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# The Louisiana Codification and Tort Rules of Choice of Law

Robert A. Sedler\*

## I. INTRODUCTION

Among the many accomplishments that stand as a tribute to the extraordinary career of Professor Symeon C. Symeonides is the Louisiana codification of conflict of laws rules. Professor Symeonides served as the Reporter for the Advisory Committee that drafted the codification, and the codification embodies Professor Symeonides's longstanding submission of the need for choice of law rules that are "flexible with built-in escapes which will allow courts enough freedom to deviate in exceptional cases."<sup>1</sup> Such rules are necessary, he maintains, as a vehicle for producing predictability and providing courts with guidance in the resolution of conflicts questions.<sup>2</sup> Along with a number of other conflicts scholars, Symeonides bemoans the purported uncertainty and lack of predictability in American conflicts law today. The consequences of this purported uncertainty and lack of predictability are said to be "contradictory results in the case law, confusion, and . . . [the] 'homeward trend' . . ."<sup>3</sup>

I totally disagree. When we look at the actual decisions of the courts in conflicts cases and the results that they reach in practice, particularly in the torts area, I submit that there is indeed a high degree of certainty and predictability and a pattern of results that is fairly consistent and coherent.<sup>4</sup> This is because what has emerged from the actual decisions of the courts in conflicts torts cases are *rules of choice of law*. Unlike choice of law rules, whether the broad, state-selecting rules of the traditional approach or the narrower and policy-based rules that many commentators have long favored,<sup>5</sup> or Professor Symeonides's "flexible" rules in the Louisiana codification, rules of choice of law are not formulated *a priori* by courts<sup>6</sup>

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1. Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Torts Conflicts)*, 75 Ind. L.J. 437, 447 (2000). The development, promulgation and structure of the Louisiana conflicts codification are discussed fully in Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Torts Conflicts: An Exegesis*, 66 Tul. L. Rev. 677, 678-96 (1992) [hereinafter Symeonides, *Louisiana's New Law*].

2. *Id.* at 447-49.

3. Eugene F. Scoles, et al., *Conflict of Laws*, § 2.26 (3d ed. 2000).

4. Obviously, with conflicts cases being decided by the highest and intermediate appellate courts of 50 states and the District of Columbia, as well as by federal courts of appeals and federal district courts applying the conflicts law of the state in which they sit, there will be some variation in results. If, however, we look to the results reached by the courts within each state, applying the conflicts law propounded by the highest state court, we are much more likely to see a greater degree of consistency and a fairly coherent body of conflicts decisional law in that state.

5. See, e.g., Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 Cornell L. Rev. 315 (1972); Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 Colum. L. Rev. 946 (1981).

6. For example, see how the New York Court of Appeals acted in *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972). Although New York generally follows interest analysis, its application of the

or by legislatures and then applied to the facts of particular cases. Rather, rules of choice of law are like common law rules in other areas, such as tort law or contract law, in that they are derived from the decisions of the courts in actual cases and serve as precedents for the resolution of future cases.<sup>7</sup> In time, as a number of conflicts cases have been decided by the courts of a particular state, a body of conflicts decisional law, embodying rules of choice of law, will emerge in that state.<sup>8</sup>

In this article, I will discuss the tort rules of choice of law and relate them to the results that would be expected to follow from the application of the tort choice of law rules of the Louisiana codification. I will demonstrate that those results are consistent with the results of the application of the tort rules of choice of law. This being so, the practical effect of the Louisiana codification will be to provide the tort rules of choice of law for Louisiana that in other states have been provided by the courts' decisions in the conflicts cases coming before them.

## II. TORT RULES OF CHOICE OF LAW

Some twenty years ago I explained how rules of choice of law had been developed in conflicts torts cases, and I identified nine tort rules of choice of law.<sup>9</sup> These rules of choice of law were based solely on the *results* of the decided cases in a number of states that had abandoned the traditional approach and were independent of the courts' explanation of their decisions in those cases or on the application of the particular choice of law approach that the court was purportedly following.<sup>10</sup> My review of the decided cases persuaded me that in practice the

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interest analysis approach in interstate accident cases is qualified by the *Neumeier* rules. Under the first *Neumeier* rule, when both the plaintiff and the defendant are from the same state, the law of that state applies. Under the second and third *Neumeier* rules, when the plaintiff and defendant are from different states—which in terms of interest analysis includes both the true conflict and the unprovided-for case—the law of the state where the accident occurs generally applies. See the discussion in *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 281-82 (N.Y. 1993). I have been a harsh critic of the *Neumeier* rules ever since they were first promulgated and continue to be so today. See Robert A. Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner*, 1 Hofstra L. Rev. 125, 131-37 (1973); Robert A. Sedler, *Interest Analysis, Party Expectations and Judicial Method in Conflicts Torts Cases: Reflections on Cooney v. Osgood Machinery, Inc.*, 59 Brook. L. Rev. 1323, 1345-50 (1994).

7. That is, they are developed through the normal workings of binding precedent and stare decisis in the common law tradition and applied in subsequent cases with such extensions or modifications as the court deems appropriate.

8. For a discussion of judicial method in conflicts adjudication see generally Robert A. Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 Ky. L.J. 27 (1967); Robert A. Sedler, *Choice of Law in Michigan: Judicial Method and the Policy-Centered Conflict of Laws*, 29 Wayne L. Rev. 1193 (1983); Robert A. Sedler, *A Real World Perspective on Choice of Law*, 48 Mercer L. Rev. 781, 782-89 (1997) [hereinafter Sedler, *A Real World Perspective*].

9. See Robert A. Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 Tenn. L. Rev. 975 (1977) [hereinafter Sedler, *Rules of Choice of Law*].

10. Courts do not generally refer to rules of choice of law as such. But see *Sexton v. Ryder Truck Rental*, 320 N.W.2d 843, 851 (Mich. 1982), referring to the "most 'universal' rule of choice of law":

courts generally were making the choice of law decision with reference to the policies and interests of the involved states and considerations of fairness to the parties, so that the results were generally consistent with the results that would be produced under the interest analysis approach to choice of law.<sup>11</sup> I also concluded that the courts were reaching fairly uniform solutions in the different fact-law patterns presented in conflicts torts cases, and that when the courts differed, the differences were sufficiently clear as to indicate "majority" and "minority" views, as in other areas of law.<sup>12</sup> My submission, therefore, was that choice of law rules were not necessary to bring about certainty and predictability. A fair degree of certainty and predictability was achieved within each state by the rules of choice of law that emerged from the results reached by the courts in the actual cases coming before them for decision. I have recently reviewed the tort rules of choice of law that I identified some 20 years ago and concluded that they are generally supported by the more recent decisions of the courts in conflicts torts cases.<sup>13</sup>

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when two residents of the forum are involved in an accident in another state, the law of the forum applies (quoting Robert A. Sedler, *Choice of Law in Michigan: A Time to Go Modern*, 24 Wayne L. Rev. 829, 849 (1978)).

11. I maintain that this is because the courts have found that in practice the interest analysis approach produces results that are functionally sound and fair to the parties. See Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. Rev. 181, 190-220 (1977); Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics,"* 34 Mercer L. Rev. 593, 635-43 (1983); Robert A. Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice of Law: An Appreciation and a Response*, 23 U.C. Davis L. Rev. 865, 891-95 (1990); Robert A. Sedler, *A Real World Perspective*, *supra* note 8, at 788-89.

12. One major reason for this substantial uniformity of results in conflicts torts cases is that these cases tend to fall into easily identifiable fact-law patterns. The fact part of the fact-law pattern relates to the states where the parties reside, the state where the harm occurred, and if it differs, the state where the act or omission causing the harm occurred. The law part of the fact-law pattern relates to whether the law in question allows or denies recovery, that is, whether it is plaintiff-favoring or defendant-favoring (a law limiting the amount of damages recoverable, for example, is defendant-favoring and so is treated for these purposes as a law denying recovery), whether it reflects only a loss allocation policy or a conduct-regulating policy as well, and whether it involves other policy considerations, such as those relating to workers' compensation. See the discussion in Sedler, *A Real World Perspective*, *supra* note 8, at 787. The other major reason for this substantial uniformity of results is the tendency of the courts to use interest analysis in practice, regardless of which particular modern approach to choice of law they are purportedly following. See *supra* note 11. I am pleased to see that Professors Borchers and Solimine have demonstrated empirically that courts generally reach the same results in cases presenting the same fact-law pattern regardless of the particular approach that they are purportedly following. See Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 Wash. & Lee L. Rev. 357 (1992); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 Ga. L. Rev. 49 (1989). And as Professor Sterk has observed, "the result in the case[s] often appears to have dictated the judge's choice of law approach at least as much as the approach itself generated the result." Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. Pa. L. Rev. 949, 951 (1994).

13. See Robert A. Sedler, *Choice of Law in Conflicts Torts Cases: A Third Restatement or Rules of Choice of Law?*, 75 Ind.L.J. 615 (2000) [hereinafter Sedler, *Conflicts Torts Cases*]. In so doing, I have revised a few of the rules of choice of law slightly to reflect intervening decisions of the last 20 years and have formulated a new rule of choice of law in products liability cases, which incorporates some of the other rules of choice of law.

The tort rules of choice of law reflect the "real world" in which conflicts litigation operates. In the "real world" of conflicts litigation,<sup>14</sup> the way that conflicts law looks to lawyers and judges is often quite different from the way that conflicts law looks to academic commentators. Lawyers and judges must look primarily to the applicable conflicts *precedents* and decisional law in their own states and are only concerned incidentally, if at all, with the conflicts decisions of other state courts. Academic commentators, in contrast, look to the totality of conflicts cases, and with a large number of conflicts cases being decided by many different courts, it is not surprising that academic commentators tend to see "inconsistency and unpredictability." Whereas if they were to look separately to the conflicts decisions of the courts within each state, they would be far more likely to find that within each state the results are fairly consistent and coherent, so that the conflicts law of that state is sufficiently certain and predictable for the lawyers and judges who are called upon to apply it.<sup>15</sup>

Moreover, in the "real world" of conflicts litigation, the question of choice of law cannot be separated fully from the question of jurisdiction as it relates to the possible states in which suit can be brought. While academic commentators may decry "forum shopping" for a more favorable law and may search for uniform solutions in conflicts cases, litigating lawyers know that the choice of law result in a particular case and the possible outcome of the case as well may often depend on the state where suit can be brought. They quite realistically assume that a court is more likely to apply its own law in preference to the law of another state and that where a state has a real interest in applying its own law in order to implement the policy reflected in that law, the courts of that state are highly likely to do so.<sup>16</sup> This

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14. In the last decade or so I have been extensively involved in the "real world" of conflicts litigation and consultation in my home state of Michigan and elsewhere. This involvement has enabled me to see how conflicts law looks to lawyers and judges in practice.

15. For a discussion of the development of the conflicts law of one state, Michigan, in conflicts torts cases, see Robert A. Sedler, *Continuity, Precedent, and Choice of Law: A Reflective Response to Professor Hill*, 38 Wayne L. Rev. 1419, 1429-37 (1992). As I there concluded:

This operation of judicial method and the policy-centered conflict of laws in Michigan, with the resulting *lex fori* approach to choice of law, contradicts Professor Hill's assertion that choice of law decisions are currently made on an 'essentially ad hoc basis.' To the contrary, the Michigan experience indicates that courts can perform the judicial function [in conflicts cases] in the manner advocated by Professor Hill and can use precedent to establish a body of conflicts law for the state.

*Id.* at 1436-37. For an earlier discussion of the development of torts rules of choice of law in 13 states as of 1977, see Sedler, *Rules of Choice of Law*, *supra* note 9, at 994-1032.

16. In other words, they assume that in the true conflict situation, the forum is likely to apply its own law, as Currie long ago advocated. As to the forum's application of its own law in the true conflict situation, see also the discussion in Sedler, *A Real World Perspective*, *supra* note 8, at 788-89:

In the true conflict situation, it seems fully reasonable to a court for it to apply its own law in order to advance its own policy and interest, so long as this will not produce any unfairness to the party against whom that law is being applied. Although academic commentators may search endlessly for a neutral solution to the true conflict, the results in practice indicate that neutral solutions do not have much appeal to the courts deciding the cases before them. Thus, in practice, the courts will almost invariably resolve true conflicts by simply applying their own law, as Currie advocates.

being so, plaintiffs' lawyers will try to bring their suit in the state whose law is plaintiff-favoring, while defendants' lawyers will assert jurisdictional and *forum non conveniens* objections to suit in the plaintiff-favoring state and try to force the plaintiff to litigate the case in a forum whose law is defendant-favoring. The lawyers on both sides will also consult the choice of law precedents of the different involved states and will try to get the case before a court whose choice of law precedents are likely to result in the application of the state's law that is more favorable to their client. Because there is this strong connection between jurisdiction and choice of law in practice, the tort rules of choice of law that I have identified are sometimes framed with reference to the state in which suit has been brought.

I have identified the following ten rules of choice of law in conflicts torts cases:

*Rule 1:* When two residents of the forum are involved in an accident in another state, the law of the forum applies.<sup>17</sup>

*Rule 2:* When two parties from a recovery state, without regard to forum residence, are involved in an accident in a non-recovery state, recovery will be allowed.<sup>18</sup>

*Rule 3:* Where two parties from a non-recovery state are involved in an accident in a recovery state, and suit is brought in the recovery state, the courts are divided. Some courts will apply their own law allowing recovery, while other courts will apply the law of the parties' home state, denying recovery.<sup>19</sup>

*Rule 4:* When a forum resident suffers injury in the forum either because of an act done there or because of an act done elsewhere that creates a foreseeable risk of harm in the forum, the forum will apply its own law allowing recovery.<sup>20</sup>

*Rule 5:* When a plaintiff from a recovery state is injured by a defendant from a non-recovery state in the defendant's home state, and the suit is brought in the plaintiff's home state, the courts are divided, with the majority view appearing to be that the forum should apply its own law in the absence of unfairness to the defendant.<sup>21</sup>

*Rule 6:* When a plaintiff from a recovery state is injured by a defendant from a non-recovery state and the suit is brought in the defendant's home state, that state will apply its own law denying recovery.<sup>22</sup>

*Rule 7:* When the law of state in which an act or omission occurs reflects a conduct-regulating policy, the defendant will be held liable if that act causes harm in another state or to a non-resident in the defendant's home

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17. See the discussion and review of cases in Sedler, *Conflicts Torts Cases*, *supra* note 13, at 619-20.

18. See the discussion and review of cases, *id.* at 620-21.

19. See the discussion and review of cases, *id.* at 621-22.

20. See the discussion and review of cases, *id.* at 622-23.

21. See the discussion and review of cases *id.* at 624-25.

22. See the discussion and review of cases, *id.* at 625-26.

state. Conversely, a state will not apply a law reflecting only a conduct-regulating policy to conduct that takes place entirely in another state.<sup>23</sup>

*Rule 8:* When a plaintiff from a non-recovery state is involved in an accident with a defendant from a recovery state, and the accident occurs in the defendant's home state, recovery will be allowed. When the accident occurs in the plaintiff's home state, recovery will usually be allowed, but sometimes the courts apply the law of the plaintiff's home state denying recovery.<sup>24</sup>

*Rule 9:* The tort liability of an employer to an employee who is covered by workers' compensation and the liability of the employer for contribution to a third-party tortfeasor in a claim involving that employee is determined by the law of the state where the employer has taken out workers' compensation to cover the particular employee.<sup>25</sup>

*Rule 10:* Where a plaintiff is injured in the home state by a product manufactured elsewhere, and the products law of the plaintiff's home state is plaintiff-favoring, the plaintiff will bring suit in the home state, and that state will apply its own plaintiff-favoring law. Where a plaintiff is injured in the home state by a product manufactured elsewhere, and the products law of the plaintiff's home state is defendant-favoring, the courts are divided. Some courts will apply the plaintiff-favoring rules of the defendant's home state. Some courts, however, hold that in products liability cases, the applicable law, whether plaintiff-favoring or defendant-favoring, is the law of the plaintiff's home state.<sup>26</sup>

The rules of choice of law that I have identified will cover most of the conflicts torts cases that arise in practice. These rules of choice of law are based on the results that courts reach in practice when presented with conflicts torts cases and thus serve as the precedents that comprise the conflicts law of the different states. While there is some division among the courts of the different states with respect to the third, fifth, eighth and tenth rules of choice of law, this division is the same as appears in other areas of law, and sometimes can be stated in terms of "majority" and "minority" views.<sup>27</sup>

I submit that these rules of choice of law provide the "certainty and predictability" that critics such as Professor Symeonides claim is lacking in

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23. See the discussion and review of cases *id.* at 626-29.

24. See the discussion and review of cases *id.* at 629.

25. See the discussion and review of cases *id.* at 630.

26. See the discussion and review of cases *id.* at 630-34.

27. Of course, with so many different courts deciding conflicts cases, there will always be some variation in results between the courts of different states. There will be some cases that cannot be explained with reference to the rules of choice of law, however there should only be a few of such cases.

American conflicts laws today. We do not need choice of law rules for conflicts torts cases. We have tort rules of choice of law.

### III. THE LOUISIANA CODIFICATION AND TORT RULES OF CHOICE OF LAW

The basic approach of the Louisiana codification to choice of law is one of comparative impairment: an issue is governed by the law of the state whose policies would be most seriously impaired if its law were not applied on that issue.<sup>28</sup> While this approach is premised on a consideration of the policies and interests of the involved states, as Professor Symeonides points out, the negative phrasing, "state whose policies would be most seriously impaired if its law were not applied to [the particular] issue," was intended to disassociate this approach from Currie's interest analysis and other modern approaches "which seem to perceive the choice-of-law problem as a problem of interstate competition, rather than as a problem of interstate cooperation in conflict avoidance."<sup>29</sup>

The basic approach, set forth in Article 3542, is implemented by four narrower and more specific rules contained in Articles 3543-3546, "which are essentially *a priori* legislative determinations of 'the state whose policies would be more seriously impaired if its law were not applied.'"<sup>30</sup> "Article 3543 provides for 'issues of conduct and safety,' Article 3544 provides for 'issues of loss distribution and financial protection,' Article 3545 provides for certain products liability cases regardless of the type of issue involved, and Article 3546 provides for punitive damages in cases other than the products cases covered by Article 3545."<sup>31</sup> Article 3547 gives the courts the flexibility and "escape hatch" with which Professor Symeonides is very concerned, by authorizing the application of the law of another state instead of the state chosen under Articles 3543-3546 "if, from the totality of the circumstances of an exceptional case, it is clearly evident under the principles

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28. Louisiana Civil Code article 3515 sets forth this approach to choice of law generally and Article 3542 sets forth this approach to tort issues. Under Louisiana Civil Code article 3515 that "state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state." In torts cases, under Article 3542, that state is determined in light of factual contacts, including the place of conduct and injury, the domicile, habitual residence, or place of business of the parties, and the state in which the relationship, if any between the parties was centered, and in light of the policies referred to in Article 3515, as well as the policies of deterring wrongful conduct and of repairing the consequences of injurious acts.

29. Symeonides, *Louisiana's New Law*, *supra* note 1, at 689-90. He goes on to say that the approach "is based on the premise that the choice-of-law process should strive for ways to minimize the impairment of the involved states' interests, rather than to maximize one state's interests at the expense of those of the other states." *Id.* This is accomplished, he says, "by identifying the state that, in light of its relationship to the parties and the dispute, and the policies rendered pertinent by that relationship, would suffer the most serious legal, social, economic and other consequences if the court did not apply its law to the issue." *Id.*

30. *Id.* at 697.

31. *Id.* at 696.

of Article [35]42, that the policies of another state would be more seriously impaired if its law were not applied to the particular issue."<sup>32</sup>

Whatever else the Louisiana codification for conflicts torts cases does, *it makes up for the dearth of Louisiana precedents in conflicts torts cases*. There has been and still is only one conflicts torts case that has been decided by the Louisiana Supreme Court, the 1973 case of *Jagers v. Royal Indemnity Co.*,<sup>33</sup> involving the very familiar situation of two residents of Louisiana, whose law did not recognize intrafamily immunity, being involved in an accident in Mississippi, whose law did recognize the immunity. In this "false conflict" case, the Louisiana Supreme Court, like so many others, abandoned the place of the wrong rule and held that Louisiana law applied. As Professor Symeonides has explained, this case appeared to adopt the "mixed methodology" of interest analysis and the Restatement Second, and he says that it resulted in "lingering confusion" among the lower state courts and federal courts sitting in Louisiana.<sup>34</sup> These courts were presented with very few torts conflicts cases in the period preceding the new codification, and the rules of choice of law that I have identified simply did not exist in Louisiana. The dearth of precedents has now been remedied by the adoption of the torts choice of law provisions of the codification.

I will now compare the results that would be expected to be produced under Articles 3543-3546 with the results that are produced under the tort rules of choice of law that I have identified.

Tort rules of choice of law 1-3 deal with the situation where two residents of the same state or of different states having the same substantive law are involved in an accident in another state. The issues in these cases involve substantive tort rules relating to loss distribution rather than specific conduct-regulating rules, which are covered by tort rule of choice of law 7. Under Article 3544(1), where the parties are domiciled in the same state, or in different states having the same law, the law of that state applies. This is in accord with the results that are produced under rules of choice of law 1-2. Under tort rule of choice of law 3, when two parties from a non-recovery state are involved in an accident in a recovery state, and suit is brought in the recovery state,<sup>35</sup> the courts are divided, with some states applying the law of the parties' home state (common domicile) to deny recovery and some courts applying their own law allowing recovery. Article 3544(1) puts Louisiana on the side of the states applying the law of the common domicile to deny recovery.<sup>36</sup>

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32. *Id.* at 763.

33. 276 So. 2d 309 (La. 1973).

34. Symeonides, *Louisiana's New Law*, *supra* note 1, at 680-84.

35. If suit were brought in the home state, that court would apply its own law to deny recovery in accordance with tort rule of choice of law 1. However, in this situation the plaintiff can always bring suit in the state of injury, obtaining specific jurisdiction under the long-arm act, so the crucial question is whether the state of injury will apply its own law allowing recovery.

36. See *Levy v. Jackson*, 612 So. 2d 894 (La. App. 4th Cir. 1993) (on rehearing). In that case, two residents of Alabama, which had a guest statute, were involved in an accident in Louisiana, which did not. There was a question as to whether the new codification applied to this case, and the court held that this did not matter, since the same result would have obtained under prior law, citing *Jagers* and another pre-codification case from the same appellate district, *Hanzo v. Liberty Mut. Ins. Co.*, 508 So.

Tort rule of choice of law 4 deals with the situation where a forum resident suffers injury in the forum either because of an act done there or because of an act done elsewhere that creates a foreseeable risk of harm in the forum, and in this "true conflict" situation, the forum will apply its own law allowing recovery. The same result obtains in Louisiana under Article 3544(2)(a) and (b).<sup>37</sup>

Tort rules of choice of law 5 and 6 deal with the situation where a plaintiff from a recovery state is injured by a defendant from a non-recovery state in the defendant's home state. Like the situation presented with respect to tort rule of choice of law 4, this is a "true conflict," since the consequences of the accident and of imposing liability or denying liability will be felt by the parties in their respective home states regardless of where the accident occurs. Where suit is brought in the defendant's home state, that court will apply its own law in accordance with tort rule of choice of law 6. If, as is frequently the case, jurisdiction over the defendant can be obtained in the plaintiff's home state, the plaintiff will bring suit there in the hope that that state will apply its own law in order to advance its own policy and interest. In this situation, the courts are divided, with the majority view appearing to be that the forum should apply its own law in the absence of unfairness to the defendant. Article 3544(2)(a) requires application of the law of the state of injury where the conduct and injury occur in the same state, so Louisiana would come down on the side of the states that apply the law of the state of injury in this situation as well as in the situation covered by tort rule of choice of law 6.<sup>38</sup>

Tort rule of choice of law 7 involves the application of a law reflecting a conduct-regulating policy. Here the state where the conduct occurs has a strong interest in applying its law to implement the conduct-regulating policy reflected in its law. Ordinarily the state in which the harm occurs would have no interest in insulating the actor from liability, since the actor usually will be a resident of the state where the conduct occurs. In terms of interest analysis then, this is the "false conflict," and the law of the state of acting will be applied. The same is true when the harm occurs in the state of acting, but the victim is a resident of another state. This tort rule of choice of law is involved in products liability cases, where the court applies the law of the manufacturer's home state imposing strict liability or liability

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2d 928 (La. App. 4th Cir. 1987), which like *Jagers*, involved two residents of Louisiana who were in an accident in a non-recovery case. In the pre-codification case of *Sutton v. Langley*, 330 So. 2d 321 (La. App. 2d Cir.), writ denied, 332 So. 2d 805, 820 (1976), a court of appeals in a different appellate district held that where two residents from Texas, which had a guest statute, were involved in an accident in Louisiana, which did not, Louisiana law allowing recovery applied. These cases are discussed in Symeonides, *Louisiana Conflicts Law: Two "Surprises,"* 54 La. L. Rev. 497, 505-12 (1994).

37. The law of the plaintiff's home state will usually reflect a loss distribution policy in addition to a conduct-regulating policy. If the law of the plaintiff's home state reflected only a conduct-regulating policy, the law of that state would apply under Article 3543. See Symeonides, *Louisiana's New Law*, supra note 1, at 710-11.

38. See *McGovern v. Marriott Int'l, Inc.*, No. 95-1285, 1996 U.S. Dist. LEXIS 12216 (E.D. La. Aug. 15, 1996) (applying Louisiana law), holding that where a Louisiana resident was injured at the defendant's hotel in Virginia, Virginia law making contributory negligence an absolute bar and apparently denying recovery for loss of consortium applied.

for punitive damages. Under Article 3543, the conduct-regulating rule of the state of acting applies if the injury occurred in that state or in another state whose law provides for a lower standard of conduct, which reaches the same result as is reached under tort rule of choice of law 7. However, Louisiana has a strong policy against the awarding of punitive damages, rooted in a concern for the protection of the judicial process from "inherently speculative awards," and this strong policy applies in conflicts torts cases. Under Article 3545, in products liability cases, Louisiana law applies to deny claims for punitive damages by Louisiana residents injured in Louisiana, even though punitive damages would be recoverable under the law of the manufacturer's home state.<sup>39</sup> Under Article 3546, which governs punitive damages in non-products liability cases, a Louisiana court may award punitive damages where they are recoverable under the law of the defendant's home state and the conduct occurred there, notwithstanding that the injury occurred in Louisiana. In this situation the result is the same as under tort rule of choice of law 7 and to this extent relaxes Louisiana's prohibition against the award of punitive damages.<sup>40</sup>

Where it is the state of injury that has a conduct regulating rule imposing liability, the victim usually will be a resident of that state, and, assuming that the application of that state's law is not unfair to the out-of-state actor, recovery will be allowed when suit is brought in the state of injury under tort rule of choice of law 4. The same result would obtain under Article 3543. In addition, under Article 3543, where the conduct of a Louisiana defendant occurring in Louisiana caused injury in another state, Louisiana law applies, even though it was foreseeable that the conduct could cause injury in the other state. This is the same result that obtains under tort rule of choice of law 6, which provides that when a plaintiff from a recovery state is injured by a defendant from a non-recovery state and suit is brought in the defendant's home state, that state will apply its own law denying recovery.<sup>41</sup> The latter situation, however, is not likely to occur very often in practice,

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39. See *Jefferson Parish Hosp. Serv. Dist. # 2 v. W.R. Grace & Co.*, CA 92-0891, 1992 U.S. Dist. LEXIS 9962 (E.D. La. June 30, 1992), holding that where Louisiana resident was injured in Louisiana by product manufactured by Texas manufacturer in Texas, Louisiana law denying recovery of punitive damages applied. To the same effect is the pre-Code case of *Pittman v. Kaiser Aluminum & Chem. Corp.*, 559 So. 2d 879 (La. App. 4th Cir.), writ denied, 563 So. 2d 885 (1990).

40. See Article 3546 in Symeonides, *Louisiana's New Law*, supra note 1, at 735-49. He points out that in this situation the award of punitive damages would "promote the defendant-detering policies of the state of the tortfeasor's domicile and the state of the tortfeasor's conduct without impairing the defendant-protecting policies of the state of injury." *Id.* at 740.

41. Professor Symeonides is very uncomfortable with this example of "hometown protectionism," which he explains as "a very common part of the legislative process in this imperfect world." He did not include this exception from the application of the higher standard of the state of injury in the draft that he and the Advisory Committee submitted to the Council of the Louisiana Law Institute. He says that the exception was drafted by the Council after a long debate to "ensure that conduct in Louisiana by persons domiciled in, or having another similarly significant relationship with this state will not be subjected to higher standards of another state where the injury might occur." Symeonides, *Louisiana's New Law*, supra note 1, at 712-14. However, this simply demonstrates that legislatures, like courts, recognize that in the "true conflict" situation, it is legitimate for the forum to apply its own law in order to implement its own policy and interest and that the forum should not subordinate its own policy and

since the Louisiana defendant whose Louisiana-based conduct foreseeably causes injury in another state will usually be subject to suit in the state of injury under specific jurisdiction, and the state of injury will apply its own law under tort rule of choice of law 4.<sup>42</sup>

Tort rule of choice of law 8 deals with the situation where a plaintiff from a non-recovery state is involved in an accident with a defendant from a recovery state. In terms of interest analysis, this situation presents the "unprovided-for case," since neither of the involved states has a real interest in applying its law in order to implement the policy reflected in that law. When the accident occurs in the defendant's home state, the law of that state applies, and recovery will be allowed. When the accident occurs in the plaintiff's home state, recovery usually will be allowed as well, but sometimes in this situation, the courts apply the law of the plaintiff's home state denying recovery. Under Article 3544(2), the result depends on where the accident occurs, putting Louisiana among the states that applies the law of the plaintiff's home state denying recovery when the accident occurs there.<sup>43</sup>

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interest to that of another state.

42. In this situation the out-of-state actor will usually be a manufacturer who has sent its products into the state where the injury occurred or an entertainment facility who has advertised in the state of injury and whose intoxicated patron caused an accident there, properly subjecting the facility to specific jurisdiction in the state of injury and to dram shop liability under that state's law. See e.g., *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal.), cert. denied, 429 U.S. 859, 97 S. Ct. 159 (1976); *BLC Ins. Co. v. Westin, Inc.*, 359 N.W.2d 752 (Minn. App.), cert. denied, 474 U.S. 844, 106 S. Ct. 132 (1985). Professor Weintraub fears, however, that Louisiana tavern keepers operating near the borders of Oklahoma and Texas, which impose dram shop liability, might not constitutionally be subject to suit in the state of injury, at least when they do not advertise there. Russell J. Weintraub, *The Contributions of Symeonides and Kozyris to Making Choice of Law Predictable and Just: An Appreciation and Critique*, 38 Am. J. Comp. L. 511, 515-16 (1990).

43. Article 3544(2)(a) provides that where the parties are domiciled in different states, and both the injury and the conduct occurred in one of those states, the law of that state applies. Article 3544(2)(b) provides that if the conduct and injury occurred in different states, and the plaintiff resides in the state of injury, the law of that state applies if it provides a higher standard of financial protection for the injured person than the law of the state in which the conduct occurred. Since in the "unprovided-for case," it is the law of the plaintiff's home state that denies recovery, where the accident occurs in that state, recovery will be denied. Professor Symeonides notes that just as the plaintiff injured in the home state obtains the higher standard of protection of that state (this is the "true conflict" situation covered by tort rule of choice of law 4), where the law of the plaintiff's home state denies recovery, "[b]eing injured in his home state by conduct in that state, that person should not be allowed to invoke the protection of that state's law 'and at the same time claim exception from its burdens.'" Symeonides, *Louisiana's New Law*, supra note 1, at 729.

In two recent cases, Louisiana Courts of Appeal, sitting in different appellate districts, reached different results in the situation where a Louisiana plaintiff was injured in Louisiana by a Florida driver in a Florida rental car. Under Florida law, the owner is liable for the driver's negligence. Under Louisiana law, the owner is not. In *Salavarría v. National Car Rental System, Inc.*, 705 So. 2d 809 (La. App. 4th Cir. 1998), the court applied 3544(a)(2), and denied recovery under Louisiana law. However, in *Oliver v. Davis*, 679 So. 2d 462 (La. App. 1st Cir.), writ denied, 682 So. 2d 773 (1996), the court took the position that Florida had an interest in the uniform application of its law imposing owner's liability, and applying Article 3542 rather than Article 3544(a)(2), concluded that Florida's policies would be more impaired than Louisiana's policies.

Tort rule of choice of law 9 involves workers' compensation policies and provides that the tort liability of an employer to an employee who is covered by workers' compensation and the liability of the employer for contribution to a third-party tortfeasor in a claim involving that employee is determined by the law of the state where the employer has taken out workers' compensation to cover the particular employee. Under the Louisiana codification, the tort liability of an employer to an employee is not covered specifically, but seemingly would involve a matter of loss distribution and so would be governed by Article 3544. In a case where a Louisiana employee of a Louisiana employer was injured while working on a work crew in Texas, the court applied Louisiana law barring the action instead of Texas law, which did not, thereby reaching the same result as is reached under tort rule of choice of law 9.<sup>44</sup> Similarly, in another case, where an injured Louisiana worker received workers' compensation from a Texas employer doing business in Louisiana and Texas for a work-related injury in Texas, the court held that Louisiana law providing the employer with tort immunity applied instead of Texas law, which did not.<sup>45</sup> Again, this is the result that is reached under tort rule of choice of law 9.<sup>46</sup>

I have formulated a new rule of choice of law 10 for products liability.<sup>47</sup> Under this rule of choice of law, where a plaintiff is injured in the home state by a product manufactured elsewhere, and the products law of the plaintiff's home state is plaintiff-favoring, the plaintiff will bring suit in the home state, and that court will apply its plaintiff-favoring law. This is the same result that is reached under tort rule of choice of law 4. It is also the same result that is reached under Article 3545, which provides that Louisiana law applies on all products liability issues when the injury was sustained in Louisiana by a Louisiana resident.

The more difficult cases under tort rule of choice of law 10 are those where the law of the plaintiff's home state is manufacturer-favoring and the law of the

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44. See *Kennington v. H. Blume Johnson, Inc.*, 632 So. 2d 833 (La. App. 2d Cir.), *rev'd on other grounds*, 638 So. 2d 1066 (1994).

45. See *Duhon v. Union Pac. Resources Co.*, 43 F.3d 1011 (5th Cir. 1995) (applying Louisiana law). Pursuant to Article 3548, the court treated the employer as a Louisiana resident, since it transacted business in Louisiana, thereby bringing into play the application of the law of the common domicile under Article 3544(1) instead of the law of the state of injury under Article 3544(2)(a).

46. In *Rigdon v. Pittsburgh Tank and Tower Co.*, 682 So. 2d 1303 (La. App. 1st Cir. 1996), a Kentucky employee of a Kentucky employer was killed in a work-related accident in Louisiana. The employer would have tort immunity under Kentucky law, but not under Louisiana law, since the conduct of the employer would constitute "intentional harm" under Louisiana law. Thus, Louisiana's interest in applying its law in order to implement the conduct-regulating policy reflected in its law conflicted with Kentucky's interest in applying its law to implement the employer-protecting loss distribution policy reflected in its law. In this "true conflict" situation, the court ended up applying Louisiana law. It emphasized that conflicts issues should be resolved on a case by case basis and held that under Article 3548, the employer was a Louisiana domiciliary for purposes of the particular case. This meant that the parties were domiciled in different states, so as to bring into play Article 3544(2)(a) and the application of Louisiana law as the law of the place of injury. The court finally concluded that the choice of Louisiana law was appropriate under Article 3542, emphasizing Louisiana's interest in applying its law and the Kentucky employer's engaging in business in Louisiana.

47. See *Sedler, Conflicts Torts Cases*, *supra* note 13, at 630-34.

manufacturer's home state is plaintiff-favoring. Where the plaintiff-favoring law of the manufacturer's home state reflects a conduct-regulating policy, a "false conflict" is presented, since the manufacturer's home state has a real interest in applying its own law in order to implement the conduct-regulating policy reflected in that law while the plaintiff's home state has no real interest in applying its manufacturer-favoring rule for the benefit of an out-of-state manufacturer. This situation brings into play rule of tort choice of law 7 and the application of the law of the manufacturer's home state imposing liability. In this situation, some courts apply the law of the manufacturer's home state as the law of the only interested state.<sup>48</sup> Some courts, however, hold that in products liability cases, the applicable law, whether plaintiff-favoring or manufacturer-favoring, is the law of the plaintiff's home state. This is the result that is reached in Louisiana under Article 3545.<sup>49</sup>

In this section I have tried to demonstrate that the results that would be expected to be produced under Articles 3543-3546 are consistent with the results that are produced under the tort rules of choice of law that I have identified. This being so, the practical effect of the Louisiana codification will be to provide the tort rules of choice of law for Louisiana that in other states have been provided by the courts' decisions in the conflicts cases coming before them.

#### IV. A CONCLUDING NOTE

Conflicts torts cases fall into certain fact-law patterns. Courts that have abandoned the traditional approach to choice of law and the "place of the wrong" rule decide conflicts torts cases with reference to the policies and interests of the involved states and considerations of fairness to the parties. The courts have reached fairly uniform solutions in the different fact-law patterns presented in conflicts torts cases, and when the courts have differed, the differences are sufficiently clear as to indicate "majority" and "minority" views, as in other areas of law.

The Louisiana codification has in effect provided tort rules of choice of law for Louisiana. I believe that I have succeeded in demonstrating that the results that would be expected to be produced under Articles 3543-3546 are consistent with the results that are produced under the tort rules of choice of law that I have identified.

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48. Where the plaintiff-favoring rule of the manufacturer's home state reflects only a loss distribution policy, the "unprovided-for case" is presented, bringing into play tort rule of choice of law 8.

49. See *Jefferson Parish Hosp. Serv. Dist. #2 v. W.R. Grace & Co.*, CA 92-0891, 1992 U.S. Dist. LEXIS 9962 (E.D. La. June 30, 1992) holding that where a Louisiana resident was injured in Louisiana by product manufactured by Texas manufacturer in Texas, Louisiana law denying recovery of punitive damages applied. This means that when a Louisiana resident is injured in Louisiana from a product sent into that state by an out-of-state manufacturer, and the law of the manufacturer's home state is plaintiff-favoring, such as where it imposes strict liability or liability for punitive damages, while the law of Louisiana is manufacturer-favoring, the Louisiana resident will sue in the manufacturer's home state, hoping to obtain the application of that state's plaintiff-favoring law. When it is Louisiana law that is plaintiff-favoring, the Louisiana plaintiff injured in Louisiana will sue in Louisiana and obtain the benefit of Louisiana law under Article 3545.

As in common law states, Louisiana conflicts law will continue to develop by the decisions of the courts in actual cases. While the Louisiana courts will use as their starting point the provisions of the codification and cases applying the provisions of the codification, the results I predict will continue to be consistent with the results produced by tort rules of choice of law. And it is the tort rules of choice of law, no less than the Louisiana codification authored by Professor Symeonides, that within each state provide a high degree of certainty and predictability in conflicts torts cases.