Conflict of Laws - Liberative Prescription

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CONFLICT OF LAWS—LIBERATIVE PRESCRIPTION

Issues of liberative prescription in conflict of laws cases are currently resolved in Louisiana on the basis of paragraph 6 of article 10 of the Civil Code which states: "The prescription provided by the laws of this state applies to an obligation arising under the laws of another jurisdiction which is sought to be enforced in this state." Under this provision, a cause of action that arises in another state, but is sued upon in Louisiana, will be subjected to the prescriptive period provided by Louisiana law regardless of the length of the limitation period of the other state. This means that, if the cause of action has prescribed under Louisiana law, the action will be dismissed even if the limitation period provided by the other state has not expired. Conversely, an action timely filed according to Louisiana law will be entertained by Louisiana courts although the underlying cause of action is barred where it arose.


2. La. Civ. Code art. 10 para. 6. For the historical development of this paragraph, see infra notes 6 & 8 and accompanying text.

3. Under Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020 (1941), a federal court is bound by the conflict of law rules of the state in which it is sitting. Therefore, the federal courts and the state courts in Louisiana follow the same conflict of laws rules.

4. See, e.g., Shaw v. Ferguson, 437 So. 2d 319, 321 (La. App. 2d Cir. 1983); Davis v. Colvin, 410 So. 2d 1211, 1212 (La. App. 3d Cir. 1982). This result conforms with the Restatement (Second) of Conflict of Laws § 142(1) (1971) [hereinafter Restatement (Second)] ("An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state.")], and with the Restatement of Conflict of Laws § 603 (1934) [hereinafter Restatement] ("If action is barred by the statute of limitations of the forum, no cause of action can be maintained though action is not barred in the state where the cause of action arose.").

5. But see La. Civ. Code art. 10 para. 7, discussed at infra text accompanying notes 42-47. This use of the forum’s longer limitation period conforms with the Restatement and the Restatement (Second). Restatement § 604 provides: "If action is not barred by the statute of limitations of the forum, an action can be maintained, though action is barred in the state where the cause of action arose." Similarly, Restatement (Second) § 142(2) states: "An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state." See Roper v. Monroe Grocer Co., 171 La. 181, 129 So. 811, 812 (1930).
Louisiana adopted this choice-of-law rule, legislatively and judicially, long ago. In 1825, the Louisiana Legislature enacted it in article 13 of the Louisiana Code of Practice. Three years later, when faced with the issue of prescription with regard to a New York contract, the Louisiana Supreme Court, without referring to article 13, stated: "The laws of the place of contract, in relation to limitation or prescription, must be left out of view. . . . The doctrine appears to be fully established that the lex fori alone governs in respect to such matters." Currently, the legislative authority for this choice-of-law rule is found in paragraph 6 of Civil Code article 10, which was redesignated from Civil Code article 3532 in 1983. Although criticized by most modern choice-of-law commentators, this general rule that the forum's law governs liberative prescription is currently followed in most states. In recent years, however, some states have abandoned this mechanical rule in favor of alternatives that allow for more responsive and rational decisions.

This article will evaluate the current Louisiana choice-of-law position on liberative prescription and assess the need for Louisiana to join the developing trend in this area of the law. First, the traditional choice-of-law theory on liberative prescription will be reviewed. Then, the alternatives developed under modern choice-of-law methodologies will be analyzed. Finally, recommendations concerning Louisiana's approach to resolving conflicts of prescriptive laws will be presented.

6. "The forms, the effects, and the prescription of actions are governed by the law of the place where they are brought . . . ." This article, along with the rest of the Code of Practice of 1825, was repealed in 1960 by Act 15 which enacted the Louisiana Code of Civil Procedure. Regarding the repeal of the Code of Practice, one court noted: "The repeal of Article 13 and the fact that its substance was not reenacted elsewhere should not affect the result here, because it is clear . . . that no substantive change was intended." Martin v. Texaco, Inc., 279 F. Supp. 1015, 1016 n.2 (E. D. La. 1968). Although Act 15 did not reenact the substance of article 13, the court apparently overlooked Act 30 of the same year which did reproduce at least part of the substance of article 13 by amending Civil Code article 3532. See infra note 8.


8. Act 30 of 1960 amended article 3532 of the Civil Code to include: "The prescription provided by the laws of this state applies to an obligation arising under the laws of another jurisdiction which is sought to be enforced in this state." This clause was redesignated as an undesignated paragraph of article 10 by Act 173 of 1983.


10. See authorities cited supra in note 9.

11. See infra text accompanying notes 72-119 for a discussion of some of these alternatives.
The General Rule

Traditionally, American courts followed the general rule that liberative prescription is governed by the law of the forum. This choice of the forum's limitation laws stems from the more general conflicts principle that issues of procedure are governed by the law of the forum. According to this principle, when a court presented with a conflict of laws case determines that another state's law should control, the court will apply the substantive aspects of the foreign law, but will rely on its own laws for procedural matters. Although civil law jurisdictions generally regard liberative prescription as a substantive issue, Louisiana adheres to the common law view that prescription is a procedural issue which is therefore governed by the law of the forum.

12. Under the traditional theory, each conflict of laws case was classified according to specific legal categories, such as tort or contract. Based on the characterization of the case, the court would apply the substantive law of the state chosen in accordance with certain a priori rules. For example, tort actions were generally controlled by the law of the place of injury. Restatement § 378 (lex loci delicti). Contract actions were governed by the law of the place of contracting. Id. §§ 311 & 332 (lex loci contractus). This traditional approach often produced anomalous results because it failed to consider the interests of the involved states or the purposes underlying the conflicting laws.

13. Restatement (Second) § 142; Restatement §§ 603, 604; see also authorities cited supra in note 9.

14. Restatement § 585 ("All matters of procedure are governed by the law of the forum."). See also Scharff v. Cameron Offshore Servs., 475 F. Supp. 48, 50 (W.D. La. 1979), where the court stated:

[Even if the forum determines that reference should be made to some foreign law, such reference is only to matters of "substance" while all matters of "procedure" are still governed by the law of the forum. As with other problems of characterization, the determination and delineation of what constitutes "substance" and what constitutes "procedure" is made by the forum in its own terms and according to its own standards.


16. "The most frequently asserted basis for this conclusion is that... [prescription] affects solely the nature of the remedy to be afforded and the forum should be permitted to fashion its own remedy even though it recognizes foreign law to determine parties' rights." Locke, Use of Foreign Statutes of Limitations in Illinois: An Analysis of Statutory and Judicial Technique, 34 De Paul L. Rev. 407, 413 n.20 (1985). However, this classification of laws as substantive and procedural is often difficult because "substance often gradually shades into procedure." Grossman, supra note 9, at 7. For instance, liberative prescription is often considered to have "both 'substantive' and 'procedural' aspects." A. Von Mehren & D. Trautman, The Law of Multistate Problems 209 (1965).
According to this common law view, liberative prescription bars only the remedy; it does not bar the underlying right of action which is still enforceable in another jurisdiction with an unexpired limitation period. The substance-procedure dichotomy may of course be defended on the basis of practical considerations. In a wholly domestic case, the forum applies its substantive laws—those that “create rights, duties, and obligations”—as well as its procedural laws—those that “prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court.” On the other hand, requiring a forum in a multistate case to adhere to a foreign state’s intricate procedural rules of form, pleading, and evidence would unduly burden the forum’s judicial process. Yet, while the various states’ procedural rules, such as those concerning pleadings, may be detailed, complex, and diverse, prescriptive laws of the different states are “no more difficult for local courts and lawyers to ascertain . . . than the foreign ‘substantive’ law.” Furthermore, unlike genuine procedural law, lib-

18. E.g., Grossman, supra note 9, at 10; R. Leflar, supra note 9, § 127, at 252-53; Comment, supra note 15, at 1135. Earlier commentators often accepted the right-remedy distinction as sufficient support for the application of the lex fori rule for issues of prescription without question or hesitation. See, e.g., J. Beale, Selections From a Treatise on the Conflict of Laws (1935):

That the statute of limitations of the forum is the applicable law of limitations is so well-settled in Anglo-American law at least, as to be beyond dispute. . . . From the doctrine that statutes of limitation ‘relate to the remedy’ it logically follows that the fact that the suit would be barred by the foreign statute if action were brought where the right arose is no defense to the action at the forum. Id. at 1620-21.

The historical development of the procedural classification of prescription and the underlying “right-remedy” distinction has been extensively analyzed elsewhere. See A. Ehrenzweig, supra note 9, at 428; Ailes, Substance and Procedure in the Conflict of Laws, 39 Mich. L. Rev. 392, 396-401 (1941); Developments in the Law—Statutes of Limitation, 63 Harv. L. Rev. 1177 (1950); Note, Delimitation of “Procedure” in the Conflict of Laws, 47 Harv. L. Rev. 315 (1933). The procedural characterization of liberative prescription has been termed “an accident of history.” Bournias v. Atlantic Maritime Co., 220 F.2d 152, 154 (2d Cir. 1955).
21. Vernon, Statutes of Limitations in the Conflict of Laws: Borrowing Statutes, 32 Rocky Mtn. L. Rev. 287, 288 (1960). See also, Heavner v. Uniroyal, Inc., 63 N.J. 130, 135, 305 A.2d 412, 415 (1973) (“It would be an impossible task for the [forum] court . . . to conform to procedural methods and diversities of the state whose substantive law is to be applied. The determination of that law is a difficult enough burden to impose upon a foreign tribunal.”).
22. Vernon, supra note 21, at 289.
ervative prescription can have a substantial impact on the outcome of a case.23

Exceptions to the General Rule

Recognizing the weaknesses of a system of always applying the forum's laws of prescription and the dangers of forum-shopping inherent therein, legislatures and courts have created exceptions to the general lex fori rule.24 These exceptions generally treat statutes of limitations as substantive in part and allow a forum to apply a foreign state's prescriptive laws in certain limited situations.

The Judicial Exception

Acknowledging that not all statutes of limitation are intended merely to bar the remedy, courts have displaced the lex fori with the law of the foreign state that created the right of action when the foreign limitation bars the right of action itself.25 In Louisiana, statutes which bar a right of action are characterized as statutes of peremption.26 The Louisiana Supreme Court has distinguished peremption from liberative prescription, stating:

When a statute creates a right of action and stipulates the delay within which that right is to be executed, the delay thus fixed is not, properly speaking, one of prescription, but it is one of peremption. Statutes of prescription simply bar the remedy. Statutes of peremption destroy the cause of action itself. That is to say, after the limit of time expires the cause of action no longer exists; it is lost.27

23. Grossman, supra note 9, at 16. By clearing court dockets of old claims, prescription can be considered procedural. However, substantive aspects of prescription are reflected when the rights of parties are affected by prescription. Comment, supra note 15, at 1139.
24. See Restatement (Second) § 143 comment a.
25. Restatement (Second) § 143 ("An action will not be entertained in another state if it is barred in the state of the otherwise applicable law by a statute of limitations which bars the right and not merely the remedy."); Restatement § 605 ("If by the law of the state which has created a right of action, it is made a condition of the right that it shall expire after a certain period of limitation has elapsed, no action begun after the period has elapsed can be maintained in any state.").
26. La. Civ. Code art. 3458 ("Peremption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the peremptive period.").
In common law jurisdictions, only statutorily created rights have been considered appropriate for this exception. In theory, this judicial exception could be utilized regardless of the length of the forum’s prescriptive period. In practice, however, resort to foreign law generally occurs only when its limitation period is shorter than that of the forum. To apply this exception, various tests have been formulated to determine if a statute of limitations affects the right of action instead of merely the remedy.

First, the “ Built-in test” treats the statute of limitation as substantive if the same statute that creates the right of action also provides a limitation period for the filing of a lawsuit. This test was first articulated by the United States Supreme Court in the wrongful death case of The Harrisburg:

The time within which suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. . . . Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right.

Second, the “ specificity test” extends the “built-in test” by requiring an analysis of the time limitation, whether or not located in the same statute that created the right. According to this test:

The fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.

28. See, e.g., Kozan v. Comstock, 270 F.2d 839, 841 (5th Cir. 1959); R. Leflar, supra note 9, § 127, at 254.
29. R. Leflar, supra note 9, § 127, at 254.
30. For an excellent discussion of these tests, see Grossman, supra note 9, at 11; see also, Bournias v. Atlantic Maritime Co., 220 F.2d 152, 155 (2d Cir. 1955).
Although other less utilized tests have been adopted by some courts, the "specificity test" is considered the most popular in the United States. The limited applicability and the vagueness of these tests has generated criticism questioning the effectiveness of the judicial exception. Be that as it may, this exception reflects a genuine attempt by the courts to ameliorate the harshness often produced by the mechanical use of the forum's prescriptive laws. The exception offers further protection from stale lawsuits and reduces forum-shopping, albeit in limited circumstances. The Louisiana Third Circuit Court of Appeal recognized this judicial exception and the "specificity test" in the maritime personal injury case of Istre v. Diamond M. Drilling Co. Nevertheless, the court did not apply the test, because "[t]here [was] no . . . statute [in the case] which limit[ed] the time within which such a right exist[ed], or which extinguish[ed] the right in any way." Both state and federal courts in Louisiana have discussed this exception in other recent cases, but none contained the fact pattern necessary for choosing a foreign state's limitation period.

Borrowing Statutes

State legislatures have provided another exception to the lex fori rule by enacting "borrowing statutes," aptly so named because "[t]hey 'borrow' the limitation rule of [some] other state and make it the forum state's law for purposes of the particular litigation." These statutes direct a court faced with a choice-of-law prescription problem to apply the foreign state's limitation laws if those laws prescribe a

34. The "attributes test" requires an analysis of the foreign statute's characteristics to determine if it should be regarded as substantive (e.g., whether the defense is available without pleading the statute). The "foreign court test" looks to the other court's treatment of its own statute. Grossman, supra note 9, at 12-13.
35. Restatement (Second) § 143 comment c.
36. A. Ehrenzweig, supra note 9, at 432 ("[The tests are] highly arbitrary . . . unreliable . . . [and] circular."); Tomlin v. Boeing Co., 650 F.2d 1065, 1070 (9th Cir. 1981) ("'The struggles of the courts to determine whether the locus has destroyed the right are amusing, even if the results are inconsistent and the reasoning at times most specious.'"); quoting Sedler, The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws, 37 N.Y.U. L. Rev. 813, 848 (1962).
37. 226 So. 2d 779, 796 (La. App. 3d Cir. 1969) (on rehearing).
38. Id. Louisiana courts have not recently mentioned any tests other than the "specificity test."
40. R. Leflar, supra note 9, § 128, at 256.
period that bars the claim.\textsuperscript{41} If the forum's statute already bars the claim, the borrowing statute is not applicable.

Louisiana's borrowing statute, originally enacted in 1855,\textsuperscript{42} in its current form provides:

When a contract or obligation has been entered into between persons who reside out of this state, which is to be paid or performed out of this state, and such contract or obligation is barred by prescription, or the statute of limitations, of the place where it is to be paid or performed, it shall be considered and held to be barred by prescription in this state, upon the debtor who is thus discharged coming into this state.\textsuperscript{43}

This statute provides three requirements which must be met before a foreign limitation period can be borrowed. First, the claim must be based on a contract\textsuperscript{44} between nonresidents.\textsuperscript{45} Second, such contract must call for performance or payment outside of Louisiana.\textsuperscript{46} Finally,

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  \item \textsuperscript{41} Restatement (Second) § 142 comment f.
  \item \textsuperscript{42} 1855 La. Acts No. 168.
  \item \textsuperscript{43} La. Civ. Code art. 10.
  \item \textsuperscript{44} Obligations arise from tortious acts as well as contracts. La. Civ. Code art. 1757. Therefore, the borrowing statute could ostensibly apply to lawsuits based in contract or tort. However, the borrowing statute refers to obligations which are to be "paid or performed." Clearly, conventional obligations require either payment or performance. Delictual obligations, on the other hand, are not really performed. Rather, payment is made in satisfaction of a judgment based on the tort, not in satisfaction of the delictual obligation itself. Since article 3501 of the Louisiana Civil Code supplies the choice-of-law rules for the prescription of such judgments, article 10's borrowing statute is probably not applicable to tort actions. Excluding delictual obligations from the scope of the borrowing statute does not render the reference to other obligations superfluous. The term "obligation" can be interpreted as referring to obligations arising from juridical acts other than contracts and to quasi-contractual obligations. Other writers have stated, without discussion, that the Louisiana borrowing statute only applies to contractual obligations. See Comment, Revision of the Civil Code Provisions on Liberative Prescription, 60 Tul. L. Rev. 379, 393 (1985); Comment, Limitation of Actions in the Conflict of Laws, 10 La. L. Rev. 374, 388 (1950).
  \item \textsuperscript{45} There is some authority for the proposition that the pertinent residence of the parties is not their domicile at the time of suit, but rather at the time of contract. Young & Geraghty v. Bowie, 3 La. App. 8 (Orl. 1925), involved a suit by two Maryland doctors for payment of a debt for medical services performed in 1917 on Mr. Bowie, a Texas resident. Two years after Mr. Bowie's death in 1918, Mrs. Bowie moved to Louisiana. When suit was filed in 1921, Mrs. Bowie pleaded the two-year Texas statute of limitations. Since the claim had prescribed under Texas law before Mrs. Bowie moved from Texas, the court applied the Louisiana borrowing statute and held the claim barred by the "borrowed" Texas law. If the residence of the parties had been determined as of the time of the lawsuit, the borrowing statute would have been inapplicable because the defendant was a resident of Louisiana at that time.
  \item \textsuperscript{46} See Young & Geraghty v. Bowie, 3 La. App. 8 (Orl. 1925), discussed in supra note 45.
\end{itemize}
the claim must be barred by the prescriptive laws of the foreign state before the debtor comes to Louisiana.\textsuperscript{47} When these prerequisites are fulfilled, the plaintiff is denied the benefit of the longer Louisiana limitation period, and the defendant is not subject to a claim that was created and subsequently barred by another state.

Like Louisiana, three-fourths of the states have enacted borrowing statutes designed to yield uniform results regardless of the forum.\textsuperscript{48} Nevertheless, for various reasons, borrowing legislation cannot always achieve such results. First, some states have not enacted a borrowing statute. Second, since a foreign limitation law is borrowed only when it is shorter than that of the forum, a forum's shorter prescriptive period can bar a claim not yet barred in the foreign state.\textsuperscript{49} Third, since the statutory terminology and judicial interpretations of the various states' borrowing statutes are inconsistent, uniform results are not always possible.\textsuperscript{50} Also, most borrowing statutes require a determination of the place where the cause of action accrued or arose.\textsuperscript{51} Such a determination is often difficult to make since the activity giving rise to a cause of action may not be centered in one state. For example, defamatory statements are often published or communicated regionally or nationally, and a simple contract, signed in one state, may require performance in a second state and payment in a third.

Another reason behind the enactment of borrowing statutes was to protect defendants from the perpetual liability often created by a forum's tolling provisions which suspend the running of prescription in certain instances.\textsuperscript{52} These tolling statutes, which vary from state to state, were originally enacted to prevent a potential defendant from avoiding liability by merely fleeing from the state until the local prescriptive period had run. R. Leflar, supra note 9, § 128, at 257-58. Today, with the current status of

\textsuperscript{47} As explained by the Louisiana Supreme Court, this requirement is satisfied only when "the defendant removes to the State of Louisiana after he has become entitled to the benefit of the plea of the statute of limitations of the place where the judgment was rendered." Walworth v. Routh, 14 La. Ann. 205, 206 (1859). Although the borrowing statute no longer applies to the prescription of judgments as it did at the time of Walworth, the above interpretation should also apply to the prescription of contractual claims. See Young and Geraghty v. Bowie, 3 La. App. 8 (Orl. 1925), discussed supra in note 45.

\textsuperscript{48} See generally Ester, Borrowing Statutes of Limitation and Conflict of Laws, 15 U. Fla. L. Rev. 33 (1962); Vernon, supra note 21, at 289.

\textsuperscript{49} See, e.g., Grossman, supra note 9, at 15.

\textsuperscript{50} Id. Professor Vernon has classified borrowing statutes into seventeen distinct categories based on their similarities. See Vernon, supra note 21, at 294-96.

\textsuperscript{51} See e.g., Grossman, supra note 9, at 15; cf. R. Leflar, supra note 9, § 128, at 256. Louisiana's borrowing statute does not refer to the state where the action accrued or arose, but to the "place where [the contract] is to be paid or performed." La. Civ. Code art. 10.

\textsuperscript{52} E.g., Milhollin, supra note 9, at 29.

Tolling provisions were originally enacted to prevent a potential defendant from avoiding liability by merely fleeing from the state until the local prescriptive period had run. R. Leflar, supra note 9, § 128, at 257-58. Today, with the current status of
state, typically suspend the limitation period when an obligor is "absent from" or "not a resident of" the state. As a result, the non-resident could find himself amenable to suit in a forum with personal jurisdiction even though the cause of action had expired fifteen or twenty years earlier in the state in which it arose. Although Louisiana does not have a general tolling provision similar to many other states, Louisiana courts encounter tolling issues when a party pleads another state's tolling statute or a special Louisiana tolling statute.

Once the borrowing statute is determined to be applicable, most states borrow the foreign statute of limitations "with all of its accouterments . . . whether . . . [legislative] or . . . judicial." The accouterments encompass related legislative and jurisprudential rules which interpret and restrict the borrowed statute of limitations, including any tolling provisions. This extended adoption of the foreign law prevents the "splitting of foreign rules whose elements may be interdependent."

Critique of the Traditional Approach

An unqualified application of the lex fori fails to consider the multistate nature of conflicts cases, and may frustrate the policies underlying statutes of limitations, as well as undermine the goal of uniformity of results. Limitation periods represent legislative determinations of the reasonable time for the allowance of a lawsuit. These determinations are designed, first to "protect defendants and the courts from having to deal with cases in which the search for the
truth may be seriously impaired by the loss of evidence, whether by
death or disappearance of witnesses, fading memories, disappearance
of documents, or otherwise."

Thus, statutes of limitation protect
defendants from stale lawsuits that, if not barred, could place a
defendant at a disadvantage by forcing him to defend himself without
sufficient evidence, especially if he did not anticipate the lawsuit.

Secondly, limitation periods are designed to protect the judicial system.
The barring of state claims promotes judicial economy by allowing a
court efficiently to allocate its time to more deserving cases. Judicial
integrity is also preserved by reducing the chance of an erroneous or
inequitable judgment in cases where relevant evidence is lost or dis-
torted due to delay.

When prescription has accrued under the law of the state where
the cause of action arose but not under the law of the forum, the
automatic application of the law of the forum may or may not be
consistent with the above policies. The foreign state that created the
right of action has determined that the shorter time period is sufficient
for potential plaintiffs who seek to enforce their rights. After the
expiration of this limitation period, the foreign state's policy of repose
for defendants becomes important, at least when the defendant was
domiciled there or acted in reasonable reliance on that law. In such
circumstances to ignore the foreign limitation period and to apply the
forum's unexpired period may frustrate the policies of the foreign
state without necessarily advancing the policies of the forum. The
granting of relief on such a claim will frustrate the foreign state's
policy of repose. Unless the plaintiff is a resident of the forum or
the parties reasonably relied on the forum's law, application of forum
prescription law would not promote any discernible interest of that
state. Nor would the forum's own policies favoring judicial economy
and efficiency be frustrated by the application of the foreign law.
Furthermore, from the perspective of the interstate community, ap-

United States v. Kubrick, 444 U.S. 111, 117, 100 S. Ct. 352, 357 (1979)). See also
Restatement (Second) § 142 comment d.
(1984); Milhollin, supra note 9, at 10.
60. Leflar, supra note 59, at 471-72.
61. Id.
62. E.g., Grossman, supra note 9, at 17. In such a case, in the absence of a
borrowing statute the forum applies its longer, unexpired limitation period to hear the
suit because the right of action is viewed as persisting, albeit without a remedy, in
the foreign state. See supra text accompanying notes 16-18.
63. Milhollin, supra note 9, at 11.
64. E.g., Steele v. G.D. Searle & Co., 428 F. Supp. 646 (S.D. Miss. 1977); R.
Leflar, supra note 9, § 127, at 253.
would promote "forum shopping" for a more favorable result. This is contrary to the general conflict of laws objective of maintaining uniform results regardless of the forum and is also inequitable since the plaintiff is allowed to rely on the law of a foreign state for his cause of action, but the defendant is denied a defense available under the same law. Additionally, a defendant may be required to preserve his evidence for an indeterminable time to guard against the possibility of a timely filed lawsuit in any state with jurisdiction over him. As a result and without any justification in policy, the forum's dockets get more crowded, the claims considered stale at the place of accrual are tried and the defendant is subjected to a lawsuit that he may justifiably have expected was barred.

There may be more justification for the lex fori rule when the forum applies its own shorter prescriptive period to bar a claim that is still valid in the foreign state that granted the cause of action. First, the forum's policies of preserving judicial integrity and protecting judicial economy are furthered by the application of its own limitation period. Second, the forum's plaintiff-favoring policies are

65. Vernon, supra note 21, at 293.
66. Grossman, supra note 9, at 18.
67. A. Ehrenzweig, supra note 9, at 429. In the converse case when the forum applies its shorter limitation to bar an action based on a foreign state's law, the defendant benefits from the use of the forum state's law.
68. This situation is only partially offset by the substantive treatment of liberative prescription granted by the judicial exception and the borrowing statutes discussed earlier, supra text accompanying notes 24-56. This substantive treatment allows repose for defendants, prevents forum shopping, and reduces the possibility of perpetual liability. However, as already explained, narrowly defined requirements must be met before these exceptions can be invoked. Additionally, borrowing statutes, if enacted and applicable, sometimes call for the application of the law of a state that is no longer relevant under modern conflict of laws theory. Grossman, supra note 9, at 15; E. Scoles & P. Hay, Conflict of Laws 64 (1982). Therefore, the limited applicability and the traditional basis of these exceptions prevent them from overcoming the deficiencies in the general lex fori rule.
69. Grossman, supra note 9, at 21. To illustrate, assume that a plaintiff has a cause of action governed substantively by State X. After two years, plaintiff sues defendant in State Y (the forum). State X has a three-year limitation period and State Y has a one-year period. By applying its shorter limitation period, the forum advances its policy of protecting the judicial system. First, judicial efficiency is promoted by reducing the case load. Second, the quality of justice is not jeopardized by a decision possibly based on incomplete evidence. Also, by barring the action, the court furthers its policy of repose for defendants. See R. Leflar, supra note 9, § 127, at 253. This policy of repose for defendants is relevant mostly when the defendant is a resident of the state which enacted the statute of limitations, since a state's laws are presumed to be for the benefit of its own citizens. See Currie, Married Women's Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227, 230-31 (1958); Note, 15 Land & Water L. Rev. 717, 728 (1980) ("The basic premise of interest analysis is that every legislature enacts laws for the benefit of its own citizens.").
not implicated, since its limitation period has expired. Also, the forum has an interest in exculpating the defendant from liability if he is a resident of the forum. It should be noted, however, that the foreign state that created the cause of action has determined that a longer time period should be allowed for a plaintiff to seek judicial relief. Hence, the foreign state’s policy of providing a judicial remedy will be frustrated, especially if the plaintiff is a resident of that foreign state. In fact, the plaintiff may have had a legitimate expectation of suing in that foreign state with its unexpired limitation period. Yet, due to jurisdictional requirements the defendant may no longer be amenable to suit in that foreign state. As a result, the plaintiff may be denied his only chance to litigate if it is not jurisdictionally possible or economically feasible to sue elsewhere.

In summary, therefore, although application of the law of the forum to issues of prescription is undeniably an easy rule for the courts to follow, it has all of the drawbacks which modern theory has revealed in mechanical rules. The lex fori rule does not allow a consideration of the particular facts and circumstances of each case, and, as a result, often undermines the interests and policies of the interested states.

MODERN CHOICE-OF-LAW THEORY

Generally

In the last three decades, most states have abandoned the territorial approach of the traditional theory in favor of more flexible choice-of-law methodologies, such as “governmental interest analysis” and

70. Milhollin, supra note 9, at 10-11.
71. R. Weintraub, Commentary on the Conflict of Laws 60 (3d ed. 1986).
72. According to its intellectual father, Professor Brainerd Currie, interest analysis generally makes conflict of law decisions by analyzing the interest of each concerned state in the application of its own law. To ascertain these interests, the potentially applicable laws of each state are examined and interpreted in order to uncover their underlying purposes and policies. Then, based on the particular facts and circumstances of the case, a determination is made as to whether the application of a state’s law will advance that state’s policies. If so, that state has an interest in the particular issue. If only one state has an interest in the application of its own law, a false conflict exists and the law of the interested state is applied. If, on the other hand, each state has an interest in the case, a true conflict exists, and the law of the forum generally controls. Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 Duke L.J. 171, 178, reprinted in B. Currie, Selected Essays on the Conflict of Laws 177, 183-84 (1963).
the "significant relationship" approach of the Restatement (Second). These methodologies replace the mechanical rules of the traditional theory with an issue-by-issue analysis of the relevant policies and interests of each potentially concerned state. Thus far, however, these modern approaches have not been extended to issues of prescription. Despite persistent criticism by commentators, the majority of states still adhere to the lex fori rule for issues of prescription. Recognizing the importance of liberative prescription to the outcome of a case, these scholars advocate alternative approaches which basically treat liberative prescription as an issue of substantive law. After all, as one commentator noted, "[t]here is no inherent reason why the choice between statutes of limitations should be handled any differently than other choice-of-law problems." Heeding this advice, a few states have rejected the lex fori rule in favor of methods more consistent with the choice-of-law methodologies that they employ for other issues.

The Controlling Jurisdiction Method

One modern approach, which, for lack of a better name, will be referred to as "the controlling jurisdiction method," recognizes the close relationship between a state's substantive laws and its prescriptive statutes. Under this method, prescription is governed by the law of the "controlling" state rather than the forum qua forum—that is, the

73. The Restatement (Second) utilizes a flexible weighing process to choose the law of the state that has the most significant relationship with the case. The determination of the state having the most significant relationship is based on certain general factors listed in § 6:
   (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 result, and (g) ease in the determination and application of the law to be applied.

These factors are judged in light of various contacts with the states. The contacts relevant for each specific type of legal issue are laid out in various sections of the Restatement (Second). See, e.g., § 145 (torts) (reproduced in infra note 128), § 188 (contracts).

74. See supra note 12 for a brief explanation of the traditional theory.

75. See authorities cited supra note 9.

76. Grossman, supra note 9, at 33; see, e.g., Cuthbertson v. Uhley, 509 F.2d 225 (8th Cir. 1975); Harris v. Clinton Corn Processing Co., 360 N.W.2d 812 (Iowa, 1985); Ouellette v. Sturm, Ruger & Co., 466 A.2d 478 (Me. 1983). See infra text accompanying notes 122-33 for a discussion of Louisiana's refusal to abandon the lex fori rule on issues of prescription.

77. R. Leflar, supra note 9, § 127, at 256.
state whose substantive law governs the other issues of the case.\textsuperscript{78} To determine the controlling state, a forum follows its own choice-of-law methodology to determine which state's law should govern the substantive issues of the case.

This method appears to have been implemented in \textit{Heavner v. Uniroyal, Inc.},\textsuperscript{79} a case in which the Supreme Court of New Jersey abandoned the traditional \textit{lex fori} rule and applied the controlling state's statute of limitations. \textit{Heavner} was a product liability case brought by a North Carolina plaintiff for injuries suffered in an accident in North Carolina. The accident resulted from the blowout of a Uniroyal tire mounted on a trailer purchased in North Carolina from Pullman, Inc. Both defendants, Uniroyal and Pullman, were engaged in business in North Carolina and were subject to nationwide service of process.\textsuperscript{80} The lawsuit was filed more than three years after the accident, but less than four years after the purchase. North Carolina's three-year statute of limitations had expired, but New Jersey's four-year limitation period had not.\textsuperscript{81} The court examined the facts of the case and, utilizing a modern governmental interest analysis, determined that North Carolina law would govern the substantive issues.\textsuperscript{82} Since North Carolina was the controlling state on the substantive issues, that state's statute of limitations was "borrowed" and the suit was barred.\textsuperscript{83}

The court did not elaborate on the reasons for its determination that New Jersey had no interest in applying its own law. It merely noted that Uniroyal's incorporation in New Jersey, the only potential interest of New Jersey, was insufficient to justify application of New Jersey's substantive law under governmental interest analysis.\textsuperscript{84} The Third Circuit Court of Appeals later tried to explain \textit{Heavner} by reasoning that:

[T]he policies evident in New Jersey's liberal law would not have been fostered in the case. The primary purpose of a torts

\textsuperscript{78} Note, An Interest-Analysis Approach to the Selection of Statutes of Limitation, 49 N.Y.U. L. Rev. 299 (1974); see also Note, supra note 15, at 492.

\textsuperscript{79} 63 N.J. 130, 305 A.2d 412 (1973). That the court in \textit{Heavner} utilized the "controlling jurisdiction" method was the conclusion of the Third Circuit Court of Appeals in \textit{Schum v. Bailey}, 578 F.2d 493 (3d Cir. 1978). As the court in \textit{Schum} explained, "We glean from \textit{Heavner} that the critical determination underlying the 'borrowing' of a foreign statute of limitations is a determination as to whether a foreign substantive law is to be applied." 578 F.2d at 495.

\textsuperscript{80} \textit{Heavner}, 63 N.J. at 133, 305 A.2d at 414.

\textsuperscript{81} Id. at 134, 305 A.2d at 414.

\textsuperscript{82} Id. at 134-35 n.3, 305 A.2d at 414 n.3.

\textsuperscript{83} Id. at 141, 305 A.2d at 418.

\textsuperscript{84} Id. at 134-35 n.3, 305 A.2d at 414 n.3.
recovery is to compensate plaintiffs for their injury. Since the Heavners were domiciliaries of North Carolina, New Jersey had no interest in protecting their compensation rights. An alternate purpose . . . [is] to deter future misconduct. Where the tortious activity took place wholly outside of New Jersey as in Heavner, however, that policy could not be fostered.85

The Uniform Act

This "controlling jurisdiction method" is the basis for the Uniform Conflict of Laws—Limitations Act (the "Uniform Act") which was approved in 1982 by the National Conference of Commissioners on Uniform State Laws.86 The Uniform Act abrogates the lex fori rule and, if adopted, would provide legislative authority for applying the liberative prescription rules of the controlling state.87

Section 2 of the Uniform Act establishes the general rule that applicable limitation periods are to be determined by the law of the state that governs the substantive issues. That section states:

(a) Except as provided by Section 4, if a claim is substantively based:
   (1) upon the law of one other state, the limitation period of that state applies; or
   (2) upon the law of more than one state, the limitation period of one of those states chosen by the law of conflict of laws of this State applies.
(b) The limitation period of this State applies to all other claims.88

Unlike the limited judicial exception and the borrowing statutes developed under the traditional theory, this section operates whether the

85. Henry v. Richardson-Merrell, Inc., 508 F.2d 28, 33 (3d Cir. 1975) (footnote omitted). For other cases which have applied the statute of limitations of the controlling jurisdiction, see, e.g., Schum v. Bailey, 578 F.2d 493 (3d Cir. 1978); Pine v. Eli Lilly & Co., 201 N.J. Super. 186, 492 A.2d 1079 (1985). As the Schum case exemplifies, the forum's statute of limitations can be applied if the forum is determined to be the controlling state.
forum's limitation period is longer or shorter than that of the foreign state. 89

Section 3 provides that the applicable law includes the foreign state's accrual and tolling provisions. 90 The judicial exceptions and the borrowing statutes discussed earlier operated similarly, but only in the limited situations that fulfilled their requirements. 91

Section 4 introduces an escape provision to prevent possible unfairness that could result from application of the general rules contained in Sections 2 and 3. Section 4 provides:

If a court determines that the limitation period of another state applicable under Sections 2 and 3 is substantially different from the limitation period of this State and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim, the limitation period of this State applies. 92

This section allows a court to enforce its state's public policy in certain instances. Nevertheless, the escape clause is intended to be used sparingly. As explained in the official comments to Section 4, "[i]t is not enough that the forum state's limitation period is different from that of the state whose substantive law is governing; the difference must be 'substantial.' " 93 For example, a foreign tolling statute may have indefinitely suspended the running of prescription against a nonresident defendant who was always amenable to service of process under a long-arm statute. 94 Applying this tolling statute could subject the defendant to suit ten or twenty years after the cause of action arose, a result which may be considered unfair under the policies of the forum state. By resorting to Section 4, the forum could apply its own limitation period to avoid that unfairness.

Section 4 also protects a plaintiff from unfair accrual provisions found in some states. For example, the discovery rule is the majority rule in the United States for the commencement of prescription in a medical malpractice case. 95 Under this rule, prescription does not begin to run until the alleged tort is or should be discovered. 96 If the limitation period of a state without this discovery rule is chosen, the

89. Id. § 2 comment, 12 U.L.A. at 52.
90. Id. § 3, 12 U.L.A. at 52.
91. See generally supra text accompanying notes 24-56. In contrast to Section 3, the borrowing statute and judicial exceptions operated only when the foreign law barred the action, and then only when their respective conditions were satisfied.
93. Id. § 4 comment, 12 U.L.A. at 53.
94. Leflar, supra note 58, at 474.
95. Id. at 470 n.52.
plaintiff unfairly may be denied a reasonable time to sue. Section 4 provides an equitable solution to this problem.

This "controlling jurisdiction method" has at least three advantages as compared to the lex fori rule. First, it effectively deters forum shopping. Second, it avoids the selection of a disinterested state's limitation law by encouraging a rational and individualized analysis of the involved policies and interests. Finally, it avoids the inconsistency of allowing the plaintiff to base his claim on the law of a state, while denying the defendant the benefit of a defense under the same state's law.

 Nonetheless, the "controlling jurisdiction method" may on occasion yield incongruous results, as when a plaintiff's cause of action is barred by the shorter limitation period of a state whose law would be applicable to the merits but which may have no interest in applying its prescriptive law, thereby protecting, for instance, a nonresident defendant. Foreseeing this deficiency, the Heavner court rendered a narrow holding limited to the facts of the case. As the court recognized, "there may well be situations involving significant interests of this state where it would be inequitable or unjust to apply the [controlling state's statute of limitations]." Following this lead by the court in Heavner, the drafters of the Uniform Act provided the "escape" provision in Section 4 which authorizes a court to disregard the controlling state's prescriptive period in limited circumstances. The shortcoming of the "controlling jurisdiction method" that this exception addresses results from a failure to consider the specific policies and interests underlying liberative prescription. Without this additional analysis the controlling jurisdiction method may produce results which are as mechanical as those under the lex fori approach.

The Separate Issue Method

The above problems may be avoided by an approach recently followed by some courts which view liberative prescription as a distinct

97. The advantages of the controlling jurisdiction test are more fully discussed in Grossman, supra note 9, at 40-42.
98. Note, supra note 78, at 322.
99. We need go no further now than to say that when the cause of action arises in another state, the parties are all present in and amenable to the jurisdiction of that state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied, and its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred. Heavner, 63 N.J. at 141, 305 A.2d at 418.
100. Id., 305 A.2d at 418.
101. See supra text accompanying note 92.
choice-of-law issue to be separately analyzed in accordance with the forum's particular conflicts methodology. To best effectuate the interests of each concerned state, these courts first ascertain the purposes of and policies behind each state's statute of limitations and then examine the specific facts of the case to determine which state's law will best promote these policies and purposes.

This "separate issue" method was utilized by the Wisconsin Supreme Court in *Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc.* *Air Products* involved a breach of contract suit brought in Wisconsin by a Pennsylvania plaintiff who had purchased some electric motors from the defendant, a Wisconsin manufacturer. Although the parties conceded that all other issues were governed by Pennsylvania law, they disagreed on the applicable statute of limitations. Wisconsin's relevant limitation period was six years while Pennsylvania provided the four year prescriptive period of the Uniform Commercial Code. The court affirmed the trial court's choice of the forum's limitation period, but disagreed with the lower court determination that Wisconsin's modern theory was too unpredictable for issues of prescription. Using its modern approach, the supreme court determined that the statutes of limitations of both states were designed to protect defendants and courts from stale claims. Since neither a Pennsylvania defendant nor a Pennsylvania court was involved, Pennsylvania had no interest in applying its shorter limitation period. By providing a limitation period longer than the four year period of the Uniform Commercial Code, the court reasoned, Wisconsin's lawmakers decided that their state would be better served by a longer limitation period.

The "separate issue" method may of course result in the application of the prescriptive law of the same state as the one chosen through the "controlling jurisdiction" method. Such a result need not invariably occur, however. While the "controlling jurisdiction" method *always* applies the prescriptive laws of the state whose law governs the substantive issues, the "separate issue" method allows the court the freedom of choosing the limitation law of either that state or of the forum, based on a rational examination of the policies underlying the particular limitation laws involved in the case. Such a forthright

103. 58 Wis. 2d 193, 206 N.W.2d 414 (1973).
104. Id. at 197, 206 N.W.2d at 418.
105. Id., 206 N.W.2d at 419.
106. Id. at 198, 206 N.W.2d at 419.
107. Id., 206 N.W.2d at 419.
108. Grossman, supra note 9, at 40.
decision is not possible under either the "controlling jurisdiction" method or the traditional lex fori rule. Under the "controlling jurisdiction" method, the governing limitation statute is generally borrowed from the controlling state without considering the special purposes and policies behind statutes of limitations. Hence, the Uniform Act's general rule had to be qualified by an escape clause to accommodate those cases in which a court finds it necessary to adhere to its own prescriptive rules, despite applying a foreign state's substantive law. Similarly, the Heavner court's holding was specifically limited to the facts before it in order to allow for the possibility of choosing the limitation laws of a state other than the controlling jurisdiction in later cases. Thus, with the "separate issue" method courts can make a more responsive choice-of-law decision based on an analysis of the various state policies and interests associated with liberative prescription. Such an analysis is absent from decisions based on the "controlling jurisdiction" method or the lex fori rule.

Restatement (Second)—A Proposed Revision

A recently proposed revision of the Restatement (Second)'s approach to liberative prescription would generally supplant the lex fori rule with a "significant relationship" analysis. Under this proposal, "whether an action will be maintained against the defense that it was not timely filed will be determined by the law of the state which, with respect to that issue, is the state of most significant relationship to the occurrence and the parties . . . ." However, this general formula is implemented by more specific rules, one of which deals with the situation where the forum has a shorter limitation and another which deals with the situation where the forum has a longer limitation. When the forum's limitation period has expired, the action generally will be barred "unless compelling considerations of remedial justice warrant permitting the action to be maintained in the forum and the action would not be barred by the statute of limitations of the state [with the most significant relationship]." Thus, although this rule places paramount importance on the forum's policies of judicial economy and integrity, it also contains an escape clause for exceptional circumstances. An action can be maintained even though barred at the forum if an alternate forum is unavailable or extremely incon-

110. Grossman, supra note 9, at 40.
111. Restatement (Second) § 142 (Supp. 1987) (proposed revision).
112. Id. at § 142(1).
113. Id. at § 142(2)(a).
By way of example, the comments suggest an alternate forum may be unavailable "where jurisdiction could not be obtained over the defendant in any state other than that of the forum or where for some reason a judgment obtained in the only other state having jurisdiction would be unenforceable in other states." If an alternate forum is available, the court may still allow the action that would be time-barred under the current forum's law if the alternate forum is too inconvenient. Inconvenience is to be determined by analyzing the relationship of the parties to the forum and the difference in the length of the limitation periods. When there is no substantial relationship between the forum and the parties and the "difference [between the limitation periods] is small, say one or two years, there is a greater likelihood that the forum will disregard the small difference in policy embodied in the two statutes and permit the parties to proceed." When the forum's limitation period has not expired, the proposal generally abrogates the lex fori rule and allows the action if it is not barred by the state with the most significant relationship. On the other hand, when the state with the most significant relationship would hold the action prescribed, the forum generally will bar the action even if such action is timely under the law of the forum. Thus, this proposed revision is closely akin to the "separate issue" approach described above.

**Louisiana's Response**

Louisiana adopted a modern approach for multistate cases in *Jagers v. Royal Indemnity Co.*, a tort case not involving an issue of prescription. However, Louisiana courts have refused to extend such an analysis to issues of liberative prescription. The basis for this reluctance is easily understood: the courts are constrained by Civil Code article 10 which codifies the lex fori rule for issues of prescrip-

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114. Id. at § 142 comment f.
115. Id.
116. Id.
117. Id.
118. Id. at § 142(2)(b).
119. Id. In order to dismiss an action as prescribed when the limitation period of the state with the most significant relationship has expired, § 142(2)(b) also requires a finding that "maintenance of the action would serve no substantial interest of the forum" and that "no compelling considerations of remedial justice warrant permitting the action to be maintained in the forum." Id. at § 142(2)(b)(ii) & (iii).
120. 276 So. 2d 309 (La. 1973). *Jagers* is discussed in depth in the Torts section of this symposium.
The Louisiana Second Circuit explained its decision to adhere to the specific codal provision rather than extending *Jagers* to prescription in the following way:

*Jagers* mandates the application of the modern interest analysis in those circumstances where the choice of law is not specifically governed by statute. . . . [W]e do not believe that *Jagers* held that the modern interest analysis is to be applied when such an application would effectively nullify a Louisiana statute which specifically governs the conflicts issue presented.122

Article 10 thus raises an obstacle for Louisiana courts not present in those states in which the lex fori rule was adopted judicially rather than legislatively. In those states, abandonment of the lex fori rule does not require legislative action. As explained by the New Jersey Supreme Court in *Heavner*, 

"[the lex fori rule] is . . . judge-made and may be changed judicially."123

That article 10 forecloses any modern analysis of liberative prescription in Louisiana is evident in *Gierling v. Garner*,124 a decision rendered by the third circuit only a few months after the Louisiana Supreme Court decision in *Jagers*. *Gierling* involved a suit for non-payment of a promissory note executed by an Indiana resident who subsequently moved to Louisiana. Since the suit was filed more than nine years after the note's maturity date, the claim was held barred by Louisiana's five-year prescriptive period.125 Due to the transaction's close association with Indiana, the plaintiff asserted that *Jagers* required the application of the unexpired Indiana time period, but the court found such a contention "unteachable" in light of the specific applicability of the lex fori rule then found in article 3532 of the Civil Code.126

In the absence of statutory authority to the contrary, courts in Louisiana would probably be willing to apply modern analysis to issues of liberative prescription. In fact, one federal district court sitting in Louisiana relied on *Jagers* to apply Georgia's longer two-year limitation period instead of Louisiana's one-year period for torts.

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122. Shaw v. Ferguson, 437 So. 2d 319, 322 (La. App. 2d Cir. 1983) (emphasis by the court).


125. Id. at 666.

126. Id.
Nevertheless, the Fifth Circuit Court of Appeals reversed this decision in *Wright v. Fireman's Fund Insurance Co.*

*Wright* was a diversity action brought by a Georgia resident against a bankrupt Louisiana company and its insurer for injuries sustained in Georgia. The district court followed the *Jagers* rationale and applied Georgia's two-year statute of limitations, because Georgia had "the most significant relationship to the issue in question." According to the Fifth Circuit, the district court mistakenly believed that the repeal of the Louisiana Code of Practice, including its thirteenth article, left Louisiana without any law or precedent other than *Jagers*. To the contrary, this repeal was not intended as an abandonment of the lex fori rule. The Fifth Circuit held that "*Jagers* [was] not intended to apply to questions of prescription," and that Louisiana still views prescription as a procedural question governed by the law of the forum. This holding conforms with article 10 of the Civil Code which, however, the court apparently overlooked.

If *Gierling* and *Wright* had been decided under any of the modern approaches, the results would probably have been different. In *Wright*, the lower court did reach a different result, but without much analysis of state policies and interests and without indicating any explicit awareness of either the "controlling jurisdiction" or the "separate issue" methods as such. According to the Fifth Circuit, the district court had determined that Georgia had the most significant relationship to the case. The source of this "most significant relationship" test is the Restatement (Second), which sets forth the choice-of-law criteria for tort issues in Sections 6 and 145. Based on the principles included therein, the district court could have soundly determined that the substantive tort issues would be governed by Georgia law. Georgia was the place where the alleged tortious activity and the resulting injury occurred. Additionally, Georgia was the domicile of the plaintiff and the probable center of the business relationship. Louisiana's only connection was as the state of incorporation and place of business of the employer. Detracting from this potential Louisiana interest is

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127. 522 F.2d 1376 (5th Cir. 1975).
128. Id. at 1377.
129. Id. at 1378. See supra note 6 for the text of article 13 and an explanation of its repeal.
130. 522 F.2d at 1378.
131. Rabalais, supra note 123, at 519.
132. 522 F.2d at 1378.
133. See supra note 6 for the text of article 13 and an explanation of its repeal.
134. *Section 6*, which provides the general principles that should be considered in any choice-of-law case, is reproduced supra in note 73. *Section 145* contains a list of relevant contacts to be considered in connection with the Section 6 principles when dealing with a conflicts case involving tort law.
the employer's apparent business activity outside Louisiana, as evidenced by the work-related accident in Georgia. Thus, under both the "controlling jurisdiction" and "separate issue" methods, the facts in *Wright* could have supported application of Georgia's substantive law. Under the former, a determination that Georgia was the controlling state would have been well-founded, and the trial court's application of the Georgia statute of limitations well supported. Similarly, though not as clearly, the choice of the longer Georgia limitation period could be sustained under the "separate issue" method. By adopting a longer period, Georgia evinced a desire to afford Georgia plaintiffs additional time to seek judicial relief.\(^3\) Since the plaintiff was from Georgia, Georgia's interest would be advanced by the application of its own limitation law. On the other hand, Louisiana's shorter one-year period reflects a policy of protection for its resident defendants. This policy was not actually implicated in this case. Although the defendant was a Louisiana-based employer, the true defendant was the employer's insurance company which had issued an insurance policy that apparently extended coverage to claims by Georgia employees for accidents occurring in Georgia. Under such circumstances, the defendant insurance company could not have justifiably expected that its liability would be governed exclusively by Louisiana law.\(^4\)

\(^{134}\) Georgia's laws, like those of Louisiana and all states, are generally presumed to be for the benefit of its own citizens. See Currie, supra note 69.

\(^{135}\) In a similar situation, the New York Court of Appeals found that the insurer must have expected to be subjected to possible liability based on the laws of a state other than the state where the defendant-insured resided. The case, *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968), involved a wrongful death action based on an automobile accident in Maine that resulted in the death of a New York resident. The defendants, domiciled in Maine at the time of the accident, subsequently moved to New York. The conflict of laws involved a damage limitation statute. Maine limited damages to $20,000, but New York had no such limit. Although *Miller* involved damage limitations rather than statutes of limitations, both types of statutes affect liability: Maine's damage limitation limited liability to $20,000, and Louisiana's statute of limitations bars the suit. In each case, application of the law of the state other than that of the insured's residence would have subjected the insurer to greater potential liability. Thus, the following discussion by the *Miller* court of the insurer's expectations should be pertinent to the expectations of an insurer such as the one in *Wright*:

The insurer may have expected that Maine's limitation on death recoveries would apply to accidents in Maine. But here in determining whether any unfairness will result by virtue of the application of New York law, he may also consider the fact that the policy was not ... limited to affording protection only to accidents occurring in the State of Maine ... and that, therefore, the possibility of liability in excess of $20,000 was certainly not unexpected and was insured against.

22 N.Y.2d at 21, 237 N.E.2d at 882, 290 N.Y.S.2d at 741.
Gierling involved a suit on a promissory note executed in Indiana by an Indiana resident in favor of an Indiana corporation. After the note's maturity date, the defendant moved to Louisiana. Past due by over nine years, the note was negotiated from the Indiana payee to the Louisiana plaintiff, who immediately filed suit. Rejecting the plaintiff's contention that Indiana's ten-year limitation period applied, the court held that the suit was barred by Louisiana's five-year prescriptive period. According to the Louisiana Civil Code, the substantive issues would be controlled by the law of Indiana, since the note was executed and intended to have effect in Indiana. Therefore, under the "controlling jurisdiction" method, Indiana would be the controlling state and its ten-year period would govern.

Under the Gierling facts, the "separate issue" method could yield a decision applying the statute of limitations of either Indiana or Louisiana. When the payee and maker were both domiciled in Indiana, each intended and expected Indiana's statute of limitations to control. Had litigation ensued at this point, this would have been a fully domestic case governed solely by the law of Indiana; no choice-of-law issue would have existed. When the maker moved to Louisiana, a conflicts issue arose. If the original payee had instituted legal

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136. 284 So. 2d at 666.
137. Plaintiff's Original Brief on the Merits at 2. (Because Civil Code article 10 requires no analysis of the interests of the concerned states, the court's opinion omitted certain facts that may be relevant to a modern analysis.)
138. Id.
139. Id. It is not evident from the court's opinion that the plaintiff was a Louisiana resident, that the plaintiff was not the original payee, or that the original payee was an Indiana corporation.
140. Id.
141. The note was executed in Indiana between Indiana parties. The maker was to make payments at a designated place in Indiana. Thus, under the following paragraphs of Louisiana Civil Code article 10 the action on the note would have been governed by Indiana law:

> The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed.

> But the effect of acts passed in one country to have effect in another country, is regulated by the laws of the country where such acts are to have effect.

Since the note was made and intended to be paid in Indiana, the note was intended to have effect in Indiana.

142. At this point, the fact situation is similar to that found in Davis v. Colvin, 410 So. 2d 1211 (La. App. 3d Cir. 1982). In Davis, a Pennsylvania resident sued a Louisiana resident on an open account that resulted from purchases made when the plaintiff was domiciled in Pennsylvania. However, in this case the Pennsylvania statute of limitations provided a shorter period (4 years) than that of Louisiana (5 years). Id. at 1212. Relying on article 3532 (now contained within article 10) of the Louisiana Civil Code, the court barred the action which would have been barred under either state's statute. Id.
proceedings at this time, both Indiana and Louisiana could have asserted an interest in the litigation. Indiana's adoption of a ten-year limitation period exhibited a policy of allowing its residents a fairly long time to seek recovery. To the contrary, Louisiana's five-year period offered more protection to resident defendants. Faced with this situation, a Louisiana court might bar the claim, especially since the defendant is now a Louisiana resident and Louisiana's interest in avoiding "state" claims is implicated.

A closer analysis of the state interests, however, may reveal that applying the longer Indiana statute would advance Indiana's interests without seriously frustrating Louisiana's policies. Because the note was executed in Indiana with payments to be made therein, the payee did not expect and the maker could not justifiably expect any law but that of Indiana to control. Thus, the application of Indiana's limitation period would advance Indiana's plaintiff-oriented policies and fulfill the parties' reasonable expectations. Furthermore, Louisiana may not have an interest in protecting a resident defendant who has implicitly but voluntarily chosen the law of another state by incurring an obligation virtually unrelated to Louisiana. Nonetheless, Louisiana's policy of judicial economy and integrity may tip the balance toward dismissal unless the plaintiff can prove the unavailability or extreme inconvenience of an alternate forum.

Instead of himself filing suit in Louisiana, however, the Indiana payee negotiated the note to the Louisiana plaintiff. If this factor is viewed as merely fortuitous, the Louisiana transferee's rights will be identical to those of his Indiana transferor. However, it may be argued that the transfer of the note altered the interests of the respective states. If so, Indiana's interest in applying its longer limitation period to benefit Indiana plaintiffs dissipates because the plaintiff is now a Louisiana domiciliary. In this situation, application of Louisiana law will be supported by Louisiana's interest in protecting a Louisiana defendant—at least when the application of Louisiana's shorter prescriptive period does not frustrate the policies of another

143. The plaintiff's position was that the negotiation of the note and the change of domicile by the defendant were irrelevant. Urging the court to extend Jagers to issues of prescription, the plaintiff argued that Indiana's law should control: "It is apparent that the interests of the State of Indiana dominate here because of [the facts relating to Indiana]. . . . [T]he most weighty factor in [the plaintiff's] view is that when the parties executed this note they expected that the laws of Indiana would apply." Plaintiff's Original Brief on the Merits at 3.

144. The view of the defendant was that the change in circumstances negated any Indiana interest: "[Defendant-]Appellant submits that [the Jagers] case does not overrule the lex fori rule in Louisiana, but that even in applying the test [of Jagers], the law of Louisiana should govern a dispute between one Louisiana resident and another." Defendant's Reply Brief at 1.
state—and also by the fact that application of Louisiana's shorter prescriptive period will advance Louisiana's policies of protecting judicial integrity and preserving judicial economy.

As the foregoing analysis reveals, decisions based on Civil Code article 10 are often contrary to those which would be reached under the modern approaches. Under both modern approaches, the Wright court could have applied Georgia's limitation period to further Georgia's policies without impairing Louisiana's policies. Yet, article 10 precluded such a result. This is the problem with article 10. It produces acceptable results only randomly and often for the wrong reasons.\(^{145}\)

**CONCLUSION**

The lex fori rule and the borrowing provision in Civil Code article 10 may require the choice of limitation laws of a state that is not substantially interested in the prescriptive issue. Adoption of a modern approach to choice-of-law prescription issues will allow Louisiana courts to decide cases in a manner that more fully conforms to the policies of the interested states and the justified expectations of the parties. Two modern alternatives have been presented. The “controlling jurisdiction” method, implemented in the Heavner decision and the Uniform Conflict of Laws—Limitations Act, applies the limitation period of the state whose law governs the substantive issues.\(^{146}\) The “separate issue” method, utilized in Air Products and arguably the proposed revision to the Restatement (Second), treats liberative prescription as a distinct issue to be analyzed separately under the forum's choice-of-law approach for other issues.

It is recommended that the lex fori rule and the borrowing provisions contained in Civil Code article 10 be replaced with a statutory adoption of the more flexible “separate issue” approach. Instead of limiting the forum to the law of the controlling state, this method allows the forum to make its choice of law on the basis of the policies and interests of each state involved.\(^{147}\) This approach is preferable because it provides the courts with the discretion necessary to address

\(^{145}\) The analysis of Gierling illustrates that a decision made in compliance with article 10 may coincide with one made under the “separate issue” method. However, the acceptability of the article 10 results is merely coincidental. Similarly, the lex fori rule can reach the same result as the “controlling jurisdiction” method, but only if a borrowing statute is applicable, an escape clause is invoked, or if the forum is the controlling jurisdiction.

\(^{146}\) See supra text accompanying notes 78-101.

\(^{147}\) See supra text accompanying notes 102-10.
the wide range of interests that can arise from varying fact patterns.¹⁴⁸

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¹⁴⁸. The advantages of granting this discretion to the courts were expanded upon by Grossman, supra note 9, at 42:

Indeed, the judiciary's role in preventing forum shopping may be the more important because legislatures often may not foresee the problems involved in conflict-of-laws litigation. Nor is it necessarily more appropriate for the legislature to dictate choice-of-law rules, even if a legislature anticipates the need for those rules. Courts, repeatedly faced with cases presenting varied fact situations, may be better suited to fashion those rules in accordance with fairness and justice. Courts make choice-of-law rules in other legal areas, and statutes of limitations do not seem to require special treatment. In addition, the judicial imposition of borrowing, flexible as it is, avoids many of the problems of incompleteness and indefiniteness raised by borrowing statutes. The court can tailor its decisionmaking to the facts of each case, borrowing a foreign statute of limitations only when the result would be equitable and just.