Choice of Law in Louisiana: Torts

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The Louisiana lawyer or judge who today must deal with a tort case having multistate aspects may be faced with a particularly troublesome problem. Over thirteen years of experimentation since the Louisiana Supreme Court’s departure from the exclusive use of the traditional method in tort cases has not produced a coherent system of choice of law to replace the discarded rules. While this state of affairs may not be particularly remarkable, especially in the field of torts, the principal area about which the American conflicts “revolution” has centered is neither desirable nor necessary. It is not desirable because the Louisiana law of choice law has been deprived of all certainty. It is not necessary because the means currently exist to formulate a workable methodology.

In contrast to some other areas of the law, such as contracts, successions and marital property, which are in part governed by provisions of the Civil Code, there is no Louisiana statute controlling choice of law with respect to torts, this area traditionally having been the province of the courts. This comment will discuss Louisiana’s departure from traditional choice of law doctrine and will examine the efforts of the Louisiana courts to develop a substitute suitable for use in tort cases. A few tentative conclusions are drawn from the results of those efforts. Finally, some suggestions for improvement are made.

The Louisiana Jurisprudence

Johnson: The Last of an Era

As late as 1970, the Louisiana Supreme Court clung to the traditional choice of law method, according to which the lex loci delicti governs

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1. See infra notes 17-20 and accompanying text.
almost all issues arising in tort cases. In Johnson v. St. Paul Mercury Insurance Co., a guest passenger brought an action for personal injuries against his host driver, alleging the driver's ordinary negligence in connection with an accident which had occurred in Arkansas while the host and guest were traveling to Iowa. Louisiana, the common domicile of host and guest, was also the place where the host's automobile was garaged, licensed and insured, as well as the place where the trip had begun and was ultimately to end. Arkansas, but not Louisiana, had a guest passenger statute requiring proof of willful negligence as a prerequisite to recovery by a guest from his host, and the defendant invoked the Arkansas law as a bar to the plaintiff's suit. This defense ultimately was sustained by the supreme court.

The Johnson majority considered and rejected several alternatives to the "firmly established" lex loci delicti rule, preferring the certainty, simplicity and judicial economy afforded by a "clear-cut" rule to the undertaking of "a legislative thought process in each case presented hereafter compelling the court to weigh all relevant interests in each fact situation," required by most of the alternative methods considered. The court also felt the lex loci delicti rule had the virtues of "adherence to the clear import of the Due Process and Full Faith and Credit Clauses" and "regard for the principles of comity so important to a workable federalism, and the restraint it imposes upon states in the extraterritorial application of their laws." The court objected to most other alternative choice-of-law methodologies because they "permit the courts to reach whatever result it [sic] wishes," thus creating the possibility of decisions applying forum law in a manner inconsistent with the constitutional requirements of due process and full faith and credit. Moreover, the majority viewed the inherent plaintiff-favoring quality of the so-called "contact doctrines" as encouraging forum-shopping, thereby placing the defendant "in an unequal position in the eyes of the law denying him the equal protection of the law." Concluding that virtually "no compelling reasons have been advanced to support a
departure from lex loci,"\textsuperscript{14} the court held that the Arkansas statute barred the plaintiff's action.\textsuperscript{15}

\textit{Jagers: A New Beginning}

The \textit{Johnson} decision did not escape academic criticism,\textsuperscript{16} and this criticism did not go unnoticed. Only three years after \textit{Johnson} was decided, it was overruled in \textit{Jagers v. Royal Indemnity Co.},\textsuperscript{17} in which a mother sued her adult son for personal injuries sustained in an automobile accident which had occurred in Mississippi, the son raising Mississippi's intrafamily immunity law as a bar to the plaintiff's action. As in \textit{Johnson}, both plaintiff and defendant were Louisiana domiciliaries and the automobile involved was registered and insured in Louisiana. There was some dispute as to whether Mississippi law in fact did bar a suit by a mother against her adult son, but the content of Mississippi's law on this point was not considered essential to the choice of law decision.\textsuperscript{18} The court described the issue as posing a "false conflict of laws," which the court defined as a situation in which "it is found that only a single state has an interest in the application of its law, and that the other state involved has no interest in the application of its law in the case."\textsuperscript{19} Concluding that the application of the Mississippi law would not advance any policy of that state but would defeat Louisiana's policy of "protect[ing] its citizens from damage from the wrongful acts of others," the court held that the plaintiff's suit was not barred.\textsuperscript{20}

After \textit{Jagers}, no doubt remained that the \textit{lex loci delicti} rule had been discarded with respect to such "classic" false conflicts as \textit{Jagers} and \textit{Johnson}. Unfortunately, while the court seemed opposed to "perpetuating the doctrine which would apply the law of the place of the tort,"\textsuperscript{21} and apparently anticipated the formulation of new choice of law rules,\textsuperscript{22} the opinion in \textit{Jagers} provided only ambiguous guidelines for courts facing choice of law problems in cases not so easily dismissed.

\textsuperscript{14} Id. at 223.
\textsuperscript{15} Id. at 224.
\textsuperscript{16} See Couch, Choice of Law, Guest Statutes, and the Louisiana Supreme Court: Six Judges in Search of a Rulebook, 45 Tul. L. Rev. 100, 111-13 (1970), in which Professor Couch chided the court for clinging to the "dying" vested rights theory in a case which presented an obvious false conflict.
\textsuperscript{17} 276 So. 2d 309 (La. 1973).
\textsuperscript{18} Id. at 311.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 313.
\textsuperscript{21} Id. at 312.
\textsuperscript{22} Id. at 313.
In brief, the supreme court abandoned a set of rules without clearly adopting a particular methodology to serve either as a replacement for the old rules or as a vehicle for the development of new rules. This omission has produced a great deal of uncertainty in Louisiana choice of law.

Part of the uncertainty engendered by the *Jagers* decision is due to the fact that in the rest of the country choice of law itself was in a state of flux at the time *Jagers* was decided. Although there seemed to be a general agreement as to the proper results in cases like *Jagers* and *Johnson* among courts and commentators who reject the traditional method, there existed and still exists a considerable difference of opinion among advocates of "modern" solutions to choice of law problems with respect to methodology and underlying principles, particularly as regards torts. *Jagers* unquestionably reached the right result. However, because this result could be reached on the basis of any one of several competing choice-of-law methodologies, a selection by the *Jagers* court of a particular "modern" choice of law methodology cannot be inferred from the mere results reached in that case.

Much of the opinion in *Jagers* was devoted to the repudiation of *Johnson* and the reasons advanced therein for the necessity and desirability of retaining the *lex loci delicti* rule. The court provided comparatively little explanation of the precise reasoning by which it reached its result, and engaged in no discussion of alternative methods for solving choice of law problems. Allusions to modern doctrinal authority were few and curiously mixed, leaving the court's stamp of approval on no single method and only ambiguously tilting towards two: governmen-

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26. See, e.g., 276 So. 2d at 312 (repudiating the "vested rights" doctrine); id. at 313 (application of forum law in false conflicts where the forum is the interested state is not "unfair to the defendant").
The lack of a clear set of guidelines for solving choice of law problems has been a source of difficulty for Louisiana courts ever since. The most troublesome aspect of Jagers is that the court vaguely referred to governmental interest analysis and the Restatement Second, two distinct and less than fully compatible choice-of-law approaches, without following one or the other, attempting instead to reconcile the two. Parts of the opinion seem to have been influenced by the teachings of governmental interest analysis. For example, the court’s use of the term “false conflict,” as well as its repeated references to state “interests,” are direct borrowings from interest analysis. The court also seemed inclined toward a bias in favor of the application of forum law, at least in some cases, referring once to the “doctrine of the law of the forum,” though the meaning of that reference is unclear. At the same time, however, the court disregarded one of the fundamental aspects of governmental interest analysis—that state interests are to be determined by examining the content and objectives of the competing rules of law. The court did recognize the policy of compensation reflected in the Louisiana rule of non-immunity; however, the content of the Mississippi rule was not regarded as “essential” to the choice of law decision.

27. This term and the term “interest analysis,” when used in the following discussion, refer to the approach advanced by Brainerd Currie, whose basic philosophy and method is explained in B. Currie, Selected Essays on the Conflict of Laws (1963). For a critical review of interest analysis, see Symeonides, supra note 24, at 549-67.


29. See Jagers, 276 So. 2d at 312: “That some modern methods for determining whether to apply the law of the forum are faulty in some respects should not deter a court in the application of the law of the forum to its citizens, when not otherwise prohibited.” (footnote omitted).

30. Id. at 313. Interest analysis heavily favors the application of forum law. See Symeonides, supra note 24, at 566-67.

31. As an example of a court applying the “doctrine of the law of the forum,” the court cited Koplik v. C. P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958). In Koplik, the court announced that it was applying the law of the family domicile to the issue of interspousal immunity because, “Otherwise, the lex loci will be permitted to interfere seriously with a state and a policy which the state of residence is primarily interested in maintaining.” 27 N.J. at 7, 141 A.2d at 40. The preference here is not one for forum law, but for the lex domicilii; however, this may be less than clear, since New Jersey was the state of the marital domicile as well as the forum state. New Jersey is a state that openly professes to apply interest analysis to choice of law questions. See Kay, Theory into Practice: Choice of Law in the Courts, 34 Mercer L. Rev. 521, 545-46 (1983).

32. See B. Currie, supra note 27, at 189; id. at 731: “[Governmental-interest analysis] inquires first of all into the policies expressed in the respective laws.” There cannot be a “false conflict” unless one state is not interested, and this cannot be determined without knowing what the rule is in both states.

33. See supra notes 18 and 20 and accompanying text.
Amidst the discussion of false conflicts and state interests, the court, without comment, cited Section 6 of the Restatement Second as an expression of "choice of law principles." In the absence of any explanation by the court, the intent of this reference is unclear. The false conflict concept is not a part of the Restatement Second, which also eschews the notion of forum law favoritism, providing instead that, with respect to most tort issues, the presumptively and residually applicable law is that of the state having the most significant relationship with the parties or events involved in the case. The court made no attempt to show how its choice of Louisiana law in the case before it was supported by Restatement Second principles, instead confining itself almost exclusively to a determination of the existence and non-existence of state interests. The extent of the court's approval of the Restatement Second is rendered even more uncertain by the court's failure to cite the plainly applicable Section 169. Furthermore, the court nowhere used the term "most significant relationship," so readily identified with the Restatement Second, to rationalize its choice of law, using instead the jargon of governmental interest analysis.

34. 276 So. 2d at 312 n.3. Restatement Second § 6 provides:
(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of 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 results, and
(g) ease in the determination and application of the law to be applied.
35. See, e.g., Restatement Second §§ 146, 147, 149, 154.
36. The policies and interests of states account for only two of the seven factors in Restatement Second § 6.
37. Restatement Second § 169 provides:
§ 169. Intra-Family Immunity
(1) The law selected by application of the rule of § 145 determines whether one member of a family is immune from tort liability to another member of the family.
(2) The applicable law will usually be the local law of the state of the parties' domicile.
38. See especially Restatement Second § 145:
§ 145. The General Principle
(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
It seems probable that the court in Jagers did not intend to adopt either interest analysis or the Restatement Second in toto, but only to decide the case before it in accord with the weight of authority as to result,\(^9\) reserving for the future any effort to develop any coherent theory. Unfortunately, however, the court has yet to resume that task.

The few supreme court cases decided soon after Jagers did nothing to clarify the court's position. Of the three cases decided, two were remanded for further findings,\(^{40}\) while the third was controlled by Jagers.\(^{41}\) None of the cases cited any authority other than Jagers in connection with the departure from the lex loci delicti rule, and in only one of these cases was any sort of supplementary explanation of Jagers offered. In Sullivan v. Hardware Mutual Casualty Co.,\(^{42}\) the court listed the "compelling facts in Jagers" as "a plaintiff domiciled in Louisiana, a defendant insured domiciled in Louisiana, a lawsuit instituted in Louisiana, the insured motor vehicle registered in Louisiana, an automobile insurance policy issued by a Louisiana agency to a Louisiana domiciliary and mailed to the assured's Louisiana address." The court also noted the absence in Jagers of any "significant Mississippi related factors other than the place of the accident, and the fact that plaintiff and her son-driver were temporarily residing in Mississippi."\(^{43}\) While these facts, in the proper context, describe a classic false conflict,\(^{44}\) no attempt was made either in Jagers or Sullivan to explain why most of the facts recited in Sullivan were either "compelling" or "significant," whether

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(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.
These contacts are to be evaluated according to their relative importance with respect to the particular issue.

39. The court was aware of the "general agreement concerning the disposition of false conflicts." 276 So. 2d at 311 n.2 (citing Couch, supra note 16, at 106).
41. Romero v. State Farm Mut. Auto. Ins. Co., 277 So. 2d 649 (La. 1973) (refusing to apply the Texas guest statute in a wife's direct action against her husband's liability insurer when the guest wife and host husband both were Louisiana domiciliaries and the accident had occurred in Texas).
42. 278 So. 2d 30 (La. 1973).
43. Id. at 31.
in terms of interest analysis, the broader principles of the Restatement
Second or any other particular choice of law method.45

Two rather cryptic remarks made by the court in Sullivan complete
the supreme court's contributions to Louisiana choice of law methodology. In passing, the court implied that the choice of law might be
affected by a change in the domicile of one or both parties to the suit
after the occurrence of the tort but before commencement of the action.46
The court also indicated that it would consider "evidence and arguments
showing the relative interests" of the states involved, "not limited simply
to the domiciles of the parties."47 No explanation of any kind accom-
panied either of these statements. Since 1973 the court has denied writs
in four court of appeal cases,48 only one of which fit the Jagers fact/
law pattern,49 but has not itself spoken further on the matter of choice
of law in tort cases.

The Impact of Jagers

Early Cases

The vagueness of Jagers is reflected in the opinions of the courts
earliest called upon to follow it. In Trahan v. Girard Plumbing &
Sprinkler Co.,50 the court perceived Jagers as having established "the
'false conflict' exception to the lex loci delicti rule."51 Trahan presented
a simple false conflict, however, and the court did not hesitate to hold
the Texas guest passenger statute inapplicable in an action by a Louisiana
guest against a Louisiana host, owner and liability insurer and arising
from an accident which had occurred in Texas.

45. In this respect, the court seems to endorse a "grouping of contacts" or "center
of gravity" approach, which "deals in broad generalities about the 'interest' of a state
in applying its law without an inquiry into how the 'contacts' in question relate to the
include in the analysis contacts "related only tangentially to the underlying conflict of
law and policy," and may choose the applicable law based on the sheer quantity of
contacts with one state or the other. Kay, supra note 31, at 537-38.
46. 278 So. 2d at 32. See Allstate Ins. Co. v. Hague, 449 U.S. 301, 319, 101 S.
Ct. 633, 643-44 (1981). Neither the Due Process Clause nor the Full Faith and Credit
Clause precludes a state from asserting an interest simply because of the plaintiff's post-
ocurrence establishment of a domicile in that state.
47. 278 So. 2d at 32 n.2.
48. See infra notes 50, 52, 58 and 143.
49. See text following infra note 51.
50. 299 So. 2d 835 (La. App. 4th Cir.), writ refused, 302 So. 2d 618, 302 So. 2d
619, 302 So. 2d 620 (La. 1974) (result correct).
51. 299 So. 2d at 830.
In *Hobbs v. Fireman’s Fund American Insurance Cos.*, another early post-*Jagers* decision, the court recognized that *Jagers* had overruled the """lex loci"""" principle,""" but distinguished *Jagers*, primarily because in *Hobbs* Louisiana was the """situs of the tort."""" The estranged wife of a Mississippi domiciliary, having acquired a domicile in Louisiana, had negligently injured a Mississippi domiciliary """at least temporarily residing in Louisiana,"""" and the plaintiff sought to hold the husband liable for his wife’s tort under Louisiana’s community mission doctrine. The defendant urged the court to apply Mississippi law to this """family issue,"""" but the court applied Louisiana law, remarking that """"Louisiana has substantial interest in the application of its laws when the conduct of family business within its borders results in injury in Louisiana."""" While this result may be defensible under either interest analysis or the Restatement Second, neither method was cited by the court. Instead, the application of Louisiana law was justified by Louisiana’s """substantial interest in the application of its laws,"""" an interest apparently derived from purely factual considerations: the occurrence of both the tortious conduct and the injury in Louisiana. No reference at all was made to the policies underlying the competing laws of the two states, nor to any of the Restatement Second’s principles.

A third court of appeal viewed *Jagers* as indicating that """"the 'interest analysis' theory for resolving choice of law problems in Louisiana is now the proper approach."""

*Sutton v. Langley* involved a suit by a Texas guest passenger against a Texas host, the plaintiff’s uninsured motorist insurer and several Louisiana residents and insurers for personal injuries sustained in an accident which had occurred in Louisiana. The uninsured motorist insurer raised the Texas guest passenger statute as

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52. 339 So. 2d 28 (La. App. 3d Cir. 1976), application denied, 341 So. 2d 896 (La. 1977) (result correct).
53. 339 So. 2d at 37.
54. Id.
55. Id.
56. The doctrine makes available the assets of both the wife (agent) and the husband (principal) to satisfy the tort claim, thereby providing greater protection for the injured person. Louisiana could assert a legitimate interest in compensating its resident, who may otherwise be unable to pay those who have furnished him medical or other services, or who may become a public charge. See B. Currie, supra note 17, at 294. If Louisiana truly has an interest here, then, under interest analysis, Louisiana law will govern, even if the existence of a Mississippi interest would create a true conflict. See B. Currie, supra note 27, at 119, 189.
57. See Restatement Second § 174 comments (b), (c) and (e). The husband had authorized his wife to care for the family in Louisiana; thus that state had a significant relationship with the parties and events.
59. 330 So. 2d 321 (La. App. 2d Cir. 1976).
a bar to the suit. "Without resorting to lex loci delicti reasoning," the court decided to apply Louisiana law because Louisiana's "governmental interests" were found to "outweigh" those of Texas. In the court's estimation, the guest statute issue did not present a false conflict because Texas had "an interest in protecting the awards of accident victims residing in that state," while Louisiana had an "interest in governing awards of victims of accidents occurring on its highways and, more importantly, involving other Louisiana residents . . . [especially] when those out-of-state residents voluntarily choose Louisiana courts as the forum." The anti-collusion policy underlying the Texas guest passenger law would not, according to the court, have been advanced by the application of the Texas rule in the case, because "such a policy is primarily concerned only with suits brought in the guest passenger states affecting torts, guests, and insurance companies subject to the jurisdiction of the guest passenger state." Accordingly, the policy behind the guest passenger law did not give rise to an interest on the part of Texas in having that law applied. While the result in Sutton is not insupportable, the reasoning in the case is highly questionable. The court's conclusion regarding the anti-collusion policy underlying the Texas rule of law was clearly ill-founded. There is no support for the court's proposition that the policy of protecting Texas insurers from fraud reflected in the Texas guest statute is pertinent only when the suit is brought in Texas courts. Furthermore, giving weight to the plaintiff's choice of a Louisiana forum is most certainly not a sound practice,

60. Id. at 326.
61. Id. at 327.
62. Id.
63. Id.
64. In support of this proposition, the court cited Justice Sanders' dissent in Johnson, 236 So. 2d at 226. Justice Sanders had relied on Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966), a simple Babcock-type of false conflict case. New Hampshire was interested because its rule of law was rationally applicable to New Hampshire guests, hosts and insurers issuing policies covering vehicles in New Hampshire. The protective law of the state of injury was not rationally applicable because no person to whom that policy was directed was involved in the suit, not because the suit was not in the courts of that state. The citation of Clark is revealing. That case was decided by applying the "better rule of law" of the forum. It has been charged elsewhere that an avowed forum interest in compensating non-resident tort victims actually reflects the court's desire to apply the "better rule of law" of the forum. See Comment, Stacking the Deck: Wisconsin's Application of Leflar's Choice-Influencing Considerations to Torts Choice-of-Law Cases, 1985 Wis. L. Rev. 401. Of course, even Currie was prepared to accept "rational altruism" as the product of judicial desires to shun even constitutionally permissible discrimination against non-residents. See B. Currie, supra note 27, at 191 n.8, 446. But at the price of intruding on the policy of a sister state, as was done in Sutton. See Hancock, Policy Controlled State Interest Analysis in Choice of Law, Measure of Damages, Torts Cases, 26 Int'l & Comp. L. Q. 799, 816 (1977).
since this encourages forum shopping.\textsuperscript{64} Strangely, even though the court found that Texas was not interested in preventing recovery on the basis of the policy behind its guest statute, the court somehow discerned a true conflict of laws, apparently because Texas' "interest" in "protecting the awards" of its resident accident victims somehow conflicted with Louisiana's interest in governing the effects of accidents occurring within its borders. The \textit{Sutton} court seemed to perceive a conflict between, on one hand, Texas' "interest" in regulating the conduct of its resident and, on the other hand, Louisiana's "interest" in governing events occurring in Louisiana. Thus, factual contacts, irrespective of the conflicting rules of law at issue, gave rise to "interests" in the sense of a claim to regulatory authority over persons or events. With all due respect, this is not the kind of interest contemplated by governmental interest analysis.\textsuperscript{66} Since the court cited no authority other than \textit{Jagers} as support for its "interest-weighing" approach,\textsuperscript{67} or for the conclusion that it reached,\textsuperscript{68} and in the absence of any explanation of how Louisiana's interests outweighed those of Texas, the result in \textit{Sutton} is hard to understand.\textsuperscript{69}

The \textit{Jagers} decision caused difficulty for the federal courts as well as for the Louisiana courts of appeal. After an extensive analysis of \textit{Jagers}, the United States Fifth Circuit Court of Appeals, in \textit{Brinkley & West v. Foremost Insurance Co.},\textsuperscript{70} concluded that "the interest analysis principles embodied in the Second Restatement are the applicable conflicts law of Louisiana."\textsuperscript{71} In \textit{Brinkley}, a Louisiana corporation sued a Michigan corporation, alleging tortious interference by the defendant with contractual relations between the plaintiff and parties located in eighteen states, including Louisiana. Subagency contracts had been entered into with domiciliaries of the various states and were to have been

\begin{itemize}
\item \textsuperscript{65} Discouraging forum-shopping is an important value in choice of law. See von Mehren, Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology, 88 Harv. L. Rev. 347, 350 (1974).
\item \textsuperscript{66} The Texas law cannot rationally be viewed as reflecting a policy of preventing its residents from recovering for injuries; the policy is one of protection, whether of host-driver or his insurer. Therefore, if Texas is interested in governing the award of its resident tort victim, under the reasoning of the \textit{Sutton} court, the interest must have been one based on considerations other than substantive policy. It is possible, though not likely, that Texas might have been interested in preventing suits by "ungrateful" guests or in giving priority in recovery to persons injured in cars not driven by the negligent host. See Cavers, The Choice-of-Law Process 296-98 (1965).
\item \textsuperscript{67} According to B. Currie, supra note 27, at 278, weighing of state interests is antithetical to interest analysis.
\item \textsuperscript{68} The result is supported by Restatement Second \S 146 [see infra note 142 for text].
\item \textsuperscript{69} But see infra note 254 and accompanying text.
\item \textsuperscript{70} 499 F.2d 928 (5th Cir. 1974).
\item \textsuperscript{71} Id. at 932.
\end{itemize}
performed in the state of the subagent's domicile. Of the states involved, only Louisiana barred actions for tortious interference with contractual relations.\textsuperscript{72} Using an approach substantially in accord with governmental interest analysis, the court first determined that it was not faced with a false conflict. The Louisiana law reflected a policy of "protecting the labor force of the state from the impediments to job mobility,"\textsuperscript{73} while the laws of the other states embodied policies related to the protection of contracts performable within their borders.\textsuperscript{74} Since the case involved a member of the Louisiana labor force as well as contracts performable within the other states, every state had an interest in having its law applied to the issue and a true conflict existed.\textsuperscript{75}

In order to resolve the true conflict that it had detected, the court considered the policy factors in Section 6 of the Restatement Second; however, the court employed the Restatement in a manner closely resembling governmental interest analysis.\textsuperscript{76} In the court's view, most of the Section 6 factors were not significant in tort cases, so it concentrated on the policies and interests of the "interested" states.\textsuperscript{77} The court opted for the more sensible result of permitting the plaintiff to maintain its action with respect to all of the contracts except those made and performable in Louisiana by Louisiana subagents.\textsuperscript{78} The court reasoned correctly that Louisiana had no interest in having its law applied with respect to contracts and persons not within the reasonable scope of the policy underlying the Louisiana rule of substantive law:

\textsuperscript{72} Id. at 934.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 934-35.
\textsuperscript{75} Id. at 932.
\textsuperscript{76} Other courts utilizing the Restatement have done the same by concentrating their analyses on factors (b) and (c) of § 6. See Kay, supra note 31, at 560. On occasion, courts have spoken of interest analysis as being "contemplated in" the Restatement Second. See, e.g., Johnson v. Spider Staging Corp., 87 Wash. 2d 577, 580, 580 P.2d 997, 999 (1976); cf. Brinkley, 499 F.2d at 932 (Restatement Second and "state interest theory" considered "generally consistent"). See also infra note 77.
\textsuperscript{77} The court considered only factors (b), (c) and (g) of § 6 to be important in tort cases. 499 F.2d at 932. See also id. at 933:

A particular contact is important . . . only insofar as it is relevant to this specific domestic policy at issue. Thus, instead of tallying each activity within the state . . . courts are to look first to the purpose behind the state rule and then the aspects of the transaction that further it.

\textsuperscript{78} 499 F.2d at 935 n.28. Factors (b) and (g) pointed to the application of Louisiana law. Id. at 935. The court obviously felt that the application of Louisiana law would produce unjust results.
Louisiana is a part of the Union and there is no indication that under its new rule it would find any difficulty either in ascertaining what the protectable interests are in each of the 18 sister states or that recognizing such substantive 'foreign' rights . . . would frustrate or infringe in any way on its capacity fully to effectuate its own contrary local substantive rule in a local Louisiana contest. On the contrary . . . a Louisiana court . . . would not hold that the Louisiana genealogy of a rule springing from the highly personalized relationship of master and servant would compel it to carry this over to defeat a claim for tortious disruption of a modern, more complex commercial arrangement.79

From a methodological view-point, Brinkley's contribution lies in delineating the scope of the two methodologies alluded to in Jagers. According to Brinkley, interest analysis is used to detect false conflicts and the Restatement Second is reserved for the resolution of true conflicts. This so-called "Jagers-Brinkley approach" is nowhere more clearly illustrated than in Ardoyno v. Kyzar.80 The plaintiffs in Ardoyno were Louisiana attorneys who had executed in Louisiana a contract to represent a Mississippi domiciliary in Louisiana courts. It was alleged that the defendant, also a Mississippi domiciliary, had interfered with this contractual relation through slanderous remarks made to the plaintiffs' principal in Mississippi. Mississippi law recognized a cause of action for tortious interference with contractual relations and permitted awards of punitive damages in slander cases, while Louisiana did not. The court determined that Louisiana alone had an interest in having its law applied to the contractual interference issue. The policy reflected in Louisiana's rule of law was the protection of mobility of the labor force within its borders. This policy was advanced by the application of Louisiana law to the issue because the employment contract was made and performable in Louisiana. Mississippi's policy of protecting employment relations would not have been furthered by the application of Mississippi law because, in most cases, Mississippi's "interest in protecting employment contracts from interference is necessarily limited to contracts that will be performed in Mississippi or executed there," since "[i]t is only with regard to such contracts that Mississippi can promote stability of contractual relations in Mississippi, or the commercial attractiveness of

79. Id. at 935. The court seems to have been motivated by one of Professor Leflar's "choice-influencing considerations": application of the "better rule of law." This concept recognizes that courts may wish to suppress laws which are "anachronistic, behind the times, a 'drag on the coattails of civilization.'" See R. Leflar, American Conflicts Law 214 (3d ed. 1977).
Mississippi as a place to contract.” Since Louisiana was the only interested state, the issue presented a false conflict and Louisiana law was applied. There was “no need to resort to the provisions of the Second Restatement to resolve this conflict—for no conflict exists.”

The court then addressed the claim for punitive damages for the slander, following the same approach as for the interference issue, but finding a true conflict. Mississippi's policy of protecting victims by allowing punitive damages would not have been advanced by the application of Mississippi law because that state had “no interest in extending the protection of its law to a Louisiana plaintiff,” but was interested “only in protecting Mississippi domiciliaries.” Nevertheless, Mississippi did “maintain an interest in preventing intentional torts committed, and causing injury, within its boundaries.” No interest on the part of Louisiana in the application of its law to this issue could be supported by a policy of protecting defendants from speculative punitive damages, since the defendant was from Mississippi; however, the court assumed that “Louisiana's interest is in protecting the integrity of its judicial system, rather than domestic defendants, from what it might consider inherently speculative awards.”

Only after the court, through interest analysis, had found that both states were interested in the issue of punitive damages, and that therefore a true conflict existed with respect to that issue, did the court turn to the Restatement Second. Under the rule provided in Section 149 of the Restatement Second, the law of Mississippi, the place where the defamatory statement was spoken, was presumed to govern, unless the factors listed in Section 6 pointed to the law of another jurisdiction as that of a state with “a more significant relationship ... to the occurrence and the parties.” Unlike the Brinkley court, the court in Ardoyno found that all of the Section 6 factors were helpful. On evaluation, “qual-
iteratively as well as quantitatively," the policy factors reaffirmed the presumptive choice of Mississippi law.\textsuperscript{88} This choice furthered Mississippi's policy of deterrence, served the "needs of the interstate system" in that, "by deferring to Mississippi law, Louisiana would promote mutual respect and harmonious relations amongst the sister states,"\textsuperscript{89} and protected justified expectations "that conduct in one's own state will be regulated by the law of the state."\textsuperscript{90} The "basic policies underlying the particular field of law" were served because First Amendment considerations were promoted "by applying the law of the place of publication, thereby avoiding a complex of litigation under varying and unanticipated law."\textsuperscript{91} Conversely, "[o]nly ease of judicial administration . . . and the relevant policies of the forum" would have been served by the application of Louisiana law.\textsuperscript{92} Furthermore, the recent enactment of a Louisiana statute authorizing awards of punitive damages in slander cases indicated that Louisiana currently was more interested in deterring slander than in avoiding speculative awards of damage.\textsuperscript{93} Since analysis of the Section 6 factors did not indicate that Louisiana had a "more significant relationship" to the occurrence and the parties than did Mississippi, the presumptive choice under Section 149, the plaintiff's claim for punitive damages was allowed to stand.

As though it were ill at ease with a value judgment the effect of which was to defeat a strongly held forum policy, the court bolstered its conclusion by reference to "comparative impairment,"\textsuperscript{94} an approach to choice of law which seeks "maximum attainment of underlying purpose by all governmental entities"\textsuperscript{95} by resolving true conflicts through the evaluation of "normative criteria," rather than through the imposition of "super-value judgments."\textsuperscript{96} Of three identifiable governmental interests at stake in the case, two were advanced by the application of Mississippi law, while only one interest was defeated. Advanced were Louisiana's interest in protecting its domiciliaries from slander and Mississippi's interest in deterring slander committed and causing injury within

\textsuperscript{88} Id. at 84. The emphasis was on quality, not quantity, for the court realized that it "ought not merely tally up how many of these factors favor each state." Id.

\textsuperscript{89} Id. at 83.

\textsuperscript{90} Id.

\textsuperscript{91} Id. at 83-84.

\textsuperscript{92} Id. at 84.

\textsuperscript{93} Id. (citing La. Civ. Code art. 2315.1 (repealed by 1980 La. Acts No. 180, § 3)). The court was not giving that statute retroactive effect, but instead was of the view that policy is determined as of the time of the litigation and not the transaction giving rise to it. 426 F. Supp. at 84 n.21 (citing B. Currie, supra note 27, at 643).

\textsuperscript{94} This approach is the invention of Professor William F. Baxter. See Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1 (1963).

\textsuperscript{95} Id. at 12.

\textsuperscript{96} See id. at 5-9.
its borders. Defeated, or subordinated, was Louisiana's interest in avoiding speculative damages. 97

It is not necessary to agree with every aspect of the court's application of comparative impairment in order to applaud its attempt to explain its choice through an analysis which does not necessarily involve an arbitrary choice between evenly balanced state interests. 98 Nor was such an approach unprecedented; the same notion was present in the Brinkley decision, which left unimpaired Louisiana's "capacity fully to effectuate its own ... rule in a local Louisiana contest." 99

Another contribution to Louisiana choice of law methodology was made by the court in Commercial Union Insurance Co. v. Upjohn Co., 100 a case decided less than a year before Ardoyno and in a fairly consistent manner. In Commercial Union, a New York insurance company brought a products liability action against a Delaware corporation, alleging that defective foam insulation manufactured and marketed by the defendant outside Louisiana had aggravated fire damage to a building in Louisiana owned by the plaintiff's insured. The plaintiff sought recovery of insurance claims paid by it, attorney's fees and punitive damages. When the defendant moved to strike the claim for punitive damages on the ground that Louisiana law did not permit recovery of such damages in products liability actions, the plaintiff argued that the law of the place of manufacture ought to govern the issue.

The court first determined that it was "faced with a true conflicts question," a conclusion which, consistently with Brinkley and Ardoyno, the court viewed as a prerequisite to the application of "Restatement principles" to a choice of law problem. 101 Though the method by which the court determined that the issue presented a true conflict is not clear because of the organization of the opinion, it appears not to differ significantly from that used in Ardoyno. The state of manufacture had not yet been established; however, the court assumed for purposes of the motion before it that the law of that state would permit punitive

97. 426 F. Supp. at 84.
98. Professor Baxter disagreed with Currie's view that forum law should automatically be applied in true conflicts. See Baxter, supra note 94, at 8-9.
99. 499 F.2d at 935.
101. Id. at 456 n.4. However, the court made a puzzling statement, indicating that it viewed "interest analysis" and the Restatement Second as essentially the same approach: "We perceive the Jagers decision as a negative pregnant; that Louisiana courts will not apply Restatement principles to a false conflicts issue implies that interest analysis will control a true conflicts issue." Compare the clear restatement of the Ardoyno approach in Southern Ins. Co. v. Consumer Ins. Agency, Inc., 442 F. Supp. 30, 31 (E.D. La. 1977): "The Louisiana courts use 'interest analysis' to resolve 'false conflicts' and resort to the Restatement to resolve 'true conflicts.'"
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damages. Such a law evidenced a policy of deterrence of tortious conduct within the borders of the state of manufacture, while the Louisiana prohibition of punitive damages was rooted in a strong "public policy" against the infliction of criminal punishment in a civil action. The policies of both states were relevant in the circumstances; therefore, both states were interested and there was a true conflict with respect to the issue.

Applying the Restatement Second to the true conflict, the court first noted the distribution of the Section 145 contacts and the provision in Section 147 for the presumptive application of the law of the state where the injury occurred in actions concerning injuries to tangible things. The court observed that, while the choice of law ought not to be determined "by a mere tallying of contacts," Sections 145 and 147 indicated that Louisiana "clearly has a significant relationship to the occurrence," so that the law of that state should be applied "unless the state of manufacture has a greater interest in the application of its law under § 6 principles." Without undertaking a detailed analysis of the Section 6 factors as would the Ardoyna court, the court concluded that, in light of the strong Louisiana policy against punitive damages, there was no demonstration that the state of manufacture had an interest in the issue strong enough to overcome the presumed applicability of Louisiana law. The court then announced the following rule:

We hold, therefore, that where Louisiana has a significant relationship to a tort action, together with a well-reasoned, long-standing rule of law relevant to public policy, the party who would have us derogate from Louisiana law to that of another state must bear the burden of proving a significant relationship and interest in the foreign state so compelling as to transcend Louisiana's interest in the application of its substantive law.

Conceding that "this burden may be insurmountable," the court justified its imposition on the ground that it furthered "ease in determination and application of the law" as well as "the relevant policies of the

102. 409 F. Supp. at 457 n.5.
103. Id. at 458 & n.7. Cf. supra note 85 and accompanying text.
104. Restatement Second § 147 provides:

§ 147. Injuries to Tangible Things

In an action for an injury to land or other tangible thing, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence, the thing and the parties, in which event the local law of the other state will be applied.

105. 409 F. Supp. at 457.
106. Id. at 458.
forum state,"107 two of the three Section 6 factors that the court, like
the Brinkley court, found to be most important in tort actions.108 The
emphasis on these two Section 6 considerations appears to have been
prompted by the court's perception that certain language in Jagers
indicated a preference for the application of Louisiana law in certain
circumstances.109

The Post-1976 Cases

In terms of methodology, there has been little new in Louisiana
jurisprudence since Ardoyno. Thus, the later cases are presented hereafter
along topical rather than methodological lines. The trend in recent years
seems to have been toward more reliance upon the Restatement Second
and less upon interest analysis. Because of this, the following discussion
of the post-1976 cases groups those cases according to categories estab-
lished by the Restatement. Three Restatement classes of issues are rep-
resented solely by cases already discussed. Section 161110 applies to
defenses, including host-guest immunity, the issue in Trahan and Sut-
ton.111 Section 169112 governs intra-family immunity and is applicable to
cases like Jagers.113 Finally, issues relative to vicarious liability, the
problem in Hobbs, are governed by Section 174.114

Damages

More cases fall within this category than any other. Understandably,
inasmuch as Louisiana is one of a small minority of American juris-
dictions which either prohibit or greatly restrict the availability of punitive
damages in civil cases,115 this has been the single most litigated issue in
Louisiana tort choice of law cases.

107. Id. at 458-59. Currie was cited for the proposition that "a forum state with a
significant interest always should adhere to its substantive law." Id. n.8.
108. Id. at 456.
109. Id. at 458 n.9, referring to language quoted supra note 29.
110. Restatement Second § 161 provides:
    § 161. Defenses
    The law selected by application of the rule of § 145 determines what defenses
to the plaintiff's claim may be raised on the merits.
111. Id. comment (e). § 161 comment (e) and § 145 comment (d) suggest that the
law of the common domicile may be applied to these issues.
112. See supra note 37 for text of § 169.
113. See text accompanying supra notes 17 and 37.
114. Restatement Second § 174 provides:
    § 174. Vicarious Liability
    The law selected by application of the rule of § 145 determines whether one
person is liable for the tort of another person.
See supra note 60 and accompanying text.
115. See Ricard v. State, 390 So. 2d 882 (La. 1980); M. Minzer, J. Nates, C. Kimball
After Commercial Union and Ardoyno, the first case to consider punitive damages was Cooper v. American Express Co. In Cooper, an Alabama plaintiff sued a Louisiana collection agency for invasion of privacy, alleging the defendant agency had made a number of insulting, threatening, abusive or profane telephone calls to the plaintiff and to her Alabama employer. The calls had been made from Louisiana to Alabama. In a very brief opinion, the court first cited Brinkley as holding that "the interest analysis principles embodied in the Second Restatement are the applicable conflicts law of Louisiana," then proceeded to apply the Restatement rules without engaging in any preliminary false conflict inquiry. Observing that under Section 152 of Alabama law was presumptively applicable to an action for an invasion of privacy which occurred in Alabama, the court concluded, without any explanation, that the Section 6 factors did not point to Louisiana as a state with a more significant relationship to the issue and affirmed the jury's award of punitive damages.

The result in Cooper is not inconsistent with Ardoyno; however, one may doubt whether the court that decided Commercial Union would have found that the burden of proof imposed in that case was satisfied. The Cooper result also strikes one as perfectly sound and reasonable. A Louisiana citizen who injects himself into another state and causes harm there through his unlawful acts, though these were committed in Louisiana, ought not to be shielded from the sanctions imposed by the state into which he intentionally has directed his activities. In terms of interest analysis, a "moderate or restrained interpretation" of Louisiana's policy against awards of punitive damages is appropriate here. Under Restatement principles, as the court in Cooper held, Louisiana does not have a more significant relationship to the parties and occur-

116. 593 F.2d 612 (5th Cir. 1979).
117. Id. at 613.
118. Restatement Second § 152 provides:
   § 152. Right of Privacy
   In an action for an invasion of a right of privacy, the local law of the state where the invasion occurred determines the rights and liabilities of the parties, except as stated in § 153, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.
119. 593 F.2d at 613.
120. Cf. text accompanying supra notes 106-09.
121. See D. Cavers, The Choice-of-Law Process 140-41 (1965) (imposing the higher standard on the defendant limits impairment of the "system of physical and financial protection" provided by the state of injury).
rences than does Alabama in a case like this.\textsuperscript{123} What is unfortunate about the \textit{Cooper} case is that the court did not explain, in terms of Section 6, how it reached its conclusion.

\textit{Ashland Oil, Inc. v. Miller Oil Purchasing Co.},\textsuperscript{124} involved a claim against multiple defendants and grounded on several legal theories, arising out of a fire at the plaintiff's Kentucky refinery and the contamination of plaintiff's crude oil stock. Both the fire and the contamination were allegedly caused by the injection, in Mississippi, of hazardous waste into the plaintiff's pipeline. Defendant A, a Delaware corporation doing business in Louisiana, had undertaken to dispose of hazardous waste produced in Louisiana. Unable to do so using its own facilities, this defendant contracted with defendant B, a Louisiana domiciliary, to haul the waste away and ultimately to mix it with crude oil stock for injection into a pipeline, thereby hopefully rendering the waste untraceable back to A. Defendant B had to hire defendant C, also a Louisiana domiciliary, to provide the trucks and drivers necessary to move the waste; however, C was unaware of the others' plan and was not informed of the nature of the material. Defendant A did not learn that the waste had been taken to Mississippi until after the movement had been accomplished, the decision to dump the waste in this state having been made by B alone. The material passed through the hands of defendants D and E, both domiciled and acting entirely within Mississippi, before its introduction into the plaintiff's pipeline. The plaintiff sought punitive damages as against all five defendants.

Citing \textit{Brinkley} and \textit{Cooper}, and without engaging in any preliminary false conflict analysis, the court analyzed the issue with respect to each defendant solely under Section 145.\textsuperscript{125} Observing that the purpose of a rule of law authorizing awards of punitive damages, as did Mississippi law in this case,\textsuperscript{126} is aimed at deterring tortious conduct, the court determined the law applicable to each defendant according to what may be described as the "center of gravity of conduct" of each.

\textsuperscript{123} Restatement Second § 171, applicable to the issue of damages, leaves the choice of law up to the general principle of § 145; however, comment (b) suggests that the place of conduct and injury will usually be the state with the most significant relationship. Much of the reasoning in \textit{Ardoyno} is pertinent to the problem in \textit{Cooper}, with the exception that the defendant in \textit{Cooper} was not entitled to a legitimate expectation that "conduct in one's own state will be regulated by the law of that state," since the defendant intentionally directed his conduct into another state. Cf. text accompanying supra note 90.

\textsuperscript{124} 678 F.2d 1293 (5th Cir. 1982).

\textsuperscript{125} Id. at 1303-06. The seemingly relevant § 147 was ignored. The court plunged directly into § 145 via § 171, citing and then disregarding § 6.

\textsuperscript{126} Since Kentucky and Mississippi law were the same on this point, the court followed § 145, comment (i) and treated the contacts with either state as grouped in a single state. 678 F.2d at 1306 n.14.
The court held that Louisiana law governed as to defendants A and C. With regard to A, the court based its determination on the grounds that "the object or purpose of [A's] conduct was not to do damage to [plaintiff] in Mississippi, but simply to rid itself of a business burden as expediently as possible," and that A had not chosen "the State of Mississippi as the situs of the dump by preconcertment." Finally, "[e]xcepting one brief excursion into Mississippi by two [of A's] employees, all of the egregious misconduct of this company . . . occurred in Louisiana." 127 As a matter of quantity, C's contacts were definitely centered in Louisiana: "[C] is a Louisiana domiciliary. The agreement to deliver [the waste] was a Louisiana contract, and [C] was paid . . . in Louisiana. Although his trucks did travel into Mississippi, upon completion of the deliveries, they immediately returned to Louisiana." 128

As to defendant D, "a Mississippi concern that acted only in Mississippi," and defendant E, which was "domiciled in Mississippi [with] the totality of its contacts . . . centered in Mississippi," the choice of Mississippi law was relatively easy. 129 With respect to defendant B also, the court applied Mississippi law:

Although the preponderance of [B's] misconduct occurred in Louisiana, he knowingly transported the substances into Mississippi . . . fully cognizant that it would enter a pipeline. The integrity of the business community within Mississippi's jurisdiction was violated by [B's] wanton enterprise. The purpose of Mississippi's exemplary damages rule would be accomplished by applying the rule . . . . 130

While the results in Ashland Oil are not insupportable, the court's reasoning is perplexing and less than convincing. "Policy" considerations were almost entirely subordinated to territorial factors, with policy, or "purpose," being reserved to break the tie in territorial contacts existing with respect to those defendants whose tortious conduct had taken place in different states. The then strong Louisiana policy against awards of punitive damages was never mentioned. 131 Furthermore, the distinction between quantity and quality of contacts was obscured, since the relevance of particular contacts was almost never explained in terms of their relation to the policies reflected in the rules of law of the respective states. For example, defendant C's trucks were purposefully directed

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127. 678 F.2d at 1305.
128. Id. at 1306.
129. Id.
130. Id.
131. Louisiana law now permits awards of punitive damages when a defendant is guilty of "wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances." La. Civ. Code art. 2315.3.
into Mississippi, but this is somehow of diminished importance because "they immediately returned to Louisiana." 132 It is also hard to see the relevance of the fact that C was paid in Louisiana, and to understand the distinctions drawn between A and B. Both A and B "intended" the consequences of their conduct; 133 the only real difference between the two was that B intended, and in fact caused, those consequences to be felt in Mississippi, while A apparently had no preference as to the situs of the dump, so long as the chemicals could not be traced back to it. Perhaps the court felt that A could not reasonably have foreseen that the waste would be taken by B to Mississippi, and that A therefore should not have to respond to the damages imposed by the law of that state. 134

In Karavokiros v. Indiana Motor Bus Co., 135 an Ohio citizen working in Louisiana was injured there through the allegedly gross negligence of a bus driver of uncertain domicile who was employed by an Indiana corporation which, it was alleged, had negligently entrusted its vehicle to the driver in Indiana. Indiana and Ohio laws permitted awards of punitive damages for gross negligence or willful misconduct, and the plaintiff sought to recover punitive damages under the law of one or the other state.

Following the Ardoyno approach, which the court described as "an 'interest approach' spelled out in the Second Restatement," involving "two separate tests," 136 the court first determined that it was faced with a true conflict. Louisiana had the familiar interest in preserving the integrity of its judicial system, while Indiana was interested in discouraging tortious conduct occurring within its borders. 137 Louisiana had a further interest in protecting a non-domiciliary who does business within the state from a speculative damage award. 138 Turning to the Restatement Second to resolve the true conflict, the court began with a quantitative analysis of the Section 145 contacts, which produced no clear answer to the problem. The court then observed that, under Section 146, Louisiana law was the presumptive choice. 139 Since the place of injury could

132. This is the sort of analysis typical of the "center of gravity" approach. See supra note 45.
133. 678 F.2d at 1309.
134. Cf. D. Cavers, supra note 121.
136. Id. at 386.
137. Id. at 386-87.
138. Id. at 387 n.1 (citing B. Currie, supra note 27, at 704-05).
139. 524 F. Supp. at 388. Restatement Second § 146 provides:

§ 146. Personal Injuries
In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect
not be characterized as "fortuitous," the presumptive choice was ac-
corded significant weight. Furthermore, because the rule of law in
issue was one concerned with discouraging wrongful conduct, and be-
cause significant wrongful conduct had occurred in Louisiana, that state's
law was considered appropriately applied to all of the alleged negligence:

Finally, while the alleged negligent entrustment did not occur
in Louisiana, Louisiana has an interest in discouraging a bus
company from hiring incompetent drivers who will routinely
pass through Louisiana. Yet, despite its interest in controlling
the conduct of the parties, Louisiana has apparently concluded
that the need for regulating such behavior does not require the
use of punitive damages . . . . Under the circumstances . . . I
believe that the State's judgment must be respected. 141

Remarking that its conclusion was similar to that reached in Commercial
Union, the court denied the claim for punitive damages. 142

Lee v. Ford Motor Co., 143 was a wrongful death and survival action
brought against the manufacturer and seller of an automobile which
had suddenly shifted into reverse, killing the plaintiff's decedent. Relying
on the law of Georgia, the place of manufacture, the plaintiff claimed
punitive damages. The court unquestioningly applied the analysis first
used in Ardoyno:

It is now well-settled that the choice of law rule applicable
in tort in Louisiana is a form of 'interest analysis' applying the
'most significant relationship' approach of the Restatement (Sec-
ond) of Conflict of Laws . . . . Interest analysis is a two step
process. We must first determine whether a true or false conflict
exists. If a false conflict exists, the law of the state that has
the exclusive interest is applied, and the second step is unnec-

140. 524 F. Supp. at 388-89.
141. Id. at 389. The reader will note that, although the court indicated that it was
following Brinkley and Ardoyno, once the true conflict was uncovered, no § 6 factors
were ever mentioned again. Cf. supra notes 79-81, 90-96. The court instead focussed on
the spatial orientation of the § 145 contacts. Without disputing the correctness of the
result in this case, one may question the soundness of the court's reasoning. The Louisiana
rule does not reflect a policy of encouraging wrongful conduct; it is not aimed at conduct
at all. Cf. supra notes 85, 103, and accompanying text; D. Cavers, supra note 121, at
152-53.
142. 524 F. Supp. at 389 n.4 (citing Commercial Union Ins. Co., 409 F. Supp. 453,
for the "burden of proof" rule announced in that case).
essary. If a true conflict exists, the law of the state with the most significant contacts is applied.\textsuperscript{144}

Louisiana's interest in preserving the integrity of its judicial system and Georgia's interest in deterring negligent manufacturing within its borders gave rise to a true conflict, so the court resorted to the Restatement Second. Arriving at Section 145 via Section 171, the court proceeded to evaluate the various factual contacts. All of the parties were domiciled, incorporated or did business in Louisiana, where the death had occurred. Although the tortious conduct had occurred in Georgia, the court found that, "since Ford is a large corporation which assembles its products all over the country[,] [t]he fact that the particular product that injured this plaintiff came from Georgia is fortuitous and of relatively little importance."\textsuperscript{145} Having determined that all weight contacts were centered in Louisiana, the court had little trouble in concluding:

Application of Louisiana law would not violate the relevant principles of § 6. Comity does not require deference to a state with fewer significant contacts. Louisiana, as the forum state chosen by the plaintiff, has the right to favor its own policies over the policies of a state with a less significant relationship to the issue. Denying punitive damages does not violate the aims of tort law because punitive damages are by definition beyond just compensation of the injured plaintiff—the goal of tort law as expressed in La.C.C. Article 2315. Certainly [sic], predictability and uniformity of result favor application of the forum's law because that is the law the forum knows best and is best equipped to apply. Likewise, ease in determination and application are factors favoring choice of forum law.\textsuperscript{146}

Without disputing the appropriateness of the result in \textit{Lee}, it can be said that the court's reasoning is neither consistent with \textit{Ardoyno} nor very plausible in a number of respects. The court converted the qualitative term "most significant relationship" to the quantitative "most significant contacts."\textsuperscript{147} That the defendant manufactured products in many states can hardly make the occurrence of its negligent conduct in

\textsuperscript{144}. 457 So. 2d at 194.
\textsuperscript{145}. Id. at 195.
\textsuperscript{146}. Id. at 195-96.
\textsuperscript{147}. See the allusions to "the state with the most significant contacts" and "deference to a state with fewer significant contacts," in text accompanying supra notes 144, 146. Other courts have understood that mere numbers of factual contacts are, of themselves, insignificant apart from their relation to the policies underlying competing rules of law. See supra notes 77, 88, text accompanying supra note 105.
Georgia "fortuitous." Georgia's interest in regulating Ford's conduct in Georgia was given little consideration by the court because Georgia was viewed as having "a less significant relationship to the issue"; however, this determination was reached by a counting of contacts completely insulated from "the issue" and from the Section 6 policies. The court incorrectly took a one-sided view of the "aims of tort law." Finally, while predictability and uniformity of result might be served by applying the law of the place with a particular contact, or group of contacts, with the events and parties, the same cannot be said for the application of the law of the forum, since different fora may have different rules of law.

*Prejudgment Interest*  

One case reported to date has addressed this issue. *Silver v. Nelson* was a suit by a New York resident against a Louisiana resident who had induced the plaintiff on several occasions to place diamonds owned by the plaintiff into the hands of a third party, who subsequently disappeared along with the diamonds. The plaintiff prevailed on the merits, with respect to some of the transactions, on a theory of negligent misrepresentation. The court found no conflict of laws with respect to the issue of liability, since the laws of every state connected with the case were substantially the same on this point. The court applied

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148. In discussing the New York courts' use of the "center of gravity" or "grouping of contacts" approach in guest passenger cases, Professor Cavers made an observation which is pertinent here: "Fortuity has become a conclusion of law. If a court considers that the significant contact in a case is, say, the place of the injury, then the fact that one or both of the persons involved were from another state becomes fortuitous." D. Cavers, supra note 121, at 311. Cf. the use of "fortuity" by the court in *Karavokiros*, in text accompanying supra note 140.

149. The idea behind this subsection of § 6 is that courts should seek to further interests that are shared by states with conflicting laws. See Restatement Second § 6, comment (b); Reese, The Second Restatement of Conflict of Laws Revisited, 34 Mercer L. Rev. 501, 512 (1983). Tort law which ties liability to wrongful conduct has, as at least a secondary goal, deterrence. See McDougal, Toward Application of the Best Rule of Law in Choice of Law Cases, 35 Mercer L. Rev. 483, 509 (1984); Fleming, Is There a Future for Tort?, 44 La. L. Rev. 1193, 1196-97 (1984).

150. The goal of uniformity reflects a policy of discouraging forum shopping, a policy which is not vindicated by application of the law of the forum. See Restatement Second § 6 comment (i).

151. Prejudgment interest is governed by Restatement Second § 171, which provides: § 171. Damages  
The law selected by application of the rule of § 145 determines the measure of damages.

See § 171 comment (c).


153. Id. at 513.
Louisiana law to the liability issue because Louisiana, the domicile of
the defendant and the situs of some of the tortious conduct, had an
interest in having its law applied to the facts of the case, and because
that state, as forum, was interested in applying its law "for purposes
of ease of application, familiarity, and sound judicial administration."\(^{154}\) New York and New Jersey, but not Louisiana, would have permitted
the recovery of punitive damages in this case. The court found that this
produced a true conflict; however, the conflict did not have to be resolved
because the court held on the merits of the case that, whatever the
applicable law, no award of punitive damages was warranted.\(^{155}\)

The issue of interest on the judgment presented an unavoidable true
conflict. While New Jersey's only contact with the case was properly
dismissed as "fortuitous,"\(^ {156}\) New York had an interest in compensating
the plaintiff and Louisiana had an interest in protecting the defendant.\(^ {157}\)
Applying Section 145 through Section 171, the court observed, without
explanation, that the contacts that it deemed most significant—the place
where the relationship between the parties as well as the negligent conduct
of the defendant was centered—were with Louisiana.\(^ {158}\) Some Section 6
factors were mentioned and briefly considered, but the basis for the
court's application of Louisiana law is clear from its citation of \textit{Com-
mmercial Union}, following the statement that "the plaintiff chose Loui-
siana as the forum state and has failed to meet his burden of proving
that New York has an interest in this particular issue which is so

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\(^{154}\) Id. at 513 (citing Home Ins. Co. v. Dick, 281 U.S. 297, 50 S. Ct. 338 (1930),
for the proposition that "[a] state would be absolutely prohibited from applying its own
law only in a false conflict situation, where, by definition, it has no interest in or minimum
contacts with the controversy." 610 F. Supp. at 513 n.8).

\(^{155}\) 610 F. Supp. at 523.

\(^{156}\) New Jersey's only contact with the case was that some of the negligent misre-
presentations and transfers of diamonds had occurred at the Newark airport, which had
been selected as a convenient meeting place by the parties. Id. at 511-12, 524.

\(^{157}\) Id. at 524.

\(^{158}\) Id. Not cited was the applicable § 148, which in cases in which "the plaintiff's
action in reliance took place in whole or in part in a state other than that where the
false representations were made," directs the court to consider the following contacts:
(a) the place, or places, where the plaintiff acted in reliance upon the defendant's
representations,
(b) the place where the plaintiff received the representations,
(c) the place where the defendant made the representations,
(d) the domicil, residence, nationality, place of incorporation and place of
business of the parties,
(e) the place where a tangible thing which is the subject of the transaction
between the parties was situated at the time, and
(f) the place where the plaintiff is to render performance under a contract which
he has been induced to enter by the false representations of the defendant.
compelling as to transcend Louisiana's interest in the application of its substantive law. 159

**Interest Entitled to Legal Protection**

Restatement Second Section 158 160 applies to issues such as the availability of a cause of action for interference with contractual relations and the requirement of physical impact as a prerequisite to the compensability of mental anguish. 161 Both *Brinkley* and *Ardoyno* involved actions for interference with contractual relations; however, in neither case was this section cited.

*Burns v. Holiday Travels, Inc.*, 162 one of the few recent Louisiana state court of appeal cases, stands in contrast to *Lee v. Ford Motor Co.*, 163 a case decided in the same year. The plaintiffs in *Burns* were Louisiana citizens who, while staying in the Florida hotel of one of the defendants, allegedly suffered mental anguish and physical discomfort when they were required to move to another part of the hotel because the air conditioning in the wing in which they were first lodged had broken down. When a hotel employee the next day advised the plaintiffs to depart for the airport earlier than was necessary, they again suffered due to an extended wait there. The trial court had granted summary judgment in favor of the defendant hotel corporation on the ground that Florida law governed the case and that under Florida law the damages claimed were not recoverable absent some physical impact. 164

On appeal, the fourth circuit cited Sections 6 and 145 of the Restatement as its guides for choice of law, insofar as the plaintiffs' action sounded in tort. 165 Any consideration given to Section 6 factors, however, was not articulated. The court made no attempt to discern the policies underlying the competing rules of law, and no false conflict step preceded the court's Restatement analysis. State "interests" were treated as synonymous with Section 145 contacts, and the court's decision to apply

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160. Interest Entitled to Legal Protection
   (1) The law selected by application of the rule of § 145 determines whether the interest affected is entitled to legal protection.
   (2) The applicable law will usually be the local law of the state where the injury occurred.

161. Restatement Second § 158 comment (a).

162. 459 So. 2d 666 (La. App. 4th Cir. 1984).

163. Discussed in text accompanying supra notes 143-50.

164. 459 So. 2d at 667.

165. Id. at 668. The court was unsure whether the action was properly characterized as one in tort or in contract, so it analyzed the problem under both characterizations, reaching identical results. Id.
Florida law seems to have rested solely on the overwhelming number of these contacts that lay with Florida, quite independently of any relevance that the contacts may have had in terms of Section 6 principles. Louisiana’s “only interest” in the case was that “plaintiffs are her citizens.”166 That the defendant operated some hotels in Louisiana did not “create an interest in Louisiana as to how a Sheraton hotel runs in Florida.”167 This latter conclusion seems sound, as does the result in the case; however, contact-counting is no substitute for the analysis prescribed in the Restatement Second.

Tortious interference with contractual relations was the issue in the recent case of Houston Oil & Minerals Corp. v. SEEC, Inc.168 A Texas corporation sued a number of defendants, some domiciled in Texas, some in Louisiana, and one, the plaintiff’s ex-employee, who had been a Texas domiciliary at the time of the alleged tort, but who had since acquired a Louisiana domicile. The plaintiff alleged that some of the defendants had induced its employee to breach his agreement with the plaintiff not to disclose trade secrets and confidential information. The alleged inducement and initial breach of contract both had occurred in Texas, the place where the relationship between the plaintiff and its employee had been centered. One of the defendants, a Louisiana domiciliary who maintained offices in Texas, moved to dismiss the action for tortious inducement of the breach of contract on the ground that Louisiana law, unlike Texas law, did not recognize this cause of action.

Applying “the ‘interests analysis’ of the Restatement of Conflicts, 2d,”169 the court first considered most of the Section 6 factors, in order to determine whether these weighed in favor of the application of one or the other state’s law, but without performing any preliminary false conflict analysis. Although it correctly determined that Louisiana’s policy relative to job mobility was not relevant because there was no claim that the defendants had induced the employee to leave his job with the plaintiff,170 and though no other relevant Louisiana policy was identified, the court did not end its analysis there.171 The court went on to list and locate the various Section 145 contacts, most of which were with

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166. Id.
167. Id.
169. Id. at 991 (citing one tort case, Burns, 459 So. 2d 666).
170. 616 F. Supp. at 992. The Louisiana rule also expresses a policy of protection of defendants from liability for consequences only remotely related to their acts. See F. Stone, Tort Doctrine 365, in 12 Louisiana Civil Law Treatise (1975), discussing Kline v. Eubanks, 109 La. 241, 33 So. 211 (1902). The court did not mention this policy.
171. No specific policy underlying the Texas rule was identified; however, most of the § 6 factors favored application of Texas law and none favored Louisiana law. 616 F. Supp. at 992.
Texas. The court’s conclusion was expressed in terms which, as in Burns, seemed to equate state interests with factual contacts. Texas law was applied because “Louisiana’s only interest” in the claim was “that [defendant-movant] has been a Louisiana domiciliary throughout this affair, and the fact that this court sits in Louisiana,” while “[t]he relative interest of Texas in this matter is greater than that of Louisiana, as the covenant was executed in Texas, and its breach induced there as well.”

Houston Oil represents yet another instance in which the choice of law seems perfectly reasonable, but certain aspects of the court’s reasoning are disturbing. First, the court did not identify any policy underlying Louisiana’s substantive rule of law which might have been relevant to the facts of the case. If there were no such relevant policy, then the issue should have presented a false conflict and the rest of the court’s analysis should have been unnecessary. In addition, the Section 145 contacts were treated as though they possessed controlling significance apart from the Section 6 policy factors: Texas’ interest in the issue was deemed “greater” than Louisiana’s because of Texas’ more extensive contacts with the parties and events involved, not because those contacts made Texas’ policy of protecting contracts relevant. This Burns-style analysis of interests by contact-counting is both less convincing and less constructive than the more thoughtful analyses found in Brinkley, Ardoyno and Lee.

Death Actions

In Marcano v. Offshore Venezuela, C.A., a Venezuelan resident invoked the right of action granted to the spouse of a wrongful death victim by Louisiana law. The decedent had been a Venezuelan, the death

172. Id. at 993.
173. Id. at 992.
175. Cf. cases discussed in text accompanying supra notes 72-79; 83-93; 144-46.
176. The Restatement Second contains a number of sections specifically applicable to death actions. The basic rule is found in § 175, which provides:

§ 175. Right of Action for Death

In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied. Various subissues are governed by reference to § 175. See, e.g., § 176 (defenses); § 177 (distribution of recovery); § 178 (damages); § 179 (proper party plaintiff).

had occurred in Venezuela and none of the defendants were Louisiana citizens. Citing Section 6 of the Restatement, the court observed that “Louisiana’s only interest in the present suit is that it happens to be the forum state,” and that “no interest of Louisiana would be served by applying its wrongful death statute to a foreign national concerning an accident which occurred abroad.” The court then held that Louisiana law did not govern the claim.

While the court in Marcano unfortunately equated “contact” with “interest,” the situation is one in which choice of law analysis seems to demand no more than a counting of contacts. When, as in Marcano, a state has absolutely no contacts with the parties and events giving rise to the litigation, the Constitution does not permit the substantive law of that state to be applied to the case.

A very recent decision by the United States Court of Appeals for the Fifth Circuit illustrates the continued free mixing of governmental interest analysis and Restatement Second principles in Louisiana choice of law cases. In Re Air Crash Disaster Near New Orleans involved death claims brought by several Uruguayan citizens against Pan Am and the United States, arising from the deaths of Uruguayans killed in the 1982 crash of a Pan Am aircraft on takeoff from a Louisiana airport. Pan Am moved to dismiss the claims for pre- and post-impact pain and suffering on the ground that Uruguayan law did not allow the recovery of such damages, arguing that Uruguay, as the common domicile of the plaintiffs and the decedents, was the only jurisdiction interested in the amount of recovery. One of the Uruguayan plaintiffs sought to recover under Uruguayan law which, unlike Louisiana law, granted a nephew a right of action for the death of his aunt. The aunt had left no survivor who would have had a right of action under Louisiana law. The district court had held for the plaintiffs as to both issues.

In affirming the district court’s decision as to choice of law, the Fifth Circuit summarized “Louisiana’s choice-of-law rules”:

179. Constitutional restrictions on the power of states to apply their laws to extra-territorial events are not severe. See generally Leflar, Choice of Law: States’ Rights, 10 Hofstra L. Rev. 203 (1981); Kozyris, Reflections on Allstate—The Lessening of Due Process in Choice of Law, 14 U.C. Davis L. Rev. 889 (1981). Nevertheless, “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 the choice of its law is neither arbitrary nor fundamentally unfair.” Allstate Ins. Co. v. Hague, 449 U.S. 301, 312-13, 101 S. Ct. 633, 640 (1981); see also Phillips Petroleum Co. v. Shutts, 105 S. Ct. 2965, 2979-81 (1985).
180. 789 F.2d 1092 (5th Cir. 1986).
181. Id. at 1094-95.
Louisiana utilizes a two-step process in resolving the choice-of-law issue. The court must first decide whether a "true conflict" exists; do both states have an actual and real interest in the application of its [sic] law. If both states do, the court is to apply the law of the jurisdiction with the most significant contacts with the case. . . . Both questions are answered by reference to the Restatement (Second) on Conflict of Laws [sic].

As to the limitation of damages issue, the court apparently, though not expressly, found that the issue presented a false conflict: It is obviously in Uruguay's interest that its citizens be fairly compensated for the wrongful death of family members. But once it is determined that recovery under Louisiana law equals or exceeds that available under Uruguayan law, the interest of Uruguay recedes. If the law of Louisiana provides more compensation for these losses than does the law of Uruguay, it is beyond the pale of reason to conclude that Uruguay would have an interest in prohibiting the award, provided no Uruguayan defendant is involved.

Louisiana's interest in applying its law to this issue rested upon the presumption, under Sections 175 and 178, that "the law of Louisiana, as the place of injury would apply absent a strong, countervailing Uruguayan interest." No other attempt was made to show why Louisiana might be interested in securing compensation for a non-Louisianian. The court was "persuaded that the needs of the international system will be served best in this instance by application of the law of Louisiana." Though the basis for this persuasion unfortunately is not articulated, the court's conclusion is supported by equal protection considerations.

182. Id. at 1096-97.
183. Id. at 1097.
184. Restatement Second § 178 provides:

§ 178. Damages

The law selected by application of the rule of § 175 determines the measure of damages in an action for wrongful death.

185. 789 F.2d at 1097.
187. 789 F.2d at 1097.
188. See B. Currie, supra note 27, at 539: "Something more than the state's lack of concern for the victim is needed to establish the reasonableness of withholding the benefits of such law from persons 'within the jurisdiction' of the state." The same principle holds, under the Privileges and Immunities Clause, where an injured citizen of a sister state invokes the protective or compensatory law of the state of injury in that state's courts. See id. at 508; see also D. Cavers, supra note 121, at 144; D. Cavers, The Choice of Law 188 (1985).
Regarding the nephew's right of action, the court held the application of Uruguayan law appropriate under Sections 175 and 178, because "Louisiana law provided no remedy; the law of Uruguay did." Because the court did not explain further, it is impossible to tell whether the court believed that this issue presented a false conflict because Uruguay was the only interested jurisdiction, or that the Section 175 presumption had been rebutted. Apparently Louisiana's failure to provide a remedy for nephews was viewed as a lack of interest in who should recover in this situation and not as reflecting a policy of protecting defendants from excessive liability, a questionable proposition.

Contributory Fault

To date, only one reported case has involved a choice between differing rules on the effect of contributory negligence. In Brown v. DSI Transports, Inc., a Louisiana worker who had been sent to Alabama by his employer was injured there through the negligence of a truck driver employed by a Texas corporation doing business in Louisiana. The injured worker sued the Texas corporation and its Pennsylvania insurer, and the worker's employer intervened seeking reimbursement for worker's compensation payments. The trial judge found the plaintiff ten percent contributorily negligent. On appeal, the defendants argued that Alabama law, under which contributory negligence was an absolute bar to recovery, should have been applied. This argument was based on "Alabama's overriding interest in regulating the conduct of persons within the State."

Following the ritual citation of Jagers, the court undertook a two-step analysis purportedly modeled after Lee. Both Alabama and Louisiana were deemed to have an interest in the application of their respective laws because both states had factual contacts with the parties and events involved in the case. In contrast to Lee and cases employing a similar analysis, the policies underlying the competing rules of law

189. 789 F.2d at 1097.
190. Restatement Second § 164 provides:
§ 164. Contributory Fault
(1) The law selected by application of the rule of § 145 determines whether contributory fault on the part of the plaintiff precludes his recovery in whole or in part.
(2) The applicable law will usually be the local law of the state where the injury occurred.
191. 496 So. 2d 478 (La. App. 1st Cir. 1986).
192. Id. at 480.
193. Id. at 481.
194. Id. at 482. Incredibly, the residence of witnesses was considered important. Id. at n.3.
were not considered in the first part of the analysis; however, they formed the critical ingredient of the second part. In fact, the policies of the respective states were the only Section 6 factors accorded any significant weight. The Louisiana rule had been enacted in order to do away with "the harsh, all-or-nothing effect of contributory negligence," and favored the compensation of injured plaintiffs. The Alabama rule, according to the defendants, was aimed at regulating conduct; however, that rule also is obviously protective of defendants, and the court seemed persuaded that the Alabama rule was one of loss distribution, not conduct regulation. Louisiana had an interest in compensating its domiciliary, the plaintiff, but there was no evidence that the defendant had any connection with Alabama apart from its presence there on the day of the accident, and no party was an Alabama domiciliary. Because "[t]he economic impact of our decision on this issue will be felt in Louisiana, not Alabama," the court held that Louisiana had the most significant relationship with respect to the issue of contributory negligence.

Miscellaneous

In some cases the courts have applied a single analysis to a group of unspecified issues. Ashland Oil is such a case. Although the court did separately analyze the issue of punitive damages, it also determined the law applicable to the "issue" of each defendant's "liability," without distinguishing, as does the Restatement Second, among the various com-

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195. Underlying policy was said to determine in part the "weight" to be given to the § 145 contacts identified. Id. at 482. Factors (a), (d), (e) and (f) were completely discounted, and factor (g) was deemed neutral. Id. at 483.
196. Id. at 483.
197. See text accompanying supra note 192.
198. It has been strongly questioned whether a contributory negligence rule serves any deterrence policy at all, since the rule imposes no responsibility on the defendant for his wrongful conduct. See McDougal, Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law Problems Concerning Contributory and Comparative Negligence, 26 U.C.L.A. L. Rev. 439, 464-65, 474-75 & n.180 (1979).
199. The court's decision was based on its analysis of where the economic impact of the choice of law decision would be felt. 496 So. 2d at 483 n.5. The court indicated that, had the contributory negligence rule been one aimed at regulating conduct, the choice of law might have been different: "Our consideration of the needs of the interstate system might be different if we were required to address a conflict of laws involving standards of negligence. Our concern here is only with the effect a finding of negligence has on plaintiff's recovery." Id.
200. 496 So. 2d at 482.
201. Id.
202. See supra notes 125-30 and accompanying text.
ponents of liability.\textsuperscript{203} The choice was made through the same "center of gravity" analysis applied to the punitive damages issue, and the choice of law was the same for liability and damages with respect to all the defendants except one.\textsuperscript{204}

\textit{Bakunas v. Life Pack, Inc.}\textsuperscript{205} is another case in which a single analysis was applied to a broad spectrum of issues. \textit{Bakunas} was a wrongful death action based on an alleged defect in a device designed to cushion the fall of a person dropping from certain heights. The device had been manufactured in Louisiana and transported by the decedent stuntman to Kentucky, where he was killed when the device failed to stop his fall. The court's choice of law analysis was extremely brief, and seems to have consisted of nothing more than simple contact-counting:

Although the decedent's jump occurred in Kentucky, Louisiana substantive law will apply. Plaintiffs are New Jersey residents, and defendants either reside or are incorporated in Louisiana. Louisiana, the state of manufacture, has the greatest interest in the application of its law under choice of law principles.\textsuperscript{206}

\textit{Commercial Union} was the only authority cited by the court relative to its choice of law decision. It is difficult, however, to find any similarity between the cases; therefore it seems probable that \textit{Commercial Union} was cited for the "burden of proof" rule announced in that decision.\textsuperscript{207}

\textbf{Evaluation of the Louisiana Jurisprudence}

\textit{Methodology}

All of the Louisiana appellate courts and the federal courts sitting in Louisiana have recognized the Louisiana Supreme Court's adoption of the false conflict concept,\textsuperscript{208} and all of these courts have at one time or another stated that Louisiana utilizes something called "interest anal-

\textsuperscript{203} See, e.g., § 156 (tortious character of conduct); § 157 (standard of care); § 159 (duty owed plaintiff); § 160 (legal cause).

\textsuperscript{204} With respect to defendant B, to whom Mississippi's punitive damages law was held applicable, the court held that "Louisiana has the strongest interest in the resolution of the issue of . . . liability," apparently because "the preponderance of [B's] misconduct occurred in Louisiana." 578 F.2d at 1306. See text accompanying supra notes 127-30.


\textsuperscript{206} Id. at 92.

\textsuperscript{207} Cf. supra notes 100-09 and accompanying text.

\textsuperscript{208} See, in addition to cases discussed in text accompanying supra notes 51-53, 58-62, 70-73, 80-82, 100-03, 190-201, Decatur v. United States Fidelity & Guar. Co., 464 So. 2d 854, 856 (La. App. 5th Cir. 1985).
Unfortunately, these rubrics are about the only thing upon which the courts seem to agree; they have not always given the same meaning to those terms. After all, the "false conflict" doctrine rests upon a determination of "state interests," so that a consistent application of the doctrine is possible only if there is agreement as to what "state interests" are. No such agreement exists among the Louisiana courts. In some cases, a state is considered as having an "interest" only "if the policy underlying its law is advanced and reified by the application of that law to the facts of this case"; in other cases, "interests" are treated as synonymous with "contacts." The courts are even less in agreement as to the exact process which "interest analysis" entails. Indeed, it is difficult to find two cases in which the same path of reasoning is followed. However, there are two basic patterns: (1) use of the Restatement Second only to resolve "true conflicts" exposed by "governmental interest analysis or a similar process"; and (2) straightforward application of the whole of the Restatement mechanism without first determining whether the case presents a false or true conflict.

Increasingly less common are those cases in which the court utilizes a free-style analysis not readily identifiable, though sometimes consistent, with any modern doctrine. In most of the cases discussed in this comment, the courts have made some use of the Restatement Second, yet even here consistency is lacking. Variously, the Section 6 policy factors, the Section 145 contacts and the more specific sections of the Restatement have been

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210. Shaw v. Ferguson, 437 So. 2d 319, 322 (La. App. 2d Cir. 1983) (dictum in a case in which the court was addressing prescription of judgments). See, e.g., Brinkley, Ardoyno, Commercial Union, Karavokiros, Lee and Silver, discussed in supra notes 73-77, 80-85, 102-03, 136-38, 144 and 156-57 and accompanying text.


212. See, e.g., Ardoyno, discussed in supra notes 80-93 and accompanying text; see also cases cited supra note 210. By "similar process" the writer means a preliminary step involving the identification of a true conflict, but without referring to the policies reflected in competing rules of law in so doing. Brown is a case which utilized such a two-step analysis. See supra note 194 and accompanying text. This is quite a different approach from that seen in Ardoyno. Cf. supra notes 80-85 and accompanying text.

213. See, e.g., Cooper, discussed in supra notes 116-19 and accompanying text; see also Burns and Houston Oil, discussed in supra notes 165-67, 169-74 and accompanying text.

214. E.g., Hobbs, Sutton, Marciano and Bakunas, discussed in supra notes 52-57, 59-69, 178-79, 205-06 and accompanying text.
used together in the same or different orders, or ignored. In some cases, the court has first found an appropriate "presumptive rule," then checked to see whether the presumptive choice was consistent with Section 6 principles in light of the distribution of Section 145 contacts.\textsuperscript{215} In other cases the presumptive rules have been used to break the ties between states with equal numbers of Section 145 contacts, then again tested against the Section 6 factors.\textsuperscript{216} Courts in still other cases have ignored the presumptive rules altogether and instead have analyzed the Section 145 contacts in an apparent effort to find the "center of gravity," sometimes called the "state with the most significant contacts."\textsuperscript{217} Section 6 principles may or may not come into play in such an analysis, and examples of apparently pure contact-counting exist.\textsuperscript{218} When consideration has been given to Section 6 factors, the courts sometimes have referred to all of the factors and sometimes have selected only a few.\textsuperscript{219} Finally, some courts have curtailed whatever analysis they have applied by invoking the "burden of proof" rule first seen in \textit{Commercial Union}, usually in cases in which the issue is doubtful because there is a true conflict with no obvious solution.\textsuperscript{220} In sum, with respect to tort cases, Louisiana has no coherent system of choice of law. Governmental interest analysis, "policy analysis," "center of gravity" analysis and out-and-out contact counting, all of which are accommodated by the Restatement Second, have been used both individually and in combination by the Louisiana courts,\textsuperscript{221} often without much concern for internal consistency and just as often inconsistently with other courts.

\textit{Jagers} injected a new uncertainty into Louisiana choice of law. At least half a dozen distinguishable approaches have been used by Louisiana courts purporting to follow \textit{Jagers}. This sort of chaos is hardly conducive to the development of new choice of law rules or principles and places

\footnotesize{\textsuperscript{215} See, e.g., \textit{Ardoyno}, discussed in text accompanying supra notes 86-94.  \textsuperscript{216} See, e.g., \textit{Karavokiros}, discussed in text accompanying supra notes 136-41.  \textsuperscript{217} See, e.g., \textit{Lee}, discussed in supra notes 144-46 and accompanying text (contact counting followed by § 6 policy justification); \textit{Silver}, discussed in supra notes 155-59 and accompanying text (center of "significant contacts" located).  \textsuperscript{218} See, e.g., \textit{Burns}, discussed in supra notes 165-67 and accompanying text; \textit{Ashland Oil}, discussed in supra notes 127-32 and accompanying text.  \textsuperscript{219} See \textit{Brinklely, Commercial Union} and \textit{Silver}, discussed in supra notes 73-77, 107-08 and 159 (only factors (b), (c) and (g) considered); \textit{Ardoyno}, discussed in supra notes 87-94 and accompanying text (all factors); \textit{Lee}, discussed in supra notes 146-49 and accompanying text (factors (b), (c), (e), (f) and (g)); In re \textit{Air Crash Disaster Near New Orleans}, discussed in supra notes 182-87 and accompanying text (only factor (a) mentioned).  \textsuperscript{220} See \textit{Commercial Union}, \textit{Karavokiros} and \textit{Silver}, discussed in supra notes 106, 142 and 159 and accompanying text; see also In re \textit{Air Crash}, 789 F.2d 1092, 1097, quoted in text accompanying supra note 185.  \textsuperscript{221} Elements of "better law" reasoning and "comparative impairment" analysis also may be seen in some decisions. See supra notes 64, 79, notes 94-99 and accompanying text.}
an unnecessary burden on courts and litigants. Uncertainty as to basic principles and methodology, unlike uncertainty as to ultimate result, ought not to be tolerated within a legal system, yet this is now the condition of the law of choice of law in Louisiana, at least with respect to tort issues.

The development of Louisiana choice of law methodology reached its zenith in Ardoyno. The approach followed in that case is commendable in several respects. First, false conflicts are detected and economically disposed of through a thoughtful application of governmental interest analysis. The problem is perceived as a conflict between rules of law, not jurisdictions, and state interests are derived from the policies underlying the conflicting substantive laws, not merely from factual contacts. Second, true conflicts are resolved by an orderly and thorough use of the approach set out in the Restatement Second. In this way, the excesses of governmental interest analysis are avoided, and the ultimate choice of law does not rest on either an arbitrary selection of one or another jurisdiction, or a counting of contacts or on some amorphous standard such as the "center of gravity." Third, the court explained its reasoning and conclusions clearly. Other courts can see what was done in this case and why, and can begin to understand and articulate the reasons for reaching similar or dissimilar results in other cases. In sum, the Ardoyno approach represents a sound reconciliation of governmental interest analysis and the Restatement Second which provides a reasonably firm foundation upon which other courts can build. The need for clear analysis should not be denigrated. In an area of the law that remains embryonic in Louisiana to this day, and in which the basic methodology provides only vague guidelines for its application, the growth and development of the law can take place only if the courts discuss the problems that they confront more thor-

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222. Cf. Currie, supra note 77: "The question whether a particular 'contact' is significant is meaningless unless significance is judged in terms of the policies and interests of the states involved."

223. Use of the Restatement Second avoids the automatic application of forum law in true conflicts and allows the courts to consider policies other than those reflected in the competing rules of law. For a partial criticism of this defect in interest analysis, see Symeonides, supra note 24, at 549 n.2.

224. Cf. supra note 45.

225. See D. Cavers, supra note 188, at 300 (Restatement Second contains "too many variables"); Cavers, Contemporary Conflicts Law in American Perspective, 131 Recueil des Cours 85, 145 (1970) (§ 6 factors "often point in different directions and carry in themselves no measure of their significance."); von Mehren, Recent Trends in Choice-of-Law Methodology in the United States, 60 Cornell L. Rev. 927, 964 (1975) (little guidance on the resolution of conflicts between § 6 policies is provided in the Restatement).
Results: Judicial Trends

Regardless of the different methodologies utilized by the Louisiana courts, the results that have been reached in the cases discussed in this comment appear to follow identifiable trends. However, it should be noted with caution that thus far the Louisiana courts have addressed relatively few of the large number of fact-law patterns possible in choice of law cases, so that current “trends” may not prove reliable as a basis for predicting future results.

Generally, the courts, in explaining their choice of law decisions, have tended to focus on the spatial orientation of the facts of each case, often, but not always, without clearly tying the relevance of facts to the policies reflected in competing rules of law or to any of the broader Restatement policy factors. With few exceptions, the domiciles of the parties has not been a factor of great significance, perhaps because litigants often have substantial connections with more than one state. Place of conduct and place of injury have been the most important factors; however, in some cases, Louisiana's status as forum state seems to have received consideration as a factor affecting the choice of law, independently of supporting policy reasons for treating it this way.

With the foregoing qualifications established, it may be observed that, with the exception of cases presenting Jagers-type false conflicts, the courts have almost always chosen the law of the state where the injury occurred as the applicable law. When the tortious conduct has occurred entirely within the state of the injury, the law of that state has been applied, with only one exception. When conduct and injury

226. Conclusory opinions, e.g., Cooper, provide later courts with little guidance. See also, e.g., In re Air Crash Disaster; Bakunas; and most of Ashland Oil. Similarly, the court in Sutton concluded that Louisiana’s interests outweighed those of Texas, but neglected to state why.

227. See, e.g., cases cited supra note 211.

228. But see Marcano, discussed in supra notes 178-79 and accompanying text; In re Air Crash, quoted in text accompanying supra note 183.

229. See, e.g., Hobbs, Lee and Burns, discussed in text accompanying supra notes 52-55, 145, 167.

230. See, e.g., Sutton, Houston Oil and Marcano, discussed in supra notes 62-65, 172 and 178.

231. See cases cited infra notes 232-34.

232. See Hobbs, Sutton, Ardoyno (with respect to the slander), Ashland Oil (with respect to defendants D and E) and Burns, discussed in supra notes 52-55, 59-63, 83-93 and 162-67 and accompanying text. Other cases only equivocally fit this pattern because either the place of conduct or the place of injury is not identified, in which case the law
have occurred in different states, Louisiana law has always been applied when that state was the place of the injury.\textsuperscript{233} When conduct in Louisiana has produced injury elsewhere, the law of the foreign state in which the injury occurred has been applied only in cases involving intentional torts and in which the defendant has purposefully injected himself into the foreign state;\textsuperscript{234} otherwise, Louisiana law has been applied.\textsuperscript{235} No reported cases have dealt with conduct in one state causing injury in another state, neither of which was Louisiana.\textsuperscript{236} Given the state of the law in Louisiana today, one can only speculate as to the probable results under one of the numerous, heretofore untested permutations of law and fact which might occur in a given case.

\textit{Comparison with Other American Jurisdictions}

Despite the rather amorphous nature of Louisiana choice of law methodology, it is clear that this state has rejected the traditional set of choice of law rules. The majority of American jurisdictions likewise have turned to some “modern” choice of law approach, although the traditional method still is used in more jurisdictions than any other

\textsuperscript{233} See \textit{Silver} (place of injury not known), discussed in text accompanying supra notes 153-58; \textit{In re Air Crash} (place of conduct not identified; Uruguayan law applied in part, but to an issue which seems to have presented a false conflict), discussed in supra notes 180-89 and accompanying text. In \textit{Houston Oil} it is not clear whether all or only the initial acts of inducement and breach occurred in Texas. See supra notes 168-73 and accompanying text. Similarly, in \textit{Brinkley}, it is not clear whether all or only some of the acts of interference occurred in the state where the subagency contracts were to be performed. See supra notes 72-78 and accompanying text.

The exception is \textit{Brown}, which arguably involved an undetected false conflict. If the court really believed that the laws in question embodied compensatory and protective policies, and not regulatory policies, then Alabama had no interest in having its law applied to protect a non-domiciliary doing no business in Alabama. See supra notes 197-99 and accompanying text. Since no state was interested in applying a contributory negligence law to protect any defendant, this was a false conflict. The \textit{Brown} court’s finding of a true conflict was not based on considerations of substantive law policy, but on a split in § 145 contacts. See supra notes 194-95 and accompanying text.

\textsuperscript{234} See \textit{Commercial Union, Ardoyno} (with respect to the contract interference), \textit{Karavokiros} and \textit{Lee}, discussed in text accompanying supra notes 80-82, 100-09, 135-42, 143-46.

\textsuperscript{235} See \textit{Cooper} and \textit{Ashland Oil} (with respect to defendant B), discussed in text accompanying supra notes 116-21 and 124-31.

\textsuperscript{236} See \textit{Ashland Oil} (with respect to defendant A, who did not direct the hazardous waste into Mississippi, and to defendant C, who was charged only with negligence); \textit{Bakunas} (decedent removed defective product from Louisiana to the place of injury), discussed in text accompanying supra notes 124-31 and 205-06.

\textsuperscript{236} Arguably, \textit{Brinkley} is such a case; however, the interferences in Louisiana were tied up in a single action with the interferences which had occurred in eighteen other states. See also supra note 232.
single method. Even where the traditional method prevails as the basic law, courts sometimes have made inroads on it by adopting exceptions to the traditional rules, especially in cases presenting "classic" false conflicts, but also in other areas.

Several different modern doctrinal authorities have found favor with American courts. The courts of some states use combinations of modern methods, or "lump several of them together as 'the' new law." The solution to true conflicts proposed by governmental interest analysis-automatic application of forum law—does not appear to have been accepted by those courts which otherwise follow that approach.

The Restatement Second seems to have been cited by more courts than any other modern method, but, as in Louisiana, these courts have made different uses of its various provisions. At least one court, apparently dissatisfied with the lack of guidance provided by the Restatement Second, which it earlier had adopted, later decided to use interest analysis to uncover true conflicts before applying the Restatement, an approach not unlike that used in Ardoyno and Lee, as well as other Louisiana cases. The supreme court of one state, refusing to tie itself to a specific doctrine by name, follows a "functional approach," and has cited with approval interest analysis, Section 6 of the Restatement Second and Leflar's "choice-influencing considerations." This court, as have

238. See Kay, supra note 31, at 582 n.377.
239. See, e.g., Andrew Jackson Sales v. Bi-Lo Stores, Inc., 314 S.E. 2d 797, 799 (N.C. App. 1984) (lex loci delicti is the basic rule, but the law of the state with the "most significant relationship" applies to actions for unfair or deceptive trade practices; no doctrinal authority cited).
240. See generally Kay, supra note 31, at 521-81.
243. See Kay, The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience, 68 Cal. L. Rev. 577, 581-82 (1980); Ehrenzweig, supra note 2, at 389. Nevertheless, some courts have shown a forum law bias even greater than that contemplated in interest analysis. See infra notes 250-52 and accompanying text.
248. See Bushkin, 473 N.E. 2d at 669-70; Bi-Rite Enter., Inc. v. Bruce Miner Co., 757 F.2d 440, 443 (1st Cir. 1985).
Louisiana courts on occasion, expressly has disapproved the mere counting up of Section 145 and other contacts as a guide to choice of law. The courts of two states use what has been called a "lex fori" approach. Under one state's version, the lex fori is applied whenever the forum has enough contacts with the case to justify the application of its law. Under the other lex fori version, forum law will be applied unless some "superior foreign interest" requires another result.

In the context of American choice of law in general, the results reached by the Louisiana courts have been no more eccentric than are the approaches used to reach those results. The soundness of the result in Jagers is generally conceded. Apparently, many American courts faced with a case like Sutton, in most respects the inverse of Jagers, would reach a similar result. Neither the results in the punitive damages cases nor any of the other categories of cases are remarkable.

The Prospects for Reform

That what Louisiana courts have been doing with choice of law methodology is not unusual does not mean that there is no room for

249. Bushkin, 473 N.E. 2d at 669-70 (noting similarity between the factors listed in § 6 and Leflar's list of five "choice-influencing considerations"). The lists are similar, except that Leflar, but not the Restatement Second, includes "application of the better rule of law" as a relevant consideration. See R. Leflar, American Conflicts Law 195 (3d ed. 1977).


251. Foster v. Leggett, 484 S.W. 2d 827, 829 (Ky. 1972): "The basic law is the law of the forum, which should not be displaced without valid reasons." As long as there are "significant contacts—not necessarily the most significant contacts—with Kentucky," that state's law will apply. Id.


253. See supra note 25.


255. Compare the Louisiana cases with Kammerer v. Western Gear Corp., 27 Wash. App. 512, 618 P.2d 1330 (Wash. App. 1980) (even the strong Washington policy against punitive damages could give way when a Washington resident went to California and transacted business there with California residents, the transaction thereafter giving rise to an action for punitive damages under California law. 618 P.2d at 1336-37. Under Restatement Second § 171, comment (b), the law of the state of conduct and injury is presumed to govern, and the presumption was not rebutted. Id.)

256. See, e.g., Barnes Group, Inc. v. C & C Prods., Inc., 716 F.2d 1023, 1033 (4th Cir. 1983) (approving the notion in Brinkley that local jurisdictions have the greatest interest in claims for contractual interference involving local residents and contracts to be performed solely within the local state.); see also, for a result similar to Brown, Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968), cited in Brown, 496 So. 2d at 482.
improvement. Perhaps clear-cut choice of law rules are too much to expect—or even undesirable—but the adoption of a coherent method of analysis would be welcome relief from the current uncertainty and inconsistency. Consistent results are not fostered by a system in which courts utilize inconsistent approaches to choice of law problems. The emerging dominance of the Restatement Second as the preferred methodology for tort choice of law cases may foreshadow a partial consensus among the Louisiana courts, but true consistency of approach will be achieved only if all of the courts apply the Restatement in a uniform way, which heretofore they have not done. At any rate, it is evident that the Louisiana law of choice of law could benefit from some form of legislative or judicial corrective action.

In the absence of legislative action, the Supreme Court of Louisiana ought to take the initiative and aid the lower courts in the effort to formulate new "rules for the application of the law of the forum," or of some other state, "in cases which might involve the law of more than one state." That court should review one or more court of appeal cases and explain, in precise terms, why the result below was or was not correct. If the court should approve the use of the Restatement Second, it should prescribe a uniform method for its application. Considering the current diversity of opinion among American courts and commentators regarding a proper successor to the outmoded traditional system of rules, it is perhaps less important to choose carefully one or another approach as "better" than the rest than it is to choose or develop a single method and apply that method consistently. The alternative to corrective action by the Supreme Court is a legislative solution. Of course, any attempt at comprehensive legislation necessarily involves tangling with the eternal conundrum of how to reconcile the conflicting policies of strengthening certainty and avoiding unjust results in particular cases. The Restatement Second—at least insofar as the Louisiana courts are concerned—has proved inadequate, principally because it leaves the courts with too little guidance in performing the task of accommodating the various choice of law values in individual sets of circumstances. The Louisiana courts have had difficulty in grasping

257. See B. Currie, supra note 27, at 183, 585; see Currie's views on choice of law rules discussed in Symeonides, supra note 24, at 550-52.
258. Regarding the different approaches used by Louisiana courts, see supra notes 208-14 and accompanying text.
259. See supra notes 205-20 and accompanying text.
260. Jagers, 276 So. 2d at 313.
261. See authorities cited supra note 24; see also Kay, supra note 31, at 521-81 (different approaches followed by American courts); Reppy, supra note 244, at 651.
262. See authorities cited supra note 225.
concepts such as "most significant relationship"" and "state inter-
ests." It may be, as the drafters of the Restatement Second anticipate,
that experimentation by the courts eventually will lead to the development
of new choice of law rules. Unfortunately, the complexity of choice
of law problems, combined with the relative rarity of the multistate
case, virtually assures that the process of developing satisfactory rules,
if left to the courts alone, will be painfully slow. The experience of
the Louisiana courts certainly does not indicate otherwise.

The Restatement Second may contain the nucleus of a workable
legislative choice of law scheme; however, clarification of some fund-
damental concepts is needed, along with a reduction of the cumbersome
structure of presumptive rules which often seems to impair efficient
decision-making. Above all, the courts must be furnished with clear and
overriding guiding principles. For what it may be worth, the writer
suggests that a great deal of confusion in the law could be avoided if
it were brought home to the courts that (1) the basic criterion for
decision is the advancement/impairment of the interests of potentially
concerned jurisdictions; and (2) state interests are to be derived from
the policies underlying competing substantive rules of law. In close cases,
where state interests appear evenly balanced, the basic criterion may be
supplemented by additional policy considerations, such as those found
in Section 6 of the Restatement Second. Of course, the courts must
cooperate in any effort to bring coherence to the law; decisions must
be explained in terms of the criteria provided and in something more
than a conclusory fashion. If the interests of one state outweigh those
of another, this ought not to be accounted for in judicial opinions by
the presence of a greater number of factual contacts with one state,
nor by mere ipse dixit.

Conclusion

The impact of the American revolution in choice of law on Louisiana
has produced both good and bad results. On one hand, the courts are
now free to pursue what are perceived to be appropriate of just results
in individual cases. On the other hand, the lack of a coherent approach
to choice of law problems has created an undesirable, though not in-

263. See supra notes 147, 149 and accompanying text for one of numerous examples
   of confusion over this concept. See also text accompanying supra notes 215-20.
264. See text accompanying supra notes 208-11.
265. See Reese, supra note 2, at 39-42; E. Scoles & P. Hay, Conflict of Laws 39
266. See von Mehren, supra note 225, at 966.
267. E.g., Bakunas. See also cases cited supra note 218.
268. E.g., Sutton; Cooper, discussed supra note 226.
curable, uncertainty in the law. Clarification in this area would be beneficial.

Perhaps, in time, the courts would reach a consensus on a precise approach to choice of law, or would develop enough rules, through experience with recurrent fact-law patterns, so that the absence of a precise approach would not be critical. Considering the state of the choice of law art in the United States today, perhaps things should be left as they are until a near-consensus among American jurisdictions is reached. Unfortunately, this is likely to take a long time; therefore, some form of corrective action seem appropriate.

Absent legislation to correct the defects in the current law, the supreme court should consider clarifying Jagers. The easiest way to do this would be to adopt by name some existing doctrine and then illustrate its application in one or more cases, taking care to explain the process in detail. Perhaps the approach best represented by Ardoyno would serve, as that well reasoned case seems to have gained a measure of acceptance among the Louisiana courts.

Legislation possibly is the best solution to the current problem, provided that certainty can be achieved without a return to the rigidity of the traditional system. Good legislation would eliminate the existing uncertainty and obviate the need for the inefficient expenditure of judicial resources in the quest for just results in each case. Although it is doubtful that any existing European codification could achieve fully desirable results if transplanted whole to Louisiana, some European models provide useful examples of ways in which codification may restore certainty to the law without the sacrifice of all that has been gained through the conflicts "revolution." Whatever action is taken, the guiding principle should be that "certainty and elasticity in legal methodology are not polar opposites, between which a clearcut choice must be made, but complementary values, which in some fashion must be meshed together."269

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269. Bodenheimer, supra note 256, at 745.