its way from New Mexico to Texas was forced to land in Mexico and not in the United States.[48]

Under the territorial rule of *lex loci delicti*, the determination as to which state's law applied to all issues of the case completely disregarded the substantive law of the states involved in the conflict.[49] As a result, courts and commentators increasingly voiced their dissatisfaction with the mechanical approach of *lex loci delicti* because it did not take into account the interests of the involved states, especially where the place of injury was truly fortuitous.[50] As professors Cheatham and Reese[51] wrote in 1952, one of the problems with the traditional approach stemmed from the belief that "all aspects of choice of law could be handled satisfactorily by a relatively small number of simple rules . . . . This view . . . had obvious ap-

45. *Id.*

46. Alabama Great S. R.R. Co. v. Carroll, 11 So. 803, 805 (Ala. 1892); *see supra* text accompanying notes 31-35. R

47. *Alabama Great S. R.R. Co.*, 11 So. at 806.

48. Carter v. Tillery, 257 S.W.2d 465, 466 (Tex. App. 1953) (refusing jurisdiction only because the aircraft accidentally landed in Mexico although all the parties were residents of Texas).

49. BEALE, *supra* note 38, at 311-12 ("[N]o statute has force to affect any person, thing, or act . . . outside of the territory of the state that passed it.").

50. *See, e.g.*, Max Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 29 (1944) ("[W]here place of wrong is interpreted as place of harm and harm at that place was not reasonably foreseeable, the rule fails to fulfill its purpose, an antagonism arises between the ideal of uniformity and that of protection of justified expectations, and unless we worship uniformity for its own sake, the former ideal has to yield.").

51. Professor Reese served as the Reporter for the Second Restatement of Conflict of Laws.

peal because it seemed to promise both certainty of result and ease of application. Its falsity is now generally recognized . . . ."[52]

Nevertheless, the traditional *lex loci delicti* approach dominated American jurisprudence until the beginning of the "choice of law revolution" in the early 1960s.[53] In the forty years to follow, most states abandoned the traditional rule, and by the end of the Twentieth Century, only ten states still used it to decide choice of law issues in tort cases.[54]

B. Exceptions to the Traditional Rule

To avoid undesirable results, courts created a variety of exceptions or "escape devices" that allowed them, in certain cases, to circumvent the rigid traditional rule.[55] As the number of exceptions grew, however, the exceptions undermined the main benefits of *lex loci delicti*: judicial economy as well as the uniformity and predictability of results.[56]

Some courts managed to escape the outcome *lex loci delicti* prescribed by re-characterizing tort cases under some other category.[57] For example, in *Levy v. Daniels' U-Drive Auto Renting Co.*, a passenger of an automobile rented in Connecticut was injured through the negligent operation of the automobile in Massachusetts.[58] The Connecticut high court re-characterized the action as *ex contractu*

52. Elliott E. Cheatham & Willis L. M. Reese, *Choice Of The Applicable Law*, 52 COLUM. L. REV. 959, 959 (1952) (citations omitted).

53. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2004: Eighteenth Annual Survey*, 52 AM. J. COMP. L. 919, 942 (2004).

54. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2000: As the Century Turns*, 49 AM. J. COMP. L. 1, 3 (2001).

55. Southerland, *Value Judgments*, *supra* note 2, at 473 ("It was apparent that these techniques were being pressed into service because courts didn't like the results called for by the traditional rules."). R

56. *See, e.g.*, Hataway v. McKinley, 830 S.W.2d 53, 56-57 (Tenn. 1992) (noting that court-created exceptions to the traditional rule undermined its main virtues, the certainty, uniformity, and predictability of results).

57. *See, e.g.*, Clark v. Clark, 222 A.2d 205, 207 (N.H. 1966) ("Some jurisdictions, experiencing . . . dissatisfaction with the mechanical place of wrong rule, have substituted a straight characterization approach. This approach would reach different results according to whether a torts case could be technically re-characterized as a contracts case, as a family law case, as one presenting a procedural question, or under some other key-number section heading which would enable a court to vary its choice of law subjectively.").

58. Levy v. Daniels' U-Drive Auto Renting Co., 143 A.2d 163, 163-64 (Conn. 1928).

and allowed the plaintiff to avoid the Massachusetts law that barred recovery.[59]

Other courts created public policy exceptions when application of the law of the place of injury was prejudicial to the general interests of the forum state and its citizens. For example, in a 1930 decision, the Wisconsin Supreme Court reached a result that was opposite to the one in *Carroll*.[60] The court held that Workmen's Compensation Act of Wisconsin applied to Wisconsin workers injured while performing their job duties outside the state because "[t]he interest of the state in the protection of the health and lives of its citizens . . . is the same whether its citizens be injured in their employment in this state or outside its borders."[61]

In 1953 the Supreme Court of California, in an opinion by Justice Traynor, held that survival of liability was a procedural issue and applied California law that allowed injured plaintiffs to sue the estate of the deceased defendant in a personal injury case where California plaintiffs had been injured in a car accident in Arizona.[62]

Finally, in certain cases, the Due Process and the Full Faith and Credit clauses of the United States Constitution forced courts to refrain from a rigid application of *lex loci delicti* to ensure that states did not reach beyond the limits imposed on them by their status as coequal sovereigns in the federal system.[63]

C. Departure from the Traditional Rule

As courts created new exceptions and legal scholars increasingly criticized the traditional approach proposing alternative theories, by the early 1960s the scene was set for what became known as the "American choice of law revolution."[64] Acknowledging limitations

59. *Id.* at 165. For contract cases, the First Restatement of Conflict of Laws prescribed application of law of the place of contract, in this case, Connecticut law. FIRST RESTATEMENT, *supra* note 16, § 311. R

60. Val Blatz Brewing Co. v. Gerard, 230 N.W. 622, 624 (Wis. 1930).

61. *Id.*; *see also supra* notes 31-35 and accompanying text. R

62. Grant v. McAuliffe, 264 P.2d 944 (Cal. 1953).

63. U.S. CONST. art. IV, § 1; U.S. CONST. amend. XIV, § 1. The United States Supreme Court held in *Allstate Insurance Co. v. Hague*, "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 449 U.S. 302, 312-13 (1981).

64. *See generally* SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE (Martinus Nijhoff, 2006). The changes in the choice of law jurisprudence paralleled changes in the substantive tort law where legislatures abrogated old statutes limiting recovery in personal injury cases and courts overruled old precedents barring recovery when the plaintiff was also negli-

of the traditional rule and influenced by scholarly works, some courts, unwilling to create yet another exception, decided to break away from the old rule and to use an alternative approach. For example, in 1957, the Supreme Court of Minnesota held that even though the plaintiff sustained injuries in an accident in Wisconsin, he could bring the action under the Minnesota Civil Damage Act since all the parties involved were residents of Minnesota and the sale of intoxicants to the allegedly intoxicated driver took place in Minnesota.[65] As the *Schmidt* decision indicated, instead of a formal application of territorial rules, courts started looking at the relationship between the subject matter of the controversy and the states whose laws were implicated.[66]

In 1962, the United States Supreme Court acknowledged the existence of a new approach to choice of law decisions[67] and affirmed its constitutionality:

> Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.[68]

The following year was marked with the watershed *Babcock v. Jackson* decision. In that case, the New York Court of Appeals abandoned the traditional rule in favor of the "grouping of contacts approach," noting that in tort cases the doctrine of vested rights ignores jurisdictional interests other than those where the tort occurred.[69]

The straightforward facts and inequitable result produced by the traditional rule made *Babcock* an ideal case for the adoption of a

gent. *See, e.g.*, Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 412 (2000) [hereinafter Juenger, *Third Restatement*].

65. Schmidt v. Driscoll Hotel, Inc., 82 N.W.2d 365, 366 (Minn. 1957) (holding that the interests of equity and justice required that the principles of the First Restatement did not apply to the facts of the case).

66. *Id.* at 368.

67. Richards v. United States, 369 U.S. 1, 12 (1962) ("Recently there has been a tendency on the part of some States to depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation.").

68. *Id.* at 15.

69. 240 N.Y.S.2d 743, 746 (N.Y. 1963). After the New York Court of Appeals had successfully used the new approach in a number of contract cases, it found it equally applicable to tort cases. The decision received praise from many prominent legal scholars. *See, e.g.*, Cavers et al., *Comments on* Babcock v. Jackson*, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

new approach.[70] The defendant driver, his wife, and the plaintiff passenger, all New York residents, started their car trip in New York and were involved in a single-car accident in Ontario, Canada, where the defendant lost control of the car and it crashed into a stone wall severely injuring the plaintiff.[71] While the applicable Ontario statute would have completely prevented plaintiff's recovery, New York law allowed recovery if the defendant was negligent.[72] The court felt that the interests of justice would be better served by adopting a new rule that called for the application of law of the state that had the most significant grouping of contacts with the facts of the case.[73] Essentially, the contact analysis served as an indirect way to identify and apply the policy of the state most concerned with the outcome of the particular case.[74] As the Pennsylvania Supreme Court pointed out a year later, although courts and scholars wrote about evaluating contacts and relationships when discussing choice of law issues, they were primarily concerned with state policies and interests implicated by the conflicting laws.[75]

In contrast, the methodology of the Second Restatement discussed in the next section prescribes a direct analysis of policies and interests behind the laws implicated in the conflict.

D. The Second Restatement: The Most Significant Relationship Approach

As criticism of the traditional *lex loci delicti* rule grew, in 1953 the American Law Institute started to work on the Second Restatement of Conflict of Laws.[76] The new Restatement was pub-

70. *See Babcock*, 240 N.Y.S.2d at 745.

71. *See id.*

72. *See id.*

73. *Id.* at 749 ("Justice, fairness and 'the best practical result' may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation." (citations omitted)).

74. *Id.*

75. *See* Griffith v. United Air Lines, Inc., 203 A.2d 796, 802 (Pa. 1964) (abandoning the *lex loci delicti* rule in favor of a more flexible choice of law approach that permitted taking into account state interests and policies underlying each issue before the court).

76. *See, e.g.*, Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 330-331 (1997). Professor Willis L. M. Reese of the Columbia University School of Law served as the Reporter for the Second Restatement, which was approved for publication at the Institute's annual meeting of 1969. *Id.*

lished in 1971.[77] It reflected changes in judicial approaches and the corpus of law developed after the publication of the First Restatement.[78] The Second Restatement rejected the rigid rules of the First Restatement and attempted to provide a much more flexible case-by-case and issue-by-issue approach for deciding choice of law questions.[79] The provisions of the Second Restatement were "eclectic in nature" since the authors attempted to accommodate a number of different legal theories and social values.[80]

In tort cases, section 145 of the Second Restatement called for the application of local law of the state where the injury occurred, unless some other state had a more "significant relationship" to the occurrence and the parties:

> (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 domicil, 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.[81]

Section 6 of the Second Restatement provided the following set of principles to help courts determine if there was a state with a more significant relationship than the state of the occurrence:[82]

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,

77. SECOND RESTATEMENT, *supra* note 10, ch. 7, tit. 1 (discussing the new position taken by the Second Restatement). **R**

78. *See generally* Jeffrey M. Shaman, *supra* note 76.

79. *Id.*

80. *See* Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 508 (1983) ("The Restatement Second provisions on choice of law can be described as eclectic in nature since they rely on a variety of different theories and values.").

81. SECOND RESTATEMENT, *supra* note 10, § 145. **R**

82. The principles stated in section 6 first appeared in the 1952 article by Cheatham and Reese. *See supra* note 52 and accompanying text. **R**

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.[83]

The authors of the Second Restatement did not intend to provide an exhaustive list of factors and did not imply their relative importance by ordering the factors in a specific way.[84] On the contrary, in their comments, the authors explained that courts might consider any other relevant factors to resolve choice of law issues, and depending on the facts of a particular case, assign different weight to certain factors or groups of factors.[85]

Unlike the jurisdiction selection rules of the First Restatement, where the choice of law decision applied to all issues in a particular case, the Second Restatement added extra flexibility in accommodating interests of several states by allowing courts to make choice of laws decisions on an issue-by-issue basis, thus giving them a wide discretion in picking and choosing which law to apply to a particular issue of the controversy.[86]

In order to identify and analyze problems arising from the application of the *lex loci delicti* and Second Restatement methodologies in products liability cases, Part II takes a closer look at choice of law rules of two jurisdictions, Indiana and New Jersey.

83. SECOND RESTATEMENT, *supra* note 10, § 6. **R**

84. *Id.* § 6 cmt. c.

85. *Id.*

86. *Id.* § 145 cmt. d ("Each issue is to receive separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states."). This approach is also known as depecage. In French, dépeçage means dismemberment and originates from dépecer, which means to carve up or analyze minutely. MERRIAM-WEBSTER'S DICTIONARY OF LAW (Merriam-Webster 1996). *See also* Simon v. United States, 805 N.E.2d 798, 801 (Ind. 2004) ("Depecage is the process of analyzing different issues within the same case separately under the laws of different states.").

II. Choice of Law in Products Liability Cases in Indiana and New Jersey: Lex Loci Delicti vs. Governmental Interest Analysis

A. Indiana Choice of Law Approach for Tort Cases

Indiana traditionally used *lex loci delicti* as its choice of law rule in tort cases.[87] For example, in 1888 the Supreme Court of Indiana, citing Joseph Story's treatise on conflict of laws, held that Michigan law governed a wrongful death case where an Indiana worker was killed while coupling railroad cars in Michigan.[88]

One hundred years later, in *Hubbard Manufacturing Co. v. Greeson*, the court revisited the issue and decided to add some flexibility to its rigid traditional rule.[89] In *Hubbard*, the plaintiff, an Indiana resident and her husband's administratrix, brought a products liability suit against Hubbard, an Indiana manufacturer, alleging that a defect in a lift unit manufactured by Hubbard caused her husband's death while her husband, also an Indiana resident, worked in Illinois replacing street lights.[90]

The applicable substantive laws of Illinois and Indiana had significant differences. Unlike Illinois, Indiana completely barred recovery if the product represented an open and obvious danger or was misused.[91] Upon finding a true conflict of laws, the Indiana court turned to its *lex loci delicti* rule that pointed to the application of Illinois law in order to resolve the conflict.[92]

The court noted that, unlike Indiana, any of the bordering states would have applied the substantive law of Indiana had the plaintiff filed her suit there and concluded that the rigid application of *lex loci delicti* to this case would lead to an inappropriate result.[93] To avoid this, the court turned to the Second Restatement in order to add a fallback provision to its rigid traditional rule.[94]

87. *See supra* Part I.A for a detailed discussion of *lex loci delicti*.

88. Burns v. Grand Rapids & Ind. R.R. Co., 15 N.E. 230, 233 (Ind. 1888).

89. 515 N.E.2d 1071 (Ind. 1987).

90. *Id.* at 1072.

91. *Id*. at 1073.

92. *Id.* ("The tort is said to have been committed in the state where the last event necessary to make an actor liable for the alleged wrong takes place.").

93. *Id.* at 1073 ("Had plaintiff . . . filed suit in any bordering state the only forum which would not have applied the substantive law of Indiana is Indiana.").

94. *Id.* at 1073.

> In a large number of cases, the place of the tort will be significant and the place with the most contacts. In such cases, the traditional rule serves well . . . . In those instances where the place of the tort bears little connection to the legal action, this Court will permit the consideration of other factors such as:

The *Hubbard* court changed the Indiana choice of law rules to benefit the defendant, a local manufacturer.[95] In this respect, the decision is somewhat unusual, since courts usually altered their choice of law rules in cases where the changes benefited the plaintiffs.[96] Although the Indiana Supreme Court never admitted it, the likely reason for the change was the decision of the United States Supreme Court in *Allstate Insurance Co. v. Hague* that declared unconstitutional the application of law of the state that did not have significant contacts or an aggregation of contacts with the subject matter of the litigation.[97]

Also, *lex loci delicti*, at least to some extent, favors local manufacturers in that it inhibits class actions against them.[98] This favoritism may be an additional reason for the unwillingness of some jurisdictions, including Indiana, to abandon the traditional rule.

After the *Hubbard* court affirmatively relied on the Second Restatement, some commentators interpreted that decision as a partial adoption of the Second Restatement and argued that the court should fully adopt the Restatement approach as its choice of law methodology.[99]

In *Simon v. United States*, however, the court shattered these hopes and forcefully rejected the Second Restatement.[100] The

1) the place where the conduct causing the injury occurred;
2) the residence or place of business of the parties; and
3) the place where the relationship is centered.

Id. at 1073-74 (citing SECOND RESTATEMENT, *supra* note 10, § 145). **R**

95. *See id.* at 1074.

96. *See, e.g.*, *supra* notes 69-73 and accompanying text; *but cf.* Dowis v. Mud Slingers, Inc., 621 S.E.2d 413, 415-19 (Ga. 2005) (refusing to abandon *lex loci delicti* and applying law more favorable to the defendant). **R**

97. 450 U.S. 971 (1981); *see also supra* note 63 and accompanying text. **R**

98. *See e.g.*, Drooger v. Carlisle Tire & Wheel Co., No. 1:05-CV-73, 2006 U.S. Dist. LEXIS 20823, at *22 (D. Mich. Apr. 18, 2006).

> Under the *lex loci delicti* rule, "if this case were certified as a nationwide class action, the Court would have to try the case under the laws of the 50 states . . . . While not necessarily the death knell to certification, a nationwide class under every state's law would only be permissible were there are no conflicts of law." *Id.*

99. *See, e.g.*, David A. Moore, Note, Hubbard v. Greeson: *Indiana's Misapplication of the Tort Sections of the Restatement (Second) of Conflict of Laws*, 79 IND. L.J. 533, 565 (2004) (arguing that "[t]he Indiana Supreme Court should . . . improve the working operation of Indiana conflicts law for torts by including the policy analysis of section 6 thereby aligning itself with modern choice-of-law theory").

100. 805 N.E.2d 798, 804 (Ind. 2004). This was a wrongful death action brought by the estates of individuals killed in Kentucky in a crash of a small private aircraft that resulted from the errors in a chart published by the Federal Aviation Administration (FAA) in Washington, D.C., and a mistake of FAA air traffic controllers based in Indianapolis, Indiana. Neither the victims of the crash nor the aircraft owners had

court also specifically denounced depecage, the doctrine endorsed by the Second Restatement that allowed courts to make choice of law decisions on an issue-by-issue basis.[101]

B. New Jersey Choice of Law Approach for Tort Cases

As far as their choice of law rules are concerned, Indiana and New Jersey are on opposite sides of the spectrum. In 1967, encouraged by the New York Court of Appeals decision in *Babcock v. Jackson*,[102] the Supreme Court of New Jersey, on very similar facts, decided to abandon the traditional rule of *lex loci delicti* in favor of the interest analysis approach.[103] The court, however, did not provide any framework for the analysis.

Three years later, in *Pfau v. Trent Aluminum Co.*, another car accident case, the New Jersey Supreme Court acknowledged difficulties in the application of the new methodology and attempted to clarify it.[104] The court outlined a two-step process for deciding which law applies.[105] First, the court determined state policies underlying the conflicting laws.[106] After that, to decide which law applies, the court assessed and balanced the states' interests in furthering their respective policies.[107]

In *Veazey v. Doremus*, the New Jersey Supreme Court used the governmental interest analysis to determine that Florida law governed a suit that arose from a car crash in New Jersey where both parties were Florida residents.[108] The court pointed out that the Second Restatement analysis yielded the same result.[109]

Ten years later, the New Jersey Supreme Court reaffirmed and clarified the use of the flexible governmental interest standard in *Gantes v. Kason Corp.* without mentioning the Second Restatement.[110] *Gantes* was a products liability claim against a New Jersey

any connection with Indiana or Washington, D.C., and the plane never flew through Indiana airspace. *Id.*

101. *Id.*

102. 240 N.Y.S.2d 743, 746 (1963).

103. *See* Mellk v. Sarahson, 229 A.2d 625 (N.J. 1967). See also *supra* notes 67-73 and accompanying text for a discussion of *Babcock v. Jackson*. R

104. 263 A.2d 129, 131 (N.J. 1970).

105. *Id.*

106. *Id.* at 132-35.

107. *Id.* at 135-37.

108. 510 A.2d 1187 (N.J. 1986).

109. *Id.* at 1191. The likely reason for this note was that at the time of the court's decision in *Veazey*, Florida already used the Second Restatement as its choice of law methodology for tort cases. *See* Bishop v. Fla. Specialty Paint Co., 389 So. 2d 999, 1001 (Fla. 1980) (adopting the Second Restatement for tort cases).

110. 679 A.2d 106, 109 (N.J. 1996).

manufacturer brought by the administrator of the estate of a Georgia worker killed at her work at a Georgia plant when she was struck in the head by a moving part of a shaker machine.[111]

In *Gantes*, the court provided a three-prong analysis framework.[112] First, the court asked whether there was a true conflict[113] between the laws of two or more states with respect to each issue in controversy.[114] For each issue where a true conflict existed, the court had to turn to the second prong of the analysis and determine the interests of each state in resolving that issue.[115] The third prong required the court to compare and weigh the identified interests to determine which law should govern each issue in the controversy.[116] Unlike the Indiana rule that required the application of law of a single state to all issues of the controversy, the New Jersey standard allowed application of law of different states on an issue-by-issue basis, and thus provided courts with more flexibility in their choice of law decisions.[117] The flip side of this flexibility was the increased uncertainty of the decisions.

The *Gantes* court found that New Jersey had a strong interest in deterring the manufacture and distribution of unsafe products within the state[118] and reversed the lower court decision to apply the Georgia statute of repose that barred recovery.[119] The court also noted that the decision allowing the claim to proceed did not undermine Georgia's interest in fair compensation for its citizens injured by unsafe products.[120]

The *Gantes* decision provided New Jersey courts with some guidance on how to apply the governmental interest standard.[121] It encouraged the New Jersey courts to decide choice of law issues by properly identifying and balancing relevant governmental interests instead of relying on a mechanical counting of contacts.[122] In prac-

111. *Id.* at 107.
112. *Id.* at 109-13.
113. *See, e.g.*, Larry Kramer, *Rethinking Choice Of Law*, 90 COLUM. L. REV. 277, 311 (1990). A true conflict occurs when the court determines that more than one state has a true interest in the dispute, and state laws implicated in the conflict yield incompatible results. *Id.*
114. *Gantes*, 679 A.2d at 109.
115. *Id.*
116. *Id.* at 113.
117. *Id.* at 109.
118. *Id.* at 111-12.
119. *Id.* at 116.
120. *Id.* at 115.
121. *See id.* at 109-13.
122. *Cf., e.g.*, Deemer v. Silk City Textile Mach. Co., 475 A.2d 648, 652-53 (N.J. Super. Ct. App. Div. 1984). In this pre-*Gantes* decision, a New Jersey court attempted

tice, however, because the formulation of the standard was vague, its application inevitably suffered from subjectivity and inconsistency.[123]

In search of better guidelines, the New Jersey Supreme Court turned to the Second Restatement to supplement its governmental interest analysis standard. In its 1999 decision, *Fu v. Fu*, the Court heavily relied on the analytical framework of the Second Restatement, finding it compatible with the governmental interest analysis choice of law methodology.[124]

Three years later, in yet another car crash case, the New Jersey Supreme Court reaffirmed its preference for the analytical framework of the Second Restatement and emphasized its governmental interest analysis provisions.[125] It is very likely that the Second Restatement's reliance on different theories and its attempt to accommodate several choice of law methodologies facilitated this transition.[126]

The next section discusses a recent case that provides a good example of how New Jersey courts apply the Second Restatement's choice of law methodology in products liability cases.

C. *Rowe v. Hoffmann-La Roche Inc.*: New Jersey Choice of Law Methodology Applied

In 2006, Robert Rowe ("Rowe"), a Michigan resident, brought a products liability action in New Jersey against Hoffmann-La Roche Inc. ("Hoffmann"), a New Jersey pharmaceutical company.[127] Rowe alleged that Hoffmann failed to adequately warn users about

to apply the governmental interest analysis in a product liability claim brought by a North Carolina plaintiff against a New Jersey manufacturer. The court appeared to base its choice of law decision not on the analysis of the relevant governmental interests of the two states but on the number of contacts each of the states had with the facts of the case: "[O]n balance, the respective contacts of the related jurisdictions dictate the application of North Carolina law." *Id.* at 653.

123. One of the indications of this inconsistency was the trial court's decision to apply New York law in *Fu v. Fu* subsequently reversed by the appellate division in Fu v. Fu, 707 A.2d 473 (N.J. Super. Ct. App. Div. 1998), which in turn was reversed by the Supreme Court of New Jersey in Fu v. Fu, 733 A.2d 1133, 1138-50 (N.J. 1999).

124. 733 A.2d 1133, 1139 (N.J. 1999). The court held that pro-recovery New York law should govern the case where plaintiffs, all New Jersey residents, were injured in a single-car accident in New York. *Id.* at 1149-50.

125. Erny v. Estate of Merola, 792 A.2d 1208, 1217-18 (N.J. 2002).

126. *See supra* Part I.D for a discussion of the Second Restatement. *But see* James P. George, *False Conflicts and Faulty Analyses: Judicial Misuse of Governmental Interests in the Second Restatement of Conflict of Laws*, 23 REV. LITIG. 489, 493-94 (2004) (arguing that the governmental interest analysis is incompatible with the Second Restatement approach).

127. 892 A.2d 694 (N.J. Super. Ct. App. Div. 2006), *rev'd* 917 A.2d 767 (N.J. 2007).

possible psychological side effects of its acne prescription drug Accutane.[128] Rowe further alleged that that in 1997 at the age of sixteen, as a result of taking Accutane, he became severely depressed and made several suicide attempts.[129]

Choice of law became a highly-contested issue in this case because under the Michigan statute, a Food and Drug Administration ("FDA") approval of a drug and its labeling granted the drug manufacturer absolute immunity from products liability claims unless the manufacturer obtained the approval by a fraudulent misrepresentation or bribery.[130] The relevant New Jersey statute treated the FDA approval of drug labeling and safety warnings as a rebuttable presumption of their adequacy. The plaintiff could overcome this presumption by presenting competent evidence that the manufacturer had unreasonably omitted critical safety warnings in the drug labeling or unreasonably disregarded a feasible safer alternative design.[131]

Since the case involved a true conflict of laws, the trial court had to resolve the choice of law issue under the *Gantes* governmental interest standard.[132] Both states had sufficient contacts to the facts of the case, and the application of the law of either state was constitutionally permissible.[133] Hoffmann contended that Michigan substantive law should control the case, while Rowe argued for the application of New Jersey law.[134]

The trial court found that New Jersey had an interest in setting a high standard of care for its drug manufacturers.[135] The court also found that Michigan law reflected the state's interest in providing its residents with pharmaceutical products by creating more predictable standards of care for drug companies that would encourage the drug companies to market their products in Michigan.[136] After comparing the state interests, the trial court decided that Michigan's interest in providing its citizens with affordable medications prevailed over New Jersey's interest in regulating

128. *Id.* at 698-99.

129. *Id.* at 698.

130. MICH. COMP. LAWS ANN. § 600.2946(5) (West 2007).

131. *See* N.J. STAT. ANN. § 2A:58C-4 (West 2007).

132. *See supra* notes 110-121 and accompanying text. R

133. *See supra* note 63 and accompanying text. R

134. *See Rowe*, 892 A.2d at 698.

135. *See id.* at 700.

136. *See id.*

its manufacturers and granted a summary judgment to Hoffmann under the Michigan statute.[137]

The appellate division in a two-to-one decision disagreed and concluded that New Jersey had a strong interest in the application of its rebuttable presumption which the legislature intended as a balanced means of providing a substantial but not absolute defense to drug manufacturers while ensuring the safety of consumers.[138] The court also found that the Michigan statute was intended to protect its local drug manufacturers, and that Michigan did not have an interest in denying recovery to its resident.[139] The court applied the framework of the Second Restatement to these findings and relied on *Gantes* to hold that the application of New Jersey law in this case would better serve the interests of deterrence and compensation.[140] The dissent warned about an adverse impact of tort liability on the pharmaceutical industry and against allowing out-of-state plaintiffs to circumvent their state legislature's policy choices by filing their actions in New Jersey courts.[141]

Hoffmann appealed this decision to the Supreme Court of New Jersey.[142] On appeal, Hoffmann argued that the application of New Jersey law would undermine Michigan's interest in protecting drug manufacturers and providing its residents with better access to affordable medications.[143] It also argued that the New Jersey deterrence interest was very limited or non-existent because of the comprehensive FDA regulation of drug manufacturers.[144] Hoffmann further asserted that the appellate court's decision would lead to the application of New Jersey law whenever an out-of state plaintiff, whose state laws were less favorable, sued a New Jersey manufacturer in New Jersey, and thus, would encourage forum shopping.[145] The decision would also, according to Hoffmann, undermine the interstate comity since states like Michigan would not be able to regulate certain activities that take place within their borders.[146]

137. *See id.* at 707.

138. *See id.* at 707-08.

139. *See id.* at 708 (citing SECOND RESTATEMENT, *supra* note 10, § 146 cmt. e). **R**

140. *See id.* at 709.

141. *Id.* at 710-11 (Wefing, J., dissenting).

142. Rowe v. Hoffman-La Roche, Inc., 917 A.2d 767 (N.J. 2007).

143. Brief of Defendant-Appellant at 11-19, *Rowe*, 917 A.2d 767 (No. A-59,454).

144. *Id.* at 23-26.

145. *Id.* at 36.

146. *Id.* at 34-37.

In response, Rowe argued that the application of New Jersey's rebuttable presumption, as opposed to the grant of absolute immunity to the drug manufacturer under Michigan law, would better serve the interests of New Jersey.[147] Rowe limited his argument to this issue and emphasized that the court should separately consider the applicability of Michigan substantive law to other issues of the case.[148] In support of his main argument, Rowe attempted to show that the sole purpose of the Michigan conclusive presumption was to immunize Michigan drug manufacturers, while the purpose of the New Jersey rebuttable presumption was to ensure drug safety through proper judicial risk-utility analysis.[149] According to Rowe, the Michigan conclusive presumption could not have been intended to affect general availability of pharmaceutical products because of its very limited potential affect on the marketing of products distributed in all states and in many foreign countries.[150]

These complex interactions of public policy and substantive law that courts have to analyze in the application of the analytical framework of the Second Restatement are in a sharp contrast with an almost trivial application of the Indiana choice of law rule discussed in the next section.

D. *Alli v. Eli Lilly & Co.*: Indiana Choice of Law Applied

Seven months after the *Rowe* decision, in September 2006, an Indiana intermediate appellate court decided *Alli v. Eli Lilly & Co.*[151] The facts of the case are strikingly similar to those in *Rowe*.[152] A widow of a Michigan patient brought a products liability action against Eli Lilly, an Indiana manufacturer of an antidepressant drug Prozac that the patient ingested a few days

147. Brief of Plaintiff-Appellee at 10, *Rowe*, 917 A.2d 767 (No. A-59,454).

148. *Id.* at 11. As noted in Part I.D, the Second Restatement calls for the issue-by-issue choice of law analysis. *See* discussion *supra* Part I.D.

149. *Id.* at 17-21 (citing Feldman v. Lederle Labs., 592 A.2d 1176 (N.J. 1991)). Rowe also relied on *Gantes* for the proposition that New Jersey had an important interest in regulating its manufacturers to ensure safety of their products. *See id.* at 31-32. Note that Hoffmann could counter these considerations by arguing that, although New Jersey had an important governmental interest in regulating its manufacturers, the New Jersey regulatory interest in this particular case was not significant because, even if the drug labeling was inadequate in 1997, Hoffmann made it adequate after the FDA warning in 1998. Hoffmann could therefore argue that since the FDA properly preformed its regulatory function, the only outstanding issue was a compensation of the Michigan plaintiff for the alleged injury, and because Michigan had a predominant interest in this issue, its law should apply.

150. *Id.* at 29-30.

151. 854 N.E.2d 372 (Ind. Ct. App. 2006).

152. *Id.* at 375.

before he committed suicide.[153] The patient and his wife were both Michigan residents, and all events related to the patient's use of Prozac and his suicide occurred in Michigan.[154]

At trial, the plaintiff argued for the application of Indiana law.[155] The relevant Indiana statute, like its New Jersey counterpart, provided a rebuttable presumption of safety for FDA-approved drugs.[156] The defendant argued that under Indiana choice of law rules, Michigan law—law of the place of injury—should apply.[157] The trial court agreed and granted the manufacturer's motion for partial summary judgment.[158]

The appellate court affirmed noting that the place of injury is insignificant only in rare tort cases.[159] Since all of the events occurred in Michigan, the court held that the place of injury was significant and never reached the second prong of the Indiana choice of law analysis.[160]

The Indiana court easily reached an opposite result to the one reached by the New Jersey appellate court in *Rowe* despite similar facts and almost identical relevant substantive law of Indiana and New Jersey.[161] This inconsistency resulted from the difference in choice of law methodologies of the two states.

E. New Jersey Choice of Law Methodology is Still in Flux

On January 3, 2007, the New Jersey Supreme Court heard an appeal of *Hoffman-La Roche* from the two-to-one decision of the appellate division panel in favor of the application of New Jersey law.[162] Two supreme court justices, the Chief Justice Zazzali and Justice Albin, recused themselves, and two appellate judges replaced them on the panel.[163]

153. *Id.*

154. *Id.*

155. *Id.* at 376.

156. IND. CODE ANN. § 34-20-5-1 (West 2007).

157. *Alli*, 854 N.E.2d at 375-76.

158. *Id.* at 376.

159. *Id.* at 379.

160. *See id.* It is likely that the second prong of the Indiana choice of law test becomes relevant only when the application of the law of the place of injury may call into question the constitutionality of the court's decision. *See supra* text accompanying note 97. R

161. *See supra* Part II.C.

162. *See supra* Part II.C for a discussion of the appellate division's decision.

163. *See* Robert G. Seidenstein, *Drug Liability; Out-of-State Suit Rebuffed*, 16 N.J. LAWYER 1 (2007).

Driven by policy considerations, in a five-to-two decision, the court reversed the decision below and remanded the case for the reinstatement of the trial court's order dismissing the case.[164] The majority of the New Jersey Supreme Court agreed with the dissenting opinion of Judge Wefing and arguments of the defendant pharmaceutical company supported by amicus curiae briefs from industry associations.[165] The majority opinion specifically emphasized the importance of the pharmaceutical industry for the state economy and public health.[166]

At the same time, the majority opinion never mentioned the Second Restatement and distinguished *Gantes* as a case where New Jersey had a strong interest in deterring manufacture of unsafe products and the application of New Jersey law did not frustrate the interests of Georgia.[167] The future will prove whether the New Jersey Supreme Court opinion in *Rowe* marks an ideological shift to a less activist approach[168] or was a purely policy-driven decision reversing *Gantes* preferences for product safety and favoring protection of local pharmaceutical companies from lawsuits by out-of-state plaintiffs.[169]

164. *See* Rowe v. Hoffman-La Roche, 917 A.2d 767, 776 (N.J. 2007).

165. *See* Brief for Pharmaceutical Research and Manufacturers of America as Amicus Curiae Supporting Defendants-Appellants, *Rowe*, 917 A.2d 767 (No. A-59,454) (arguing that the appellate division overvalued New Jersey's and undervalued Michigan's interests and disregarded the need for certainty and predictability of results); Brief for Product Liability Advisory Council, Inc. and N.J. Defense Ass'n as Amici Curiae Supporting Reversal of Appellate Division's Opinion and Dismissal of Case, *Rowe*, 917 A.2d 767 (No. A-59,454) (arguing that the majority opinion improperly weighed New Jersey governmental interests and failed to consider the effect of its decision on the state's economy); Brief for Healthcare Institute of N.J Supporting Motion for Leave to Appear as Amicus Curiae, *Rowe*, 917 A.2d 767 (No. A-59,454) (arguing that the appellate division's decision will subject New Jersey drug and medical device manufacturers to the least favorable law and force them to move out of the state).

166. *Rowe*, 917 A.2d at 774. Fourteen of the twenty-five world's largest pharmaceutical companies have major facilities in New Jersey, eleven of which are national or global headquarters. NEW JERSEY COMMERCE, ECONOMIC GROWTH & TOURISM, NEW JERSEY'S BIOTECHNOLOGY INDUSTRY, http://www.state.nj.us/commerce/pdf/ba/2005-06-ba-biotech.pdf. Pharmaceutical companies perform nearly half of the nation's thirty billion dollar worth of private health research New Jersey. *Id.*

167. *Rowe*, 917 A.2d at 773; *see also* discussion of *Gantes supra* Part II.B.

168. *See* Seidenstein, *supra* note 163. R

169. The dissent pointed out that legislation currently pending in the Michigan Senate proposes to enact a rebuttable presumption of drug safety with retroactive applicability. *Rowe*, 917 A.2d at 780 (Stern, J., dissenting) (citing H.B. 4044-4045, 94th Leg., Reg. Sess. (Mich. 2007)). Since the proposed Michigan legislation was very similar to the New Jersey rebuttable presumption, the dissenting opinion suggested to wait a reasonable period of time. *Id.* The majority rejected this proposal but still

The New Jersey Supreme Court's decision in *Rowe* once again demonstrated a lack of guidance provided by New Jersey's choice of law methodology.[170] As a result, the court's policy preferences and not the principled application of law guided by doctrinal considerations determined the outcome of this case. The court decisions in *Rowe* suggest that the forty years since New Jersey abandoned the traditional rule in favor of a more flexible approach[171] did not result in development of a consistent approach to choice of law issues, and New Jersey courts still lack guidance in this area.

Part III discusses several ways to improve consistency and predictability of choice of law decisions.

III. CONSISTENCY AND PREDICTABILITY OF CHOICE OF LAW DECISIONS: PROBLEMS AND SOLUTIONS

A. Choice of Law and Socio-Economic Progress

Although the traditional *lex loci delicti* rule was appropriate in the Nineteenth Century, the increasing mobility of society made the rule increasingly inadequate.[172] Several states abandoned the traditional rule in the 1960s, and the trend of adopting more flexible choice of law methodologies continues.[173] The publication of drafts and the final version of the Second Restatement of Conflict of Laws played an important role in this process.[174]

Traditionally, the choice of law rules aimed to prevent forum shopping and provide predictable and uniform results.[175] The choice of law revolution changed these goals. The proponents of the modern choice of law methodologies were more concerned with rigid constraints of the traditional rule that did not allow

insisted that in doing so it advanced Michigan's interests. *Id.* at 776 (majority opinion).

170. *Cf. supra* note 123 and accompanying text. R

171. *See supra* Part II.B.

172. *See* First Nat'l Bank in Fort Collins v. Rostek, 514 P.2d 314, 316 (Colo. 1973) ("When the doctrine of *lex loci delicti* was first established in the mid-nineteenth century, conditions were such that people only occasionally crossed state boundaries. Under those circumstances, there was legitimacy in a rule which presumed that persons changing jurisdictions would be aware of the different duties and obligations they were incurring when they made the interstate journey.").

173. *See supra* Part II.C.

174. *See, e.g.*, Kennedy v. Dixon, 439 S.W.2d 173, 184 (Miss. 1969) (adopting Proposed Official Draft of the Second Restatement).

175. *See, e.g.*, Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard In Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1371 (2004).

judges to decide cases based upon their notion of justice and policy preferences.[176]

Although some courts expressed hope that the adoption of modern approaches would eventually lead to some consistency in choice of law decisions, in general, there was little concern at the time about uniformity and predictability of decisions.[177]

This new approach was appropriate for individual and, to a great extent, unique tort cases. Further socio-economic progress and the proliferation of mass-marketed products, however, led to an ever increasing number of products liability cases involving parties from different states.[178] These changes often required courts to consider choice of law issues in the products liability context, but as discussed in the following sections, neither of the choice of law theories was suited for that purpose.

B. *Lex Loci Delicti*: The Rigid and Anachronistic Rule

In the era of mass production and worldwide distribution of undifferentiated products, the application of the rigid traditional rule in products liability cases precluded courts from taking into account state policies aimed at protecting consumers from potentially unsafe products or at limiting liability of domestic manufacturers.[179] For example, the result reached by the *Alli* court was, at least in part, predicated on the incompatibility of the Nineteenth Century rule with the realities of the Twenty-First Century. If there were reasons to doubt the safety of a product sold to consumers in Indiana, Indiana had a strong interest in protecting its consumers and regulating its manufacturers as expressed in the

176. *See, e.g.*, Kennedy v. Dixon, 439 S.W.2d at 181 (noting that "the *lex loci delicti* rule is too harsh and inflexible and is an unsatisfactory rule"); *supra* note 50. R

177. *See, e.g.*, First Nat'l, 514 P.2d at 320 (adopting the Second Restatement methodology for tort cases and expressing a hope that further development of the body of case law will enable the court to formulate more precise choice of law rules governing specific areas of law); Griffith v. United Air Lines, 203 A.2d 796, 806 (Pa. 1964) ("We are at the beginning of the development of a workable, fair and flexible approach to choice of law which will become more certain as it is tested and further refined when applied to specific cases before our courts."); *see also* Southerland, *Value Judgments*, *supra* note 2, at 473 (pointing out that "there was certainly a cost in terms of certainty, predictability, and uniformity of result—a sacrifice of the virtues of the territorial system in the service of result-oriented decision making"). R

178. *See, e.g.*, Michael I. Krauss, *Product Liability and Game Theory: One More Trip to the Choice-of-Law Well*, 2002 BYU L REV. 759, 774-76 (2002).

179. Courts abandoned *lex loci delicti* primarily because it prevented them from making choice of law decisions based upon their policy preferences. *See supra* Part I.B.

Indiana products liability statute.[180] Guided by its choice of law rule, the Indiana court did not even consider its own state's interests insisting on the rigid application of the law of the place of injury.[181]

When consumer products are manufactured and distributed in mass quantities, a defective product can cause an injury practically anywhere in the world.[182] Therefore, except for judicial efficiency, there is little justification to base choice of law rules in products liability cases on the place where the injury occurred.

At the same time, given the differences in substantive law governing products liability, and since most of the states abandoned the traditional rule and adopted several different choice of law methodologies,[183] Indiana's adherence to the traditional rule contributes to the current state of inconsistency and unpredictability of results in products liability cases dealing with mass-manufactured products.

Further, despite its simple appearance, the territorial rule of the First Restatement which requires identification of the last event that was necessary to make an actor liable and the place where that event took place, is difficult to apply where activities crossed jurisdictional boundaries. This difficulty is apparent, for example, in complex products liability cases, such as DES or tobacco litigation.[184]

In contrast with the traditional rule, the Second Restatement and other modern choice of law methodologies provide courts with virtually unlimited freedom to reach equitable results by taking into account relevant state policies and balancing competing considerations. These decisions, however, are highly dependent on

180. IND. CODE § 34-20-5-1 (2007).

181. Alli v. Eli Lilly & Co., 854 N.E.2d 372, 376 (Ind. Ct. App. 2006).

182. *See, e.g.*, Gantes v. Kason Corp., 679 A.2d 106, 113 (N.J. 1996) (noting that "although place of injury is a significant factor in many tort actions, it does not warrant undue weight in product liability cases"); Rowe v. Hoffmann-La Roche Inc., 892 A.2d 694, 703 (N.J. Super. Ct. App. Div. 2006) ("[T]he place where a product manufactured, ultimately comes to rest, and causes injury is a matter of pure fortuity.").

183. *See generally* Symeonides, *supra* note 54.

184. *See* Trahan v. E.R. Squibb & Sons, Inc., 567 F. Supp. 505, 505 (M.D. Tenn. 1983) (plaintiff diagnosed with cervical cancer in Tennessee argued that the "last event" occurred when her mother ingested DES during pregnancy in North Carolina); Philip Morris, Inc. v. Angeletti, 752 A.2d 200, 232 (Md. 2000) ("The [*lex loci delicti*] rule is fairly easy to apply when all of the events giving rise to a suit have occurred in one state, as in a typical negligence action arising from an automobile accident. . . . The more difficult situation arises when the events giving rise to a suit occur in a number of states.").

courts' policy preferences and therefore are often inconsistent and unpredictable.[185]

C. Second Restatement: Flexibility vs. Predictability and Uniformity

During the years that followed its publication, the Second Restatement became the leading choice of law methodology.[186] There are several reasons why courts favor the Second Restatement.[187] Like other modern choice of law methods, it provides them with virtually unlimited discretion.[188] But unlike those other methodologies, it projects the appearance of a logical and orderly system that carries with it the prestige of the American Law Institute.[189]

Although the majority of states that abandoned the traditional rule embraced the Second Restatement, Dean Symeonides called this development a mixed blessing.[190] Some courts and commentators praised the Second Restatement for utilizing "a flexible mixture of the current thinking on choice of law."[191] Others were uncomfortable with the flexibility it provided[192] and claimed that its eclectic nature[193] resulted in a "largely incoherent product."[194] Critics of the Second Restatement usually point out that, while attempting to incorporate several different choice of law theories, the Second Restatement provided very little guidance to courts and legal practitioners.[195]

185. *See supra* Part II for a detailed discussion.

186. *See* Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 439 (2000).

187. *See, e.g.*, Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1269-79 (1997) [hereinafter Symeonides*, Judicial Acceptance*].

188. *See id*. at 1269-72; *see also* Juenger, *Third Restatement*, *supra* note 64, at 405 ("Many courts seem to like the 'mishmash,' or 'kitchen-sink,' concoction the restaters produced; after all, it enables judges to decide conflicts cases any which way they wish." (citations omitted)). R

189. *See* Symeonides, *Judicial Acceptance*, *supra* note 187, at 1276. R

190. *See id.* at 1277.

191. *See, e.g.*, Hataway v. McKinley, 830 S.W.2d 53, 57 (Tenn. 1992) (adopting the Second Restatement rules for tort cases in Tennessee).

192. *See, e.g.*, Dowis v. Mud Slingers, Inc., 621 S.E.2d 413, 417 (Ga. 2005) (insisting that "[t]he very flexibility of the approach of the Restatement (Second) has proved to be problematic").

193. *See supra* note 80 and accompanying text. R

194. Harvey Couch, *Is Significant Contacts a Choice-of-Law Methodology?*, 56 ARK. L. REV. 745, 755 (2004).

195. *See, e.g.*, George, *supra* note 126, at 491 (arguing that the Second Restatement's choice of law methodology leads to "choice of law decisions so lacking in uni- R

For example, in personal injury cases, the analysis under the Second Restatement rules started with the presumption that the law of the place of injury governed unless there was a state with a more significant relationship to the facts of the case.[196] To make this determination, the Second Restatement directed the court to prioritize and balance the vague considerations of section 6 as well as any additional factors the court deemed relevant.[197] In doing so, one had to apply the factors listed in section 145(2) to decide which law applies.[198]

Many courts complained about the complexity of the Second Restatement's multi-step rules, especially when compared to the straightforward traditional approach.[199] Since courts were not able to objectively and consistently balance all the competing considerations and principles that the Second Restatement suggested, their choice of law decisions lacked uniformity and predictability.[200]

Referring to some of these reasons in a 2004 decision, the Supreme Court of Indiana once again rejected an invitation to adopt the Second Restatement and cited, among others, the following characterization of the Second Restatement by Professor Gottesman:[201]

> The [S]econd Restatement thus was a hodgepodge of all theories. A court was to compare apples, oranges, umbrellas, and pandas, and determine which state's law to apply by the relative importance assigned to these factors. The supposed virtue of the [S]econd Restatement was the freedom it provided courts to weigh all conceivably relevant factors and then tailor the choice of law to the circumstances of the case. That very flexibility was,

formity that the Second Restatement's balancing test has become chimeric, taking on vastly different forms in different courts").

196. *See* SECOND RESTATEMENT, *supra* note 10, § 146. **R**

197. *See id.* § 6 cmt. c.

> It is not suggested that this list of factors is exclusive. Undoubtedly, a court will on occasion give consideration to other factors in deciding a question of choice of law. Also it is not suggested that the factors mentioned are listed in the order of their relative importance. Varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law.

Id.

198. *See id.* § 145.

199. *See, e.g.*, Dowis v. Mud Slingers, Inc., 621 S.E.2d 413, 416 (Ga. 2005) ("The approach taken by the Restatement (Second) of Conflict of Laws (1971) certainly fits a description of complexity.").

200. The lack of uniformity and predictability in choice of law decisions may discourage settlements and reduce the accuracy of case valuations by attorneys. *See* Shirley A. Wiegand, *Fifty Conflict of Laws "Restatements": Merging Judicial Discretion and Legislative Endorsement*, 65 LA. L. REV. 1, 4 (2004).

201. *See* Simon v. United States, 805 N.E.2d 798, 804 (Ind. 2004).

> however, equally its vice: courts could arrive at any outcome applying its factors, and no one could predict in advance what state's law governed their actions.[202]

One might question whether we are worse off now, after most of the states have abandoned the traditional rule, than in the early 1950s when all of the states followed the rule. This is certainly the impression that results from reading *Simon v. United States* and the numerous academic critics of the Second Restatement cited in that decision.[203]

While the criticism mounted against the Second Restatement makes a good case for starting the work on the Third Restatement or some tuning of the Second Restatement,[204] it does not justify the outright rejection of the Second Restatement.

First, even in the early 1950s when the American Law Institute started to work on the Second Restatement, all jurisdictions still adhered to the traditional rule, but uniformity and predictability in the choice of law decisions were wanting.[205] In his 1953 paper discussing choice of law issues related to tort liability resulting from publishing an injurious material in multiple states,[206] Professor Prosser pointed out inconsistencies in court decisions and labeled the area of conflict of laws "a dismal swamp, filled with quaking quagmires and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon."[207]

202. Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 8 (1991) (arguing for federal choice of law rules that will govern resolution of disputes arising in multi-state contexts); *see also* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 68 (1991) (noting that the Second Restatement "reminds one of the famous humorous definition of a camel: a horse drafted by a committee").

203. *See Simon*, 805 N.E.2d at 803-804 (citing Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice-of-Law*, 92 COLUM. L. REV. 249, 253 (1992) ("Trying to be all things to all people, it produced mush.")); Juenger, *Third Restatement*, *supra* note 64, at 405 ("Many courts seem to like the 'mishmash,' or 'kitchen-sink,' concoction the restaters produced; after all, it enables judges to decide conflicts cases any which way they wish. To be sure, the Second Restatement's unprincipled eclecticism has done little to strengthen the intellectual underpinnings of our discipline.").

204. *See, e.g.*, Bruce Posnak, *The Restatement (Second): Some not so Fine Tuning for a Restatement (Third): A Very Well-Curried Leflar over Reese with Korn on the Side (Or is it Cob?)*, 75 IND. L.J. 561 (2000) (arguing for the Third Restatement as an improvement and "tuning" of the Second Restatement) [hereinafter Posnak, *Restatement Second*].

205. *See supra* Part I.B.

206. Similar issues arise in multi-state products liability actions.

207. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

In the framework of the Second Restatement, consistency and forum shopping prevention[208] were just additional policy considerations that needed to be balanced together with other relevant factors. In practice, however, the latter sometimes outweighed the former or a busy court took a shortcut and skipped a detailed analysis.[209] Moreover, since it is not unusual for a lower court in its choice of law analysis to apply a different methodology than the one prescribed by prior decisions of the high court of its jurisdiction, the judicial decisions in this area of law might lack consistency even within a single jurisdiction.[210]

The Second Restatement did not and could not solve the problem of inconsistency in choice of law decisions. In tort cases, the main thrust of the Second Restatement and other modern choice of law methodologies was the flexible accommodation of policies and interests of several states and the facilitation of fair judgments.[211]

Second, the issue of the Second Restatement's complex methodology is exaggerated. Even in complex cases, where seemingly simple rules of the First Restatement lead to unacceptable results or are unworkable, the Second Restatement enabled courts to reach fair and reasonable results since it provided a justification for their policy-based decisions.[212] After all, courts had to exhibit more ingenuity to avoid an unjust result by devising a way to re-classify a tort as a contract, rather than justify an equitable result through the analysis of facts of the case and their relationship to the relevant state interests.[213]

208. While traditionally forum shopping has been regarded as evil, some commentators advanced arguments in support of state-state forum shopping. For a good overview of these arguments see George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 668-75 (1993).

209. *See supra* note 122 and accompanying text. **R**

210. *See, e.g.*, Cal. Fed. Sav. & Loan Ass'n v. Bell, 735 P.2d 499 (Haw. Ct. App. 1987) (applying Leflar's choice-influencing considerations despite Hawaii Supreme Court's adoption of interest analysis in *Peters v. Peters*, 634 P.2d 586 (Haw. 1981)).

211. *See* Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1636 (1985) ("[F]or the judge persuaded that consideration of precedent is a useful starting-point in dealing with choice-of-law issues, the Second Restatement provides helpful formulations. At the same time the court in effect is left free to take account of any argument rationally bearing on a judicious solution.").

212. *See* Southerland, *Value Judgments*, *supra* note 2, at 511 ("Judges decide in an intuitive sort of way what they think they ought to do if their conception of justice is to be served and then lay hold of some method . . . with which to fashion a rationalization for their opinion."). **R**

213. *See supra* notes 57-59 and accompanying text. **R**

In addition, when analyzing the Second Restatement, one should keep in mind that it was intended to be a transitional document.[214] The vague rules of the Second Restatement did not necessarily require courts to engage in a serious research effort or accurately balance all conflicting considerations. Judges could do as much or as little as they wanted, from thorough analysis of the policies underlying laws involved in the conflict to a trivial counting of contacts.[215] In this sense, it is possible to discuss different levels of adoption of the rules of the Second Restatement, which might vary from court to court and even from case to case.[216] If one views the Second Restatement as a document intended to facilitate migration to a common methodology, the flexibility it provides helps the Second Restatement accomplish one of its important goals.

Third, the attempt of the Second Restatement to accommodate various theories and points of view, although repugnant to theoretical "purists," served the same purpose of facilitating the adoption of the Second Restatement by the courts.[217]

Finally, the main purpose of the Second Restatement was to provide flexible rules that would enable courts to take into account important policy considerations and to avoid patently unjust results. Unlike critics of the First Restatement who cited numerous cases where the rule of *lex loci delicti* led to harsh or meaningless results,[218] critics of the Second Restatement usually appeal to the authority of scholarly writings and allege theoretical impurity, com-

214. *See* Reese, *supra* note 80, at 518-19. ("It was written during a time of turmoil and crisis when former rules of choice of law were being abandoned, when rival theories were being fiercely debated, and when serious doubt was expressed about the practicality, and indeed the desirability, of having any rules at all."). Although several states still adhere to the traditional rule, the American choice of law jurisprudence is still arguably in the transitional state. As discussed in Part D below, it is time to make a next step towards more uniformity and predictability in the choice of law decisions.

215. *See, e.g.*, *supra* note 122 and the accompanying text. R

216. The history of adoption of the Second Restatement by the New Jersey Supreme Court is a good illustration of this. *See* discussion *supra* Part II.B.

217. *See supra* note 80 and accompanying text; *see also* Symeon C. Symeonides, R
American Choice of Law at the Dawn of the 21st Century, 37 WILLAMETTE L. REV. 1, 87 (2007) [hereinafter Symeonides, *21st Century*] (noting that "methodological or philosophical purity should not be an end in itself when dealing with complex multistate problems that by definition implicate conflicting national and societal values"); Symeonides, *Judicial Acceptance*, *supra* note 187, at 1269-79. Dean Symeonides sug- R
gests a few other reasons for a wide adoption of the Second Restatement. *Id.*

218. *See, e.g.*, First Nat'l Bank in Fort Collins v. Rostek, 514 P.2d 314, 316 (Colo. 1973) (noting that since all the facts of the case point to Colorado except the fortuitous place of accident in South Dakota, "the facts in the case at bar classically demonstrate the injustice and irrationality of the automatic application of the Lex loci delicti rule"); *see also supra* notes 31-35, 48 and accompanying text. R

plexity, and a lack of guidance.[219] For example, the Indiana Supreme Court, rejecting the Second Restatement, cited numerous academic authors but not a single case where injustice resulted from the use of the Second Restatement.[220] Likewise, academic papers cited in the *Simon* decision did not provide any examples of such injustice.[221]

A year later, the Supreme Court of Georgia, refused to adopt the Second Restatement analysis in tort cases and complained about its complexity and lack of guidance.[222] The court stated that "it is well-settled that Georgia will continue to adhere to a traditional conflict of laws rule" and cited two contract cases and several academic sources.[223] The court, however, did not provide any examples of unfair decisions that resulted from the application of the Second Restatement or some other modern methodology.

Consequently, the Second Restatement has served the interests of justice better than the First Restatement, and thus constituted a significant progress in the choice of law jurisprudence.[224] Not surprisingly, the Second Restatement still maintains its momentum and appeal. As recently as May 2006, the Supreme Court of Nevada adopted the most significant relationship test of the Second Restatement and overruled its previous decision in *Motenko v. MGM Dist., Inc.*[225] that replaced *lex loci delicti* with a hybrid approach.[226]

Therefore, the preferred course of action is for courts and legal scholars to acknowledge the drawbacks of the Second Restatement and build upon its success to achieve consolidation, greater uniformity, and predictability in the choice of law jurisprudence. The next section outlines and examines several suggestions in this area.

219. *See, e.g.*, Simon v. United States, 805 N.E.2d 798, 804 (Ind. 2004).

220. *Id.*

221. *See, e.g.*, Gottesman, *supra* note 202. **R**

222. *See* Dowis v. Mud Slingers, Inc., 621 S.E.2d 413, 415-19 (Ga. 2005) (disagreeing with an employee's argument for application of a Missouri law that allowed a tort action against the employer, in a personal injury action brought by a Georgia employee of a Missouri corporation injured on a work site in Georgia).

223. *Id.*

224. *See* Symeonides, *supra* note 186, at 445 ("[T]he Second Restatement . . . has helped liberate the courts from the confines of the First Restatement without placing them under a different yoke.").

225. 921 P.2d 933, 935 (Nev. 1996).

226. *See* GMC v. Eighth Judicial Dist. Ct. of State of Nev., 134 P.3d 111, 116 (Nev. 2006) (adopting the Second Restatement as Nevada's choice of law methodology for tort cases).

D. Some Enhancements for the Second Restatement

Many scholars proposed enhancements to the Second Restatement and argued that work should commence on the Third Restatement.[227] These proposals, however, were mostly concerned with simplifying the analytical framework of the Second Restatement and not with the wide discretion it provided.[228] A number of proposals call for drastic changes stimulating vigorous academic discussions that are unlikely to lead to any practical changes in the foreseeable future.[229] After all, the work on the Second Restatement that signified a radical departure form the First Restatement lasted seventeen years, and the American Law Institute has no plans to start work on the Third Restatement of Conflict of Laws any time soon.[230]

At the same time, the current Second Restatement rules are inadequate for products liability conflicts,[231] especially in multi-state class actions.[232] The predictability of court decisions is no less important in choice of law than it is in any other area of law.[233] As discussed above, the consistency, uniformity, and predictability of

227. *See, e.g.*, Posnak, *Restatement Second, supra* note 204 at 571-72; Symeonides, *supra* note 186, at 439-40. *But see* Aaron D. Twerski, *One Size Does Not Fit All: The Third Multi-Track Restatement of Conflict of Laws*, 75 IND. L.J. 667, 667 (2000) (arguing for a multi-track Third Restatement incorporating major competing choice of law theories as separate tracks).

228. *See, e.g.*, Posnak, *Restatement Second*, *supra* note 204, at 571-72 (proposing retaining only two jurisdiction-selecting rules to allocate the burden of production and to raise presumptions that a functional analysis may rebut, elimination of contact identifying and characterization steps, as well as all rigid rules, extending section 6 factors by adding a "better law" rule, making the section 6 factors exclusive, and providing a rule for handling false conflicts).

229. *See id.*; *see also* Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475, 479-97 (2000) (arguing for the elimination of the most significant contacts rule, in favor of a *lex fori* presumption, for making and updated section 6 a central point of the choice of law mechanics of the new Restatement, and for the adoption as opposed to the choice of better law).

230. *See, e.g.*, Juenger, *Third Restatement*, *supra* note 64, at 410 (arguing that it would be premature to embark on the task of drafting the Third Restatement of Conflict of Laws); Twerski, *supra* note 227, 667 ("Any attempt to draft a traditional third restatement of conflicts will quickly deteriorate into irreconcilable conflict between academicians, judges, and members of the bar who favor one or another approach to choice of law."); *see also supra* Part I for a detailed discussion of historic developments that led to the publication of the Second Restatement. R

231. *See* Symeonides, *supra* note 186, at 442.

232. *See, e.g.*, Symeon C. Symeonides, *Choice of Law in the American Courts in 2005: Nineteenth Annual Survey*, 53 AM. J. COMP. L. 559, 617 (2005) (discussing an unpublished New Jersey products liability case where the court had to examine laws of fifty states to make it choice of law decision).

233. *See id.* at 448.

choice of law decisions are especially important in the products liability context. Therefore, it would be better to make some practical steps in that direction now, rather than argue about sweeping changes and extreme proposals. In order to minimize the impact on the existing choice of law jurisprudence, a separate Products Liability Restatement of Conflict of Laws[234] could provide sections dealing specifically with choice of law issues in products liability cases. It is important that these new sections strike the right balance between rigid rules akin to *lex loci delicti* and the unlimited discretion provided by the Second Restatement. On the one hand, it is extremely unlikely that courts used to the freedom of the Second Restatement would give it up in favor of a rigid set of rules.[235] On the other hand, it is impossible to improve uniformity and predictability of choice of law decisions without limiting, at least to some extent, the discretion that the Second Restatement provides.

One of the obvious sources for inconsistency and unpredictability of choice of law decisions is that the Second Restatement allows issue-by-issue choice of law decisions also known as depecage.[236] In *Simon*, the Indiana Supreme Court, relying on the works of several academic writers, advanced a number of reasons for its strong rejection of depecage.[237] The court expressed concerns that depecage could circumvent legislative intent and hinder public policies of the involved states.[238] In other words, if courts apply laws outside of the context of other laws of their jurisdiction, the application of hybrid law might produce unfair results that are impossible under the law of any particular jurisdiction.[239] The court also pointed out that depecage could give an unfair advantage to a party with better access to legal resources.[240]

All of these are legitimate concerns. As the *Rowe* case shows, however, a plaintiff can creatively use the doctrine of depecage against a defendant with much greater access to legal resources.[241]

234. The American Law Institute used a similar approach in creating a specialized products liability restatement of torts. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998).

235. *See* Southerland, *Value Judgments*, *supra* note 2, at 501 ("[V]alue judgments, not methodologies, underpin the work of the courts."). R

236. *See* discussion *supra* Part I.D.

237. *See* Simon v. United States, 805 N.E.2d 798, 801-03 (Ind. 2004).

238. *Id.*

239. *Id.* at 803.

240. *Id.*

241. *See supra* note 147 and accompanying text. In his appellate brief, the plaintiff argued that, under the New Jersey choice of law rules, the court should consider the choice of law issue separately from the issue of liability. Brief of Plaintiff-Appellee at R

But the main issue here is that if courts apply hybrid law that does not exist in any state, they might reach completely unpredictable and inconsistent results. In the products liability area depecage creates an uncertain legal environment and makes it impossible to estimate business risks associated with the marketing of a particular product.

The ultimate question is whether the extra flexibility depecage provides is worth the extra litigation, the increased burden on the judicial system, the increased inconsistency of decisions, and the potential unfair advantage to some types of litigants. Given the fact that many courts are still struggling with the purported complexity of modern choice of law methodologies,[242] while others are still faithful to the traditional approach,[243] there is hardly any justification for a doctrine that adds an extra layer of uncertainty to what already appears to many as a highly inconsistent and complex system.[244] Even without depecage, the Second Restatement provides courts with the flexibility to rationalize almost any decision. Therefore, depecage can be excluded from the Second Restatement, at least for products liability cases, without a significant impact on judicial discretion.

As discussed in Part II.C, the application of the Second Restatement rules requires courts and the parties to the lawsuit to engage in a detailed analysis of the implicated substantive law and corresponding public policies. Making the new products liability choice of law rules content-blind will lead to judicial economy, reduce burden on the parties, and with carefully drafted rules, improve uniformity of results.[245] Such rules can provide a fairly close approximation of actual court decisions without the overhead of the current methodologies.[246]

New products liability sections in a Third Restatement can provide the parties to the suit with an option to choose applicable law

10, Rowe v. Hoffmann-La Roche Inc., 892 A.2d 694 (N.J. Super. Ct. App. Div. 2006) (No. A-59,454) .

242. *See supra* note 199. **R**

243. *See, e.g.*, *Simon*, 805 N.E.2d at 804 (Ind. 2004) (refusing to abandon *lex loci delicti*).

244. *See* Symeonides, *21st Century*, *supra* note 217, at 87 ("While flexibility is preferable to uncompromising rigidity, too much flexibility can lead to too much uncertainty with all concomitant adverse consequences.").

245. *See* Symeon C. Symeonides, *Choice of Law for Products Liability: The 1990s and Beyond*, 78 TUL. L. REV. 1247, 1335-36 (2004) [hereinafter Symeonides, *Choice of Law for Products Liability*] (arguing that not all choice of law rules should be content-oriented).

246. *Id.* at 1341-48.

from a limited list determined by a pre-defined set of rules and can give a preference of choice to the plaintiff.[247] In addition to simplifying the choice of law process, this will lead to more predictable results by *ex ante* limiting options for the applicable law.

At the same time, the new rules would retain some discretion for the court to adjust the choice of law selection according to its value judgments and policy preferences. Thus, the choice of law rules would produce a result that the courts would treat as a presumption that is valid unless it contradicts important public policy considerations. Alternatively, the courts can retain discretion to choose the law governing damages under general choice of law rules for tort cases.[248]

These proposed changes can improve uniformity and predictability of choice of law decisions in the products liability area without the need for a total overhaul of the Second Restatement.

E. Federal Preemption for Some Types of Products

As discussed earlier, the territorial rule of *lex loci delicti* and the policy-oriented methodology of the Second Restatement were inherently rooted in the idea of state sovereignty. Although there is merit to this approach,[249] to a significant extent it became incompatible with the increased globalization of economic activities. Some commentators have even questioned the value of national sovereignty in this context.[250]

Even if the modest changes this Comment proposes are implemented, it will take many years until they produce a noticeable improvement in the products liability area. A more immediate way to improve uniformity and predictability would be federal legislation governing choice of law rules or the rules of liability.[251]

247. See *id.* at 1322-32 for an overview of several sets of content-blind choice of law rules; *see also* Robert A. Sedler, *Choice of Law in Conflicts Torts Cases: A Third Restatement or Rules of Choice of Law?*, 75 IND. L.J. 615, 630-33 (2000) (criticizing Dean Symeonides's approach and proposing his own set of choice of law rules for products liability cases).

248. *See* Symeonides, *Choice of Law for Products Liability*, *supra* note 245, at 1332 (arguing that courts' selection of law governing damages awards will lead to more balanced decisions if the choice of law for liability turns out to favor the plaintiff). Retaining this limited depecage provision will still be a considerable improvement over the unlimited depecage rule of the Second Restatement. R

249. *See* Gonzales v. Raich, 545 U.S. 1, 42-48 (2005) (O'Connor, J., dissenting) (arguing for the protection of state sovereignty from federal encroachment and for preserving the right of states to socio-economic experimentation).

250. *See, e.g.*, Juenger, *Third Restatement*, *supra* note 64, at 415. R

251. *See* Gottesman, *supra* note 202, at 49-50 (arguing for a federal choice of law statute). R

Although some authors express hope that means other then federal legislation can bring about uniformity of decisions in the products liability area,[252] given the strong federalist stance of the Supreme Court[253] and no plans for the Third Restatement, this appears to be highly unlikely. The Erie doctrine and its logical extension in *Klaxon*, directing the federal courts to use choice of law rules of the forum state, are still an essential part of the Supreme Court jurisprudence.[254] Therefore, without federal legislation establishing a uniform approach to choice of law issues, both state and federal courts will continue to apply methodologies that vary from state to state and render inconsistent and often unpredictable decisions.

The recently adopted tort reform legislation, Class Action Fairness Act, that federalizes procedural aspects of certain nationwide class actions[255] does not address related choice of law issues deferring them to the states, and thus exacerbates the problem.[256] The new legislation amends the statutory provision on diversity jurisdiction[257] to move many interstate class actions into federal courts,[258] but the courts still have to apply the choice of law rules of the forum.[259]

252. *See* Gregory T. Miller, Comment, *Behind the Battle Lines: A Comparative Analysis of the Necessity to Enact Comprehensive Federal Products Liability Reforms*, 45 BUFF. L. REV. 241, 274 (1997).

253. *See, e.g.*, Paul Boudreaux, *A Case for Recognizing Unenumerated Powers of Congress*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 551, 561-62 (2005) (describing the revival of federalism by a more conservative Supreme Court under the late Chief Justice Rehnquist).

254. *See* Erie R. R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (declaring federal general common law unconstitutional, and thus, upholding state rights); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

255. Class Action Fairness Act of 2005, 28 U.S.C.A. § 1332 (West 2007).

256. *See, e.g.*, Samuel Issacharoff, *Class Action Fairness Act: Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1867 (2006) [hereinafter Issacharoff, *Class Action Fairness Act*]. Some authors, however, argue that choice of law issues that complicate the class action certification process play a positive role. *See, e.g.*, Jeremy T. Grabill, *Multistate Class Actions Properly Frustrated By Choice-Of-Law Complexities: The Role of Parallel Litigation in the Courts*, 80 TUL. L. REV. 299, 320-21 (2005) (citing efficiency of a diversified decisionmaking as a possible benefit). There is little doubt, however, that these perceived benefits come at the expense of uniformity and predictability of decisions.

257. 28 U.S.C.A. § 1332.

258. The Class Action Fairness Act of 2005 extended federal diversity jurisdiction to include class actions where the amount in controversy exceeds five million dollars and no member of the class of plaintiffs is a citizen of the same state as any of the defendants. 28 U.S.C.A. § 1332(d)(2).

259. *See* Issacharoff, *Class Action Fairness Act*, *supra* note 256, at 1867. **R**

Although a sweeping federal preemption in the products liability area is highly unlikely,[260] it may be possible for some types of nationally marketed products already heavily regulated by the federal government, such as pharmaceutical products and medical devices regulated by the FDA.[261] By eliminating the choice of law issue, a comprehensive federal regulation of pharmaceutical products and manufacturers' liability can provide a uniform and reasonably predictable treatment of products liability controversies in this area. The main concern is whether this legal regime provides enough safety for the consumers.

There are indications that the FDA oversight may be inadequate. For example, it is possible that the negative side effects of a drug might manifest themselves years after the drug's initial FDA approval and release to the market.[262] Unfortunately, there are no reliable controls in place that can ensure timely identification of dangerous side effects of FDA-approved drugs already on the market. As Professor Conk explained in his recent article, under the current system, drug manufacturers voluntarily analyze reports of suspected adverse side effects of their mass-marketed FDA-approved products.[263] This system, however, has been rendered, at least to some extent, ineffective by the inherent conflict of interests built into it.[264]

The reliance on FDA approvals, the approach endorsed by the Michigan products liability statute,[265] may therefore be inadequate to provide drug safety. An improvement of FDA procedures could help, but in the long run, a statutory provision for a private cause of action would provide assurance that drug manufacturers exer-

260. *See, e.g.*, Brown, *supra* note 208, at 668-75 (arguing that for the conservative Supreme Court, state sovereignty trumps pro-defendant considerations). R

261. *See, e.g.*, National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3743 (1986). Some authors argue that federal agencies, including the FDA, are already moving in this direction through the introduction of federal preemption preambles in the regulations they issue. *See, e.g.*, Catherine M. Sharkley, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007) (discussing a "backdoor federalization" of tort law).

262. Birth defects and other health problems caused by the drug DES were probably the best-known examples of this problem. *See, e.g.*, Trahan v. E.R. Squibb & Sons, Inc., 567 F. Supp. 505 (M.D. Tenn. 1983) (plaintiff developed cancer many years after her mother ingested DES during pregnancy).

263. George W. Conk, *Restructure FDA Review*, NAT'L L.J., Sept. 26, 2005, at col. 1.

264. *Id.*

265. *See* MICH. COMP. LAWS ANN. § 600.2946(5) (West 2007); *see also supra* note 130 and accompanying text. R

cise reasonable care in testing, manufacturing, and labeling their products.[266]

This approach has additional advantages. First, it is easier to fine-tune a solution that is specific to a particular industry and then use gained experience to facilitate future enactments. Further, the limited scope of the legislation reduces the risk of unforeseen negative consequences.

CONCLUSION

The changing socio-economic landscape of American society led to corresponding changes in law governing it. The evolution of conflict of laws theories was not an exception. The rigid, archaic rules of the First Restatement and the vague choice of law principles of the Second Restatement are inadequate to provide guidance to the courts and manufacturers of mass-marketed undifferentiated goods in products liability litigation.

There is a clear need for a new choice of law approach that will provide product manufacturers with a more predictable business environment and reduce unnecessary litigation. The current political realities, however, will likely prevent the adoption of a solution that can significantly improve predictability and uniformity of choice of law decisions in products liability cases.

This Comment proposes to enhance the Second Restatement's ability to guide courts on choice of law issues in products liability cases. For some types of products that are already heavily regulated by the federal government, federal preemption eliminating choice of law issues altogether can provide more uniform and predictable decisions in products liability cases. A more realistic approach would focus on incremental changes that improve the predictability of the business environment for product manufacturers and fuel new theoretical debates leading to a more comprehensive solution.

266. Some commentators argue, however, that FDA regulation is sufficient and that the role of tort law should be limited to the enforcement of regulatory compliance. *See, e.g.*, W. Kip Viscusi et al., *Deterring Inefficient Pharmaceutical Litigation: An Economic Rationale for the FDA Regulatory Compliance Defense*, 24 SETON HALL L. REV. 1437, 1438 (1994).