

Louisiana Law Review

Volume 60 | Number 4

Conflict of Laws, Comparative Law and Civil Law: A

Tribute to Symeon C. Symeonides

Summer 2000

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Repository Citation

Patrick J. Borchers, *Louisiana's Conflicts Codification: Some Empirical Observations Regarding Decisional Predictability*, 60 La. L. Rev. (2000)

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Louisiana's Conflicts Codification: Some Empirical Observations Regarding Decisional Predictability

Patrick J. Borchers*

I. INTRODUCTION

Of all of Professor Symeonides's accomplishments during his tenure at the Louisiana State University Law Center, perhaps the one with the greatest public impact was serving as the Reporter for the Louisiana State Law Institute's preparation of a draft bill to comprehensively codify the state's conflicts law.¹ That bill, unanimously passed by both houses of the Louisiana Legislature, became law for cases filed as of January 1, 1992.² The Louisiana conflicts codification is not your father's conflicts statute. Sleek and modern, it represents a serious effort to consolidate the gains of the conflicts revolution.

It also provides a unique opportunity in the United States to study the advantages and disadvantages of comprehensive statutory solutions to conflicts problems. While conflicts codifications are fairly common abroad—particularly in countries with a civil law heritage³—Louisiana (doubtlessly motivated in part by its civil law heritage⁴) is the first American jurisdiction to undertake such an endeavor. Louisiana makes an interesting laboratory for the further reason that for the nineteen years preceding the codification, it mostly followed a modern common law conflicts approach derived from Professor Currie's writings and the Second Conflicts Restatement.⁵ Thus, if one were to look at Louisiana choice-of-law decisions immediately preceding and following the codification, one might find clues as to whether comprehensive conflicts statutes could benefit other states.

In this article, I endeavor to begin that task. I selected the project of measuring the affirmance rate in Louisiana by appellate courts of trial court conflicts decisions before and after the codification. As discussed more extensively below, I chose to look at affirmance rates because they are a reasonable proxy for decisional predictability. A higher affirmance rate (and correspondingly a lower reversal rate) probably indicates greater decisional predictability. Correspondingly, a lower affirmance rate (and correspondingly a higher reversal rate) probably indicates less

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1. See Symeon C. Symeonides, *Louisiana Conflicts Law: Two "Surprises,"* 54 La. L. Rev. 497, 503 n.30 (1994).

2. 1991 La. Acts No. 923, § 1. The law is codified in a new Book IV of the Civil Code. See La. Civ. Code arts. 3515-3549.

3. See Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis,* 66 Tul. L. Rev. 677, 689-90 (1992) (noting Swiss, Austrian and German conflicts codifications).

4. See Symeonides, *supra* note 1, at 497-98.

5. See Symeonides, *supra* note 1, at 498-502.

predictability, and brings with it greater incentives for parties to appeal adverse decisions, and with that higher litigation costs (and transaction costs generally), as well as greater costs imposed on the judicial system and thus, the public at large.

As reported in detail below, for the pre-codification cases that I sampled, the affirmance rate was 52.9%, which is statistically indistinguishable from a coin flip. For post-codification decisions, however, the affirmance rate improved to 76.2%. Any statistical analysis has inherent limitations. While the sample size is large enough that the before-and-after rates do not fall within a standard deviation of each other, more data is needed before one can say with virtual certainty that the Louisiana codification has produced an improved affirmance rate. Moreover, I do not mean to suggest that merely analyzing case results in terms of affirmances and reversals can ever provide the complete picture. Nonetheless, the results are hopeful and suggest that comprehensive conflicts codifications can produce significant benefits.

II. LOUISIANA CONFLICTS LAW: BEFORE AND AFTER

Beginning with the Louisiana Supreme Court's 1973 decision in *Jagers v. Royal Indemnity Co.*,⁶ Louisiana became a pretty typical "modern" conflicts jurisdiction. *Jagers*—a case involving the application of intrafamilial immunity—seemed to adopt interest analysis,⁷ at least in the case of loss-allocating tort rules in which the contesting parties are all domiciled in the same state. These sorts of cases, conventionally called false conflicts,⁸ are the most appealing for departing from the conventional state-of-the-injury rule in tort cases, and account for many instances in which states have gone modern.⁹ *Jagers*, however, cited the Second Conflicts Restatement as well. As things eventually developed in Louisiana, courts took to applying interest analysis for the purpose of identifying so-called "false conflicts," but then applying the Second Conflicts Restatement in the event that the case was not a false conflict.¹⁰

One of the charges that is often brought against such methodologies is that they are radically uncertain in their operation.¹¹ Interest analysis itself is notoriously vulnerable to the criticism that what counts as an "interest" is neither self-evident nor well understood by courts,¹² and the Second Restatement (particularly for torts

6. 276 So. 2d 309 (La. 1973).

7. *Id.* at 311-12. See also Harvey Couch, *Louisiana Adopts Interest Analysis: Applause and Some Observations*, 49 Tul. L. Rev. 1 (1974).

8. See Symeonides, *supra* note 1, at 499 n.13.

9. See, e.g., *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968); *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

10. See, e.g., *Clark v. Favalora*, 722 So. 2d 82, 85 (La. App. 1st Cir. 1998).

11. See, e.g., Friedrich K. Juenger, *Choice of Law and Multistate Justice* 109-10, 156 (1993); Scott Fruehwald, *A Multilateralist Method of Choice of Law*, 85 Ky. L.J. 347, 372 (1997).

12. See Patrick J. Borchers, *Back to the Past: Anti-Pragmatism in American Conflicts Law*, 48 Mercer L. Rev. 721, 724 (1997); Juenger, *supra* note 11, at 121-23; Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 Geo. L.J. 1, 12 (1991).

conflicts) is generally only relied upon for its open-ended, "grab-bag" provisions,¹³ which are popular with courts but woefully indeterminate.¹⁴ There are suggestions, old and new, that such free-form methodologies may be heaping higher-than-necessary costs on parties and taxing judicial resources.¹⁵ If, then, such methodologies suffer this vice, there is little reason to think that pre-codification Louisiana would have been atypical.¹⁶

All this changed in Louisiana for cases filed beginning in 1992. Of course, one might ask whether there is any reason to think that the new codification is more determinate than the old system. Louisiana's codification is not, to be sure, laced with hard-and-fast rules. For instance, Article 3544, a general torts provision, states:

Issues pertaining to loss distribution and financial protection are governed, as between a person injured by an offense or quasi-offense and the person who caused the injury, by the law designated in the following order:

(1) If, at the time of the injury, the injured person and the person who caused the injury were domiciled in the same state, by the law of that state. Persons domiciled in states whose law on the particular issue is substantially identical shall be treated as if domiciled in the same state.

(2) If, at the time of the injury, the injured person and the person who caused the injury were domiciled in different states: (a) when both the injury and the conduct that caused it occurred in one of those states, by the law of that state; and (b) when the injury and the conduct that caused it occurred in different states, by the law of the state in which the injury occurred, provided that (i) the injured person was domiciled in that state, (ii) the person who caused the injury should have foreseen its occurrence in that state, and (iii) the law of that state provided for a higher standard

13. See, e.g., Restatement (Second) of Conflict of Laws §§ 6, 145 (1971).

14. Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 Md. L. Rev. 1232 (1997) (courts applying the Second Restatement are much more likely to cite its general provisions than its more specific ones).

15. Juenger, *supra* note 11, at 121-23; Gottesman, *supra* note 12, at 12; Friedrich K. Juenger, *Choice of Law: How it Ought Not To Be*, 48 Mercer L. Rev. 757, 760-61 (1997). A recent article makes this point forcefully. See William H. Allen & Erin A. O'Hara, *Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond*, 51 Stan. L. Rev. 1011 (1999). Allen's and O'Hara's point that certain aspects of the modern methodologies (in particular the version of interest analysis followed by California) generate inefficiencies seems confirmed by the data reported below. See also Erin O'Hara & Larry E. Ribstein, *Interest Groups, Contracts and Interest Analysis*, 48 Mercer L. Rev. 765, 765 (1997) ("Interest analysis does not stand up well under economic analysis.").

16. Louisiana might have been slightly out of the ordinary in having, even pre-codification, a more extensive than average network of statutes that arguably applied to conflicts problems. See Symeonides, *supra* note 1, at 498-99. However, "[f]rom the beginning, Louisiana courts assumed a lack of statutory authority [in conflicts matters] and proceeded to develop jurisprudential rules, borrowed mostly from sister states." *Id.* at 499.

of financial protection for the injured person than did the law of the state in which the injurious conduct occurred.¹⁷

This statute should, at least in some cases, reach results similar to those expected to be reached under the modern approaches. It is not tied to the state of the injury or any other single connecting factor. It also contains terms that are open to debate in a significant number of cases. For instance, determining whether tort rules involve "loss distribution" is possible in most instances, but is not an enterprise that is always free from doubt.¹⁸ The same could be said for determining when the laws of the connected states are "substantially identical" or when the tortfeasor "should have foreseen" the injury being caused.

But, from the standpoint of predictability, there are many reasons to be optimistic that such a statute will be an improvement over the pre-existing approach. For one, it gives litigants and courts an indisputably authoritative text in which to turn. When contrasting a statute with the judicially invented approaches—which rely upon a confusing amalgamation of law review articles, cases from other states, quotations from Restatements and the like¹⁹—one ought not underestimate the benefits of having, at the very least, a commonly understood starting point for analyzing multistate problems. Another reason to be sanguine that such a statute will improve predictability is that even with some open-ended terminology, the universe of competing considerations is restricted. If, say, a case under Article 3544 were to turn upon whether the locus of the injury was "foreseeable," at least all concerned could address themselves to that question. By contrast, with the judicially invented approaches, one only need survey the cases briefly to discover that there is intense debate as to what counts as an "interest" in any particular case.²⁰

Of course, speculation on these matters accomplishes little. The question to which I now turn is whether one can measure any impact on predictability made by the codification.

III. METHODOLOGY

Attempting to measure anything as elusive as decisional predictability is a difficult task. I settled on attempting to measure the affirmance rates by appellate courts of trial court choice-of-law decisions. I decided on looking at affirmance (and by implication reversal) rates, because they are a reasonable proxy for predictability. If the trial court and the appellate court agree on the result, even though the losing party thought it worth the trouble to prosecute an appeal, this is

17. La. Civ. Code art. 3544.

18. See Patrick J. Borchers, *The Return of Territorialism to New York's Conflicts Law: Padula v. Lilam Properties Corp.*, 58 Alb. L. Rev. 775 (1995) (suggesting that the distinction between conduct regulation and loss allocation is essential and serviceable, but not always free from doubt).

19. The Louisiana Supreme Court's decision in *Jagers* is an excellent example. See *Jagers v. Royal Indem. Co.*, 276 So. 2d 309, 311-13 (La. 1973).

20. Juenger, *supra* note 11, at 121-23; Gottesman, *supra* note 12, at 12.

a systemic success. It shows that both of the neutral observers agreed on the result. A reversal, however, is a systemic failure. If a trial court—presumably neutral in its outlook and doing its level best to reach the “correct,” non-reversible result—fails in the task, this suggests that resolution of the issue was not apparent. If so, the resolution of similar issues will not be apparent to contesting parties, and thus will become a likely source of litigation. If over a large number of cases, one system produces a higher affirmance rate than the other, one ought to be able to say, with some confidence, that the system with the higher affirmance rate is the one that produces more predictable results.

I make no claim, of course, that affirmance rates are perfect measures of predictability. The decision as to whether to appeal is the losing party’s. Losing parties below might, for instance, routinely misjudge their chances of success on appeal, thus producing higher-than-expected affirmance rates. Moreover, a losing party may not take an appeal because of economic considerations, or may be precluded from doing so by the lack of a final judgment or some other obstacle to meaningful appellate review. Moreover, some sampling bias is inherent because appellate courts do not publish all of their decisions, and the decisions they publish tend to be in the closer cases—favoring reversals. However—and this is a critical point—there is no reason to think these considerations were significantly different in the period before and after the passage of Louisiana’s conflicts codification. If, for instance, the passage of the conflicts statute had been accompanied by some other institutional change in appellate review (for instance, if appellate jurisdiction had been dramatically expanded or contracted), then one might attribute any before-and-after effect to that other change. But, since there was no such evident change in Louisiana in 1992, a significant variation in affirmance rates in conflicts decisions before and after the statute can probably be attributed to the statute.

Because the statute became effective for cases *filed* after January 1, 1992, there was a considerable period of time during which both the old approach and the new statute co-existed. In an effort to generate a reasonable sample size, I began by looking at decisions from 1988 forward. All of the decisions from 1988 through 1991 were, of course, under the old system. Beginning in 1992 appellate decisions under the new statute began to appear, and by now the statute governs substantially all cases on appellate review.

There were, of course, some complications. First, I limited the study to choice-of-law decisions of what one might call the “horizontal” variety. Paradigmatically, these were cases in which two or more states were connected to the transaction, and the question was which state law to apply. I chose these kinds of cases because they are the ones that the new statute covers. Thus, I did not include “vertical” choice-of-law cases, where the question was whether to apply, say, federal admiralty law or state law.²¹ I did, however, include federal diversity cases to the extent that these cases were making a horizontal choice (again, usually between two or more state

21. See, e.g., *Coto v. J. Ray McDermott, S.A.*, 709 So. 2d 1023 (La. App. 4th Cir. 1998).

laws), because such courts are required to follow the conflicts law of the state in which they sit.²²

The question of what to count as an "affirmance" does not always admit of an easy answer. Sometimes appellate decisions do not make clear how the trial court ruled on the choice-of-law question, and sometimes trial courts themselves are not clear as to how they ruled. If the trial court's ruling could not be discerned, I did not include the case. Similarly, if the appellate court did not clearly rule on the matter, I excluded such cases as well.²³ If a trial court made the wrong choice of law, but wound up being affirmed on different grounds, I counted such cases as reversals, because such an affirmance hardly counts as an endorsement of the trial court's choice-of-law analysis.²⁴ Conversely, if the trial court got the choice-of-law issue right, but was reversed on other grounds, I counted such cases as affirmances.²⁵

There were also occasional questions as to whether to count cases as pre or post-codification. Occasionally such difficulties arose from ambiguous discussions and timing of the cases.²⁶ Another occasional problem was presented by cases (both before and after the passage of the new statute) that were decided under other state statutes that contained conflicts principles.²⁷ I sorted those cases by filing date. Those filed before 1992 I treated as pre-codification; those filed in 1992 and after I treated as post-codification.

Finally, I cannot warrant that I found every case. I endeavored to find as many as I could in order to make the sample size as large as possible. In the end, I can say with some confidence that someone else engaging in the same task would probably not agree with my classification of every case, but I am confident that any fair effort to look at the cases would produce results similar to mine.

22. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020 (1941).

23. See, e.g., *Roberts v. Energy Dev. Corp.*, 104 F.3d 782 (5th Cir. 1997) (remanding for further consideration of conflicts issue).

24. See, e.g., *Cherokee Pump & Equip. Inc. v. Aurora Pump*, 38 F.3d 246 (5th Cir. 1994) (district court erred in choice-of-law determination; affirmed on other grounds). Similarly, partial reversals—as long as the reversal was on choice-of-law grounds—were treated as reversals. See, e.g., *Piper v. Alamo Rent-a-Car, Inc.*, 567 So. 2d 175 (La. App. 4th Cir. 1990).

25. See, e.g., *Bolton v. Tulane Univ. of Louisiana*, 692 So. 2d 1113 (La. App. 4th Cir. 1997). *Bolton* is actually a difficult case to assess in several respects. The trial court was reversed, but appears to have correctly decided to apply Louisiana law, rather than the law of Mississippi as urged by Bolton. The appellate opinion does not explicitly report the trial court's ruling, but the discussion of "course and scope of employment" under Louisiana law (and its reversal of the trial court on that point) clearly implies that the trial court chose Louisiana law.

26. The most difficult case in this regard was *Levy v. Jackson*, 612 So. 2d 894 (La. App. 4th Cir. 1993). *Levy* justifies its result both under the statute and the pre-existing law. However, the docket number reported for the trial court decision shows that the case was filed in 1990, which makes the statute inapplicable. I therefore counted *Levy* as a pre-codification case.

27. See, e.g., *Dekeyser v. Automotive Cas. Ins. Co.*, 706 So. 2d 676 (La. App. 4th Cir. 1998) (decided under statute specifically applicable to insurance contracts).

IV. THE RESULTS

My research ultimately produced thirty-four pre-codification cases, of which eighteen were affirmances²⁸ and sixteen were reversals.²⁹ Post-codification, I found twenty-one cases, sixteen of which were affirmances³⁰ and five were reversals.³¹

In raw numbers, therefore, in pre-codification cases, the affirmation rate was 52.9% (0.529), and in post-codification cases, it was 76.2% (0.762). At first blush, therefore, the new statute appears to have produced a substantial improvement in the affirmation rate of conflicts cases.

28. *America's Favorite Chicken Co. v. Cajun Enters*, 130 F.3d 180 (5th Cir. 1997); *Dupre v. Penrod Drilling Corp.*, 993 F.2d 474 (5th Cir. 1993); *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115 (5th Cir. 1992); *Peavey Co. v. M/V Anpa*, 971 F.2d 1168 (5th Cir. 1992); *Gates v. Claret*, 945 F.2d 102 (5th Cir. 1991); *Cruse v. Astroworld, Inc.*, 941 F.2d 265 (5th Cir. 1991); *Orthopedic & Sports Injury Clinic v. Wang Labs., Inc.*, 922 F.2d 220 (5th Cir. 1991); *Fallon v. Superior Aircraft Corp.*, 884 F.2d 229 (5th Cir. 1989); *Wooton v. Pumpkin Air, Inc.*, 869 F.2d 848 (5th Cir. 1989); *Sandfer Oil & Gas, Inc. v. AIG Oil Rig of Texas, Inc.*, 846 F.2d 319 (5th Cir. 1988); *Clark v. Favalora*, 722 So. 2d 82 (La. App. 1st Cir. 1998); *Dekeyser v. Automotive Cas. Ins. Co.*, 706 So. 2d 676 (La. App. 4th Cir. 1998); *Hanks v. Shell Oil Co.*, 631 So. 2d 1189 (La. App. 5th Cir. 1994); *National Union Fire Ins. Co. v. Ward*, 612 So. 2d 964 (La. App. 2d Cir. 1993); *Francis v. Travelers Ins. Co.*, 581 So. 2d 1036 (La. App. 1st Cir. 1991); *Pittman v. Kaiser Aluminum & Chem. Corp.*, 559 So. 2d 879 (La. App. 4th Cir. 1990); *Cohn v. Heymann*, 544 So. 2d 1242 (La. App. 3d Cir. 1989); *Hanover Petroleum Corp. v. Tenneco Inc.*, 521 So. 2d 1234 (La. App. 3d Cir. 1988).

29. *Hollier v. Union Texas Petroleum, Corp.*, 972 F.2d 662 (5th Cir. 1992); *Taylor v. Liberty Mut. Ins. Co.*, 579 So. 2d 443 (La. 1991); *Ridings v. Danos & Curole Marine Contractors, Inc.*, 723 So. 2d 979 (La. App. 4th Cir. 1998); *Continental Eagle Corp. v. Tanner & Co. Ginning*, 663 So. 2d 204 (La. App. 3d Cir. 1995); *Partin v. Dolby*, 652 So. 2d 670 (La. App. 1st Cir. 1995); *Sentilles v. Kwik-Kopy Corp.*, 652 So. 2d 79 (La. App. 4th Cir. 1995); *Walnut Equip. Leasing Co. v. Moreno*, 643 So. 2d 327 (La. App. 2d Cir. 1994); *Reeves v. Allstate Ins. Co.*, 619 So. 2d 202 (La. App. 3d Cir. 1993); *EM Nominee Pshp. Co. v. Arkla Energy Resources*, 615 So. 2d 1369 (La. App. 2d Cir. 1993); *Levy v. Jackson*, 612 So. 2d 894 (La. App. 4th Cir. 1993); *Willett v. National Fire & Marine Ins. Co.*, 594 So. 2d 966 (La. App. 3d Cir. 1992); *State v. Fontenot*, 587 So. 2d 771 (La. App. 2d Cir. 1991); *Kirby v. Kirby*, 579 So. 2d 508 (La. App. 4th Cir. 1991); *Piper v. Alamo Rent-a-Car, Inc.*, 567 So. 2d 175 (La. App. 4th Cir. 1990); *Wilkins v. State*, 526 So. 2d 308 (La. App. 3d Cir. 1988); *Jones v. Jones*, 523 So. 2d 874 (La. App. 4th Cir. 1988).

30. *Woodfield v. Bowman*, 193 F.3d 354 (5th Cir. 1999); *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512 (5th Cir. 1996); *Duhon v. Union Pac. Resources Co.*, 43 F.3d 1011 (5th Cir. 1995); *Coleman v. Robinson*, No. 98-CA-1874, 1999 WL 691887 (La. App. 4th Cir. Sept. 1, 1999); *Nicholas v. Allstate Ins. Co.*, 739 So. 2d 830 (La. App. 2d Cir. 1999); *Drew v. Martello*, 729 So. 2d 90 (La. App. 5th Cir. 1999); *De Nunez v. Bartels*, 727 So. 2d 463 (La. App. 1st Cir. 1998); *Kanz v. Wilson*, 703 So. 2d 1331 (La. App. 1st Cir. 1997); *Shell Oil Co. v. Hollywood Marine, Inc.*, 701 So. 2d 1038 (La. App. 5th Cir. 1997); *Bolton v. Tulane Univ. of Louisiana*, 692 So. 2d 1113 (La. App. 4th Cir. 1997); *Trautman v. Poor*, 685 So. 2d 516 (La. App. 3d Cir. 1996); *Rigdon v. Pittsburgh Tank & Tower Co.*, 682 So. 2d 1303 (La. App. 1st Cir. 1996); *Oliver v. Navis*, 679 So. 2d 462 (La. App. 1st Cir. 1996); *Norwood v. Craig*, 658 So. 2d 212 (La. App. 2d Cir. 1995); *Sentilles Optical Servs. v. Phillips*, 651 So. 2d 395 (La. App. 2d Cir. 1995); *Kennington v. H. Blume Johnson, Inc.*, 632 So. 2d 883 (La. App. 2d Cir. 1994).

31. *Cherokee Pump & Equip. Inc. v. Aurora Pump*, 38 F.3d 246 (5th Cir. 1994); *Salavarría v. National Car Rental Sys.*, 705 So. 2d 809 (La. App. 4th Cir. 1998); *Anderson v. Oliver*, 705 So. 2d 301 (La. App. 3d Cir. 1998); *Norvell v. Norvell*, 649 So. 2d 95 (La. App. 4th Cir. 1995); *Holcomb v. Universal Ins. Co.*, 640 So. 2d 718 (La. App. 3d Cir. 1994).

Because of the relatively small sample size, it is necessary to assess the statistical significance of the results. The standard deviation for the pre-codification results is 8.6% (0.086).³² Thus the true pre-codification affirmance rate, to within one standard deviation, was 52.9% +/- 8.6%. The standard deviation on the post-codification results was 9.3% (0.093). Thus, the true post-codification affirmance rate, to within one standard deviation, was 76.2% +/- 9.3%. In other words—again, to within one standard deviation—the pre-codification affirmance rate was between 44.3% and 61.5%; the post-codification affirmance rate was between 66.9% and 85.5%.

The following table consolidates these results:

Value	Pre-Codification	Post-Codification
Affirmances	18	16
Reversals	16	5
Affirmance Rate (Raw)	0.529 (52.9%)	0.762 (76.2%)
Standard Deviation	+/- 0.086 (8.6%)	+/- 0.093 (9.3%)
True Value (to one std. dev.)	44.3% ≤ x ≤ 61.5%	66.9% ≤ x ≤ 85.5%

V. DATA ANALYSIS

The data is, therefore, supportive of the hypothesis that the Louisiana conflicts codification has improved the affirmance rate, and by implication the predictability of decisions in conflicts cases. Moreover, the results show a surprisingly low affirmance rate (and thus high reversal rate) in pre-codification cases. In statistical terms, before the codification, a trial court's decision had no more predictive value than flipping a coin. In fact, perversely, trial court performance would not have worsened statistically if trial courts had tried to get the *wrong* result. After the

32. The formula for calculating the standard deviation is the square root of the mean times one minus the mean divided by the total number of samples. See R. Mark Sirkin, *Statistics for the Social Sciences* 120 (1995). For the pre-codification results, this was the square root of: $(0.529 \times 0.471) / 34$. The result is thus .086. Other standard deviations were calculated in the same way.

This formula is consistent with the common-sense notion that the larger the sample size, the more reliable the results. Consider, for example, an observer who sees two players shooting basketball free throws. If Player A attempts two free throws and succeeds on one of them, and Player B attempts three and succeeds on two, Player B would have the higher percentage at that point, but that data would be so limited as to give one little confidence that Player B is really the better free throw shooter. However—to use the data generated here—if Player A attempts 34 free throws and succeeds on 18, and Player B attempts 21 and succeeds on 16, one would have considerably greater confidence that Player B is really the better free throw shooter.

codification, the affirmance rate improved to the point that a trial court's determination indisputably was well to the high side of 50% mark for predictive value.

There are limitations to this study and any like it. First, one should not make too much of the absolute numbers. Because reported appellate opinions usually come in close cases, the predictability problem pre-codification was probably not as bad as the 47.2% reversal rate might lead one to believe. It would also be desirable to have more data because a larger base brings more reliability. Nonetheless, one can say with considerable confidence that the affirmance rate has improved post-codification.³³

VI. CONCLUSION

The modern common law approaches to conflicts problems are vulnerable to criticism on the grounds that they provide insufficient decisional predictability and all of the attendant costs that come with a lack of predictability. In this essay I have endeavored to explore whether a comprehensive conflicts statute such as Louisiana's can improve predictability. The answer, based on the data available, appears to be "yes."

Of course, there are other values at stake in multistate cases. One can imagine silly, but highly predictable, methods for deciding conflicts cases. Professor Currie once proposed (I hope in jest, but it is difficult to tell) that certain kinds of conflicts cases be decided by choosing the law of the state first in alphabetical order.³⁴ Such a system would so undermine confidence in the fair administration of justice that almost any other system (no matter how unpredictable) would be preferable.

Predictability is, however, an important value in the law, and an important value in conflicts cases. To the extent that legal rules affect primary behavior, predictability is nearly essential. The lender who takes a security interest in personal or real property needs to know with a high degree of certainty how to perfect his interest against third parties, and can know this only if he knows what law will apply to the transaction.³⁵ If he cannot reasonably predict what law will

33. The confidence that one can have in the results actually turns out to be a complicated and interesting question. Recall that the standard deviations were calculated according to the formula for binary statistics. See Sirkin, *supra* note 32, at 120. Assuming a normal distribution, a width of one standard deviation covers 68% of the bell curve. Thus, the probability that the true mean lies beyond one standard deviation is 32% (0.32). Assuming again a normal distribution, the probability that the true mean lies to the high side is 16% (0.16), and to the low side is also 16% (0.16). Because the data here shows that the pre- and post-codification affirmance rates do not fall within one standard deviation of each other, in order for them to actually be identical, the true post-codification rate would have to be on the low side, and the true pre-codification rate be on the high side. There are independent events, each with a probability of no more than 16% (0.16). Applying the rule of multiplication of probabilities, *see id.* at 237, the probability that both would occur is less than 0.0256. In other words, there is less than a 3% probability that the true means are actually identical. Thus, one can have better than 97% confidence that the post-codification affirmance rate is higher than the pre-codification rate.

34. Brainerd Currie, *Selected Essays on the Conflict of Laws* 608-10 (1963).

35. See generally Patrick J. Borchers, *Choice of Law Relative to Security Interests and Other Liens in International Bankruptcies*, 46 Am. J. Comp. L. 165 (Supp. 1998).

apply, transactions of this kind would become either more expensive or extinct. Even when the applicable legal rules are unlikely to affect primary behavior (as in the case of loss allocating tort rules), predictability is still an important value, because as long as choice of law remains a wild card, parties are less likely to be able to voluntarily resolve their cases, and the costs (both on the parties and on the public) will increase. The Louisiana conflicts codification, the fruit of Professor Symeonides's deft efforts as its Reporter, is a hopeful indication that statutory solutions can allow for the reconciliation of predictability and other values in multistate cases.