

CHOICE OF LAW RULES^α

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THE THIRD RESTATEMENT OF CONFLICT OF LAWS is still being written, but it is well on its way to proposing substantial revisions in choice of law doctrine. While I was originally skeptical of the project, I am happily excited about the direction it has taken and can say with a great deal of confidence that it will be an enormous improvement over both the First and the Second Restatements. It will guide judges in deciding choice of law issues by describing new rules and by revising the test to use in judging the relative strength and pertinence of state interests and party rights. This new approach will be both more helpful and more defensible than the prior rules.

An advance of this kind is to be celebrated. The new rules being offered by the Third Restatement are far better than those of the prior Restatements. They are better because they reflect actual judicial practice, because they benefit from fifty years of experimentation and analysis in the courts, because they reflect careful use of interest analysis and attention to party rights, and because they incorporate careful evaluation of the circumstances when one state should engage in comity and defer to the law of another state. Better rules will mean that courts are more likely to follow them, parties are more likely to understand their rights, and litigants are more able to determine when to fight about a choice of law issue and when to give in.

At the same time, we should be realistic about the new rules. While they are better than the old ones, they will not end debate, and they will not be applied in a mechanical way. This is so for several reasons. First, Restatements are not statutes. Courts that adopt them do not follow them to the letter, as if they were promulgated by a state legislature and codified in the state laws. Judges look to Restatements for guidance; they do not apply Restatement rules mechanically. It is the courts that make the common law, not the American Law Institute. There will be variations in how the rules are phrased and interpreted, and the rules will be changed in subtle or not-so-subtle ways when they

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are applied to real cases.

Second, the rules are written on the backdrop of particular types of cases. The real world, however, is messy, and as soon as the rules are adopted by the American Law Institute, a case will come along that is not covered by the rules. Or if it is covered, it will press against the rule. Adding one stray fact can make all the difference in the world; it can make a rule that seems advisable feel horribly unjust. Rules cannot be applied without interpretation because the courts will need to determine the *scope* of application of those rules. Is this case inside the rule or outside it? Does this case fit within an exception, or is it clear that an exception needs to be recognized? Or is the controversy not covered at all by the rules, and we are left with the underlying task of determining how to choose what the Third Restatement calls the “most appropriate law”?

Third, good as they are, the rules contain ambiguities. Some of these ambiguities are inside the rules themselves, such as the distinction they make between conduct-regulating and loss-allocating rules. Clear as the Restatement tries to be, it cannot wrestle that distinction to the ground; the dividing line between these concepts is slippery, and it escapes from our grasp. Other ambiguities arise because the rules themselves can come into conflict with each other. It is inevitable that rules may overlap; when two rules seem to cover the same fact situation, we will need to determine their scope and the way they fit together.

Fourth, the rules make choices. Some of them are good ones and will garner widespread agreement. Others are controversial. Choice of law cases are *hard*. We have two states that both want their laws applied and have sufficient contacts to give them interests in doing so. We have two parties who claim the protection of the laws of different states, and when rights conflict, we may not be able to avoid unfairness; we find ourselves needing to do the *least unfair* thing, rather than promoting justice.

For all these reasons, it is important to understand not only what is good about the new rules but also the ways they will need to be refined, interpreted, and remade over time, as well as the ways they may shape—rather than end—debate about the right way to choose between competing state laws. That is the purpose of this essay. I will confine my attention to the rules governing tort conflicts. I will “restate” the Third Restatement draft rules by focusing on the eight basic patterns of tort cases identified by Symeon Symeonides.¹ Doing that will enable

¹ SYMEON C. SYMEONIDES, CHOICE OF LAW 192–240 (2016). While my analysis is based on the Symeonides patterns, I have combined several of his patterns to simplify the

me to convey the rules in a shorthand fashion that will be easy to understand. Focusing on the various patterns will also help us to recognize the kinds of debates likely to arise in such cases. The three major patterns are (1) common domicile cases; (2) split domicile cases; and (3) cross-border torts. Each of these three categories has several sub-categories. Some of these patterns are typical true conflicts, others are typical false conflicts, and still others are typical “no interest” cases. The key factors that separate true from false conflicts are (a) the domiciles of the parties and (b) the distinction between loss-allocating rules and conduct-regulating rules. For each pattern, we will review the emerging Third Restatement rules, explain the basis for each rule, the reasons why some scholars and judges might disagree with the rule, and the ambiguities that will need to be worked out in practice when the rules push us in opposite directions.

I. COMMON DOMICILE CASES

Modern choice of law doctrine truly began in the courts with the *Babcock* decision in the New York Court of Appeals.² That case described a false conflict in a manner so vivid and convincing that it had a huge impact on courts, leading them to adopt a common domicile rule for certain types of tort cases and displacing the older place of injury rule for torts conflicts. Because the case depended on understanding the rules of both states to be loss-allocating rather than conduct-regulating, a new rule was generated over time and has been embraced by the most recent version of the Third Restatement. The rule is this:

Common domicile rule: When the parties have a common domicile in one state, or they have a relationship centered there, and they are involved in an accident in another state, apply the law of their common domicile (or the place where their relationship is centered) unless the legal rule at the place of conduct and injury is a conduct-regulating rule.

To understand the rule, we will address the *Babcock* pattern first and then the “reverse *Babcock*” pattern.

presentation.

² *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

A. Babcock Pattern: Common Domicile in Plaintiff-Protecting State; Conduct & Injury in Defendant-Protecting State (Pattern 1: Babcock)

The *Babcock* case involved two friends from New York who went to Ontario for a short trip and were involved in a car accident there.³ The passenger sued the driver in state court back home in New York.⁴ Ontario had a guest statute granting the driver immunity from suit while New York had no such law and was perfectly happy for the suit to proceed.⁵

The traditional approach under either the First or Second Restatement would be to apply the law of the place of the injury.⁶ But in *Babcock*, the New York Court of Appeals applied the law of the common domicile for two reasons. First, it found the domicile of the parties to be significant for tort cases, rejecting the First Restatement approach denying any relevance to party domicile in choosing the applicable law in torts cases.⁷ Because both parties were domiciled in New York rather than Ontario, the court found Ontario to have either weak interests or no interest in applying its law.⁸ The guest statute was primarily directed toward Ontario residents, and Ontario had little reason to be concerned if a New York court recognized a remedy against a New York resident to benefit another New York resident.

Second, the Ontario rule was thought to be loss-allocating rather than conduct-regulating. It was not a rule of the road designed to promote safe driving; it was not a negligence rule designed to deter unreasonable conduct that puts others at risk; it was not a rule designed to promote tourism or business investment or job creation. It is unlikely that it was designed to give drivers an incentive to drive others around by giving the drivers immunity from tort claims by passengers. The only conduct-regulating purpose Ontario might have would be to

³ *Id.* at 280.

⁴ *Id.*

⁵ *Id.*

⁶ RESTATEMENT OF CONFLICT OF LAWS §378 (1934) (“The law of the place of wrong determines whether a person has sustained a legal injury.”); *Id.* at §377 (“The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §146 (1971) (“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 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.”); *Id.* at §146 cmt. d (“When conduct and injury occur in [the] same state. . . [t]his state will usually be the state of dominant interest . . .”).

⁷ *Babcock*, 191 N.E.2d at 281–284.

⁸ *Id.* at 284.

protect insurance companies from collusive claims by guests against hosts.⁹ But because the car was garaged in New York and normally driven there, and the insurance was purchased there, the insurance company would not assume that it would be immune from paying out awards to guests if the driver acted negligently and caused the guest harm.

All that meant that the conduct-regulating purpose of the Ontario law, if any, was directed at Ontario drivers for the benefit of Ontario insurance companies. But this case involved no driver from Ontario and no Ontario insurance company either.¹⁰ Conversely, New York has a view about the just relationship between a victim of negligence and a tortfeasor who acted wrongfully and wants its resident to have civil recourse against its other resident to redress the wrong. Ontario has no reason not to let New York apply its law in this instance.

On that reasoning, New York has a loss-allocating interest in applying its negligence rule, while Ontario has no interest in applying its guest statute at all. The case is a false conflict; the place of conduct and injury has no interest in applying its law while the common domicile is interested in applying its rule. Ontario has no conduct-regulating interest, even though the conduct took place in Ontario, and no loss-allocating interest, because the parties are not from Ontario, so Ontario is happy to let New York govern a New York-based relationship.

Conversely, if Ontario did have a conduct-regulating interest, then nonresidents who come to Ontario would have a duty to comply with local regulations and would have no claim to an exemption from them. Hence, the rule: apply the law of the common domicile unless the law at the place of conduct and injury is a conduct-regulating rule. This rule swept the United States courts and was adopted in state after state in cases that fit the *Babcock* pattern.

What lingering doubts remain? The main problem is that the analysis depends on our being able to distinguish between conduct-regulating rules and loss-allocating rules. Or it requires us to recognize when a rule is a conduct-regulating rule even if it is *also* a loss-allocating one. The *Babcock* case seems easy because the defendant-immunizing law is not intended to promote business investment or to classify

⁹ Even if the driver were not negligent, the driver and guest could agree to the guest testifying that the driver was negligent, as a way to justify a tort judgment that could then be recovered from insurance and shared between the driver and guest.

¹⁰ The court did not consider whether the New York insurance company might reduce its coverage or lower the price for its insurance based on a calculation that some of its covered car owners would be driving to Ontario. If we consider the reverse case, Ontario insurance companies might charge more for extra coverage to protect themselves if their residents drove to New York and were involved in accidents there.

unreasonably dangerous driving as socially undesirable. But are there tort rules that are intended to lower the costs of doing business or promoting investment or job creation? The answer is yes, and in such cases, there is an argument that such defendant-protecting rules are “conduct-regulating” in the sense that they are intended to promote activity by nonresidents in the territory that has the liability-limiting or immunizing rule. If the place of conduct and injury has a conduct-regulating purpose, then the common domicile rule will require “going the other way” and applying the law of the place of conduct rather than law of the place of the common domicile.

A potential example of such a case is *Alabama Great Southern Railroad Co. v. Carroll*¹¹—often the first case in the conflict of laws casebook. *Carroll* had a pattern quite similar to *Babcock*. A railroad company based in Alabama hired an Alabama-domiciled employee to work on its trains as they moved from Alabama to Mississippi and back again.¹² A link between two cars was visibly defective and should have been detected by railroad employees while the train was stopped in Alabama.¹³ Employees should also have noticed the defect while passing from car to car while the train was in transit in Mississippi.¹⁴ But the employees did not do their job properly, the defect was not discovered, and the link broke, causing an accident in Mississippi that injured the Alabama employee.¹⁵

While the Alabama Supreme Court in 1892 treated the case as a simple torts case governed by the law of the place of injury, a modern analysis would recognize that both states had interests in applying their laws. Alabama imposed vicarious liability on the employer for the negligence of its employees that caused harm to a co-employee.¹⁶ Mississippi immunized the employer from any liability under both the doctrine of assumption of risk and the “fellow servant” rule.¹⁷ While Alabama has an interest in regulating an employment relationship centered in Alabama and in imposing mandatory terms in a Alabama contract, Mississippi is interested in lowering the costs of doing business in Mississippi by refusing to recognize any claims by employees against employers, especially when the employer had not itself acted negligently. Does this Mississippi policy extend to nonresident

¹¹ *Alabama Great S. R.R. Co. v. Carroll*, 11 So. 803 (Ala. 1892).

¹² *Id.* at 803–805.

¹³ *Id.* at 804–806.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 807–808.

¹⁷ *Carroll*, 11 So. 803 at 809.

companies doing business in Mississippi? Of course it does. While some courts (and scholars) have misunderstood interest analysis and suggested that states have no interest in protecting nonresidents, the reality is that states seek to promote business investment within their territories whether or not the companies place their headquarters there.

Does *Carroll* represent a case that is governed by the exception to the common domicile rule? The Third Restatement suggests that the answer is “no.” First, the Third Restatement defines conduct-regulating rules as those “whose primary purpose is to impose liability for conduct deemed socially undesirable or absolve actors from liability on the grounds that their conduct was not socially undesirable.”¹⁸ An example of a rule designed to deter socially undesirable conduct might be negligence liability. An example of a rule designed to absolve an actor from liability on the ground that the conduct was not socially undesirable might be a law allowing the sale of marijuana. The state may not view that as wrongful conduct even though the use of marijuana harms the buyer, or the state may not view the seller as the proximate cause of any harm to the buyer or anyone injured by the buyer while under the influence of marijuana. What about a rule immunizing an employer from vicarious liability?

The Third Restatement classifies “vicarious liability” as a loss-allocating rule.¹⁹ Does that mean that a state that *denies* vicarious liability, as Mississippi did in *Carroll*, also has a loss-allocating rule? This is not clear. The answer may be yes, as the text makes no distinction between rules that impose or deny vicarious liability, but the answer may be no because the Restatement classifies as a conduct-regulating rule any “defenses that negate wrongfulness.”²⁰ If Mississippi believes the employer did nothing wrong, then its immunity rule has a purpose of absolving defendants from liability “on the grounds that their conduct was not socially undesirable.”²¹

I do not intend to answer this question one way or the other. I merely want to point out that an immunizing rule may be seen as either conduct-regulating or loss-allocating, depending on how we think about it. Nor is it clear that there is an easy way to determine when a defendant-protecting rule is designed to absolve an actor from liability on the ground that his behavior was “not socially undesirable.” Importantly, we have lived through a tort reform era that saw many laws

¹⁸ RESTATEMENT (THIRD) OF CONFLICT OF LAWS §6.01(1) (AM. LAW INST., Preliminary Draft No. 3, 2017) (hereafter *Restatement Third, Prelim. Draft 3*).

¹⁹ *Id.* at §6.03(c).

²⁰ *Id.* at §6.02(g).

²¹ *Id.* at §6.01(1).

passed to limit damages, protect businesses from undue liability, raise burdens of proof, and grant immunities from liability in certain cases. Those laws were partly generated by a sense from lawmakers that tort liability had gone too far and partly because they sought to lower the costs of doing business and promote business investment.

Consider a more modern example. The Third Restatement classifies workers' compensation as loss-allocating.²² While workers' compensation imposes liability without fault to ensure that workers injured on the job get some remedy, those laws also limit the cost of doing business by adopting payouts that are preset and are far lower than what might be awarded in a successful tort suit, particularly if the plaintiff could show that the employer ran an unsafe workplace. In *García v. Public Health Trust of Dade County*, an employee of Iberia Airlines was injured in Florida by medical malpractice.²³ The doctor was also an employee of Iberia Airlines.²⁴ The victim recovered a workers' compensation award in Florida and then returned home to Spain where he sued his employer for negligence. Florida, but not Spain, immunized the employer from the lawsuit.²⁵ If workers' compensation is only a loss-allocating rule, the Third Restatement requires application of the law of the common domicile—in this case, Spain. But the Florida court applied Florida law on the ground that the airline had a right to do business in Florida on the same terms as any other business.

The current wording of the Third Restatement rules seems to require application of the law of the common domicile because “workers' compensation” is classified as a loss-allocating rule.²⁶ Perhaps that is the right result. After all, the employment relationship is centered in Spain. Both employer and employee are “domiciled” there; the employee lives there and the airline is a Spanish governmental entity. If Spain is happy to impose higher liability on its employers based there to protect and benefit its employees who reside there, then why not let Spain govern a relationship centered there?

The counterargument is that the airline has the right to do business

²² *Id.* at §6.03(j).

²³ *Garcia v. Pub. Health Tr. of Dade Cty.*, 841 F.2d 1062, 1063 (11th Cir. 1988).

²⁴ *Id.* at 1063.

²⁵ *Id.*

²⁶ Or perhaps the fact that Spain allows a negligence suit on top of workers' compensation means that the Spanish rule is conduct-regulating. That purpose might not be applicable here because the conduct took place in Florida. Or perhaps it is because the company directors in Spain made the hiring and supervision decisions that led to the malpractice in Florida. Again, because the Third Restatement lists “workers' compensation” as a loss-allocating rule, it is not clear how it means for us to understand the purpose of a law like that of Spain that allows recovery on top of workers' compensation.

in Florida on the same basis as other companies. If it has higher liability for its operations in Florida than do Florida businesses, then it is at a competitive disadvantage, and customers in Florida will be harmed if this limits competition in the airline industry in Florida. Moreover, Florida's business protection policy is not limited to companies whose only business is inside Florida; it seeks to attract foreign investment to Florida, and that includes attracting airlines that fly between Florida and other countries. If we focus on the ways that Florida law protects businesses operating in Florida, and the fact that this may be intended to promote business investment and job creation in Florida, then Florida has a (strong?) conduct-regulating interest in extending not only its workers' compensation statute but also the *immunizing* provision in that law that protects the employer from tort suits arising out of workplace injuries.

The upshot is courts will need to determine when a defendant-protecting law is—and is not—conduct-regulating. If workers' compensation is loss-allocating, as the current draft of the Third Restatement provides, then *García* may have been wrongly decided. Courts may mechanically apply the Third Restatement rule that workers' compensation (and similar laws, like damage limitations²⁷) are loss-allocating and apply the law of the common domicile even though the place of conduct and injury may have reason to apply its defendant-protecting or immunizing law, despite the fact that the relationship is centered elsewhere. Yet it is doubtful that Florida courts would refuse to extend the immunity granted by its workers' compensation law to a foreign corporation doing business in Florida based on a claim arising out of conduct and injury that occur in the course of doing business in Florida.

It would be fruitful to debate whether the place of conduct and injury has a regulatory purpose when it limits liability in cases like this and to compare the strength of that interest to the loss-allocating interest of the common domicile. Indeed, the Third Restatement itself allows courts to create exceptions from its rules when “a case presents exceptional circumstances that make the application of a different state's law manifestly more appropriate.”²⁸ But even if that narrow exception is not met, the courts will need to wrestle with the distinction between conduct-regulating and loss-allocating rules, and they may well not apply the Third Restatement's classification of rules mechanically, especially when a state like Florida has strong governmental interests in extending its immunizing laws to actors conducting business inside Florida. Rather than ending debate about the appropriate rule to

²⁷ *Restatement Third, Prelim. Draft 3*, *supra* note 18, at §6.03(d).

²⁸ *Id.* at §5.03.

apply, the proposed Third Restatement rule will require courts to engage in that very debate. That may be a good thing, but it means the proposed rule will solve fewer cases than it may have seemed at first glance.

B. Reverse Babcock Pattern: Common Domicile in Defendant-Protecting State; Conduct & Injury in Plaintiff-Protecting State (Pattern 2: Schultz; Saharceski)

A similar, but obverse, problem arises if we reverse the laws. The “reverse *Babcock*” pattern occurs when the parties have a common domicile or a relationship centered in a defendant-protecting state while the conduct and injury occur in a plaintiff-protecting state. The most famous example in this category is *Schultz v. Boy Scouts of America*.²⁹ In that highly controversial case, two boys domiciled in New Jersey were raped by their Scoutmaster both in New Jersey and while on weekend trips to a camping site in New York.³⁰ The boys suffered severe psychological injury, and one committed suicide.³¹ Their parents sued the Boy Scouts for negligent hiring and negligent supervision.³² While the relationship was centered in New Jersey, and the charitable relationship was established and based there, there obviously was both conduct and injury that occurred inside the state of New York.

The New York Court of Appeals classified charitable immunity as a loss-allocating rule, and the Third Restatement agrees.³³ However, it also assumed that New York’s negligence laws were also loss-allocating. That conclusion was either wrong or needed a more searching analysis to come to that conclusion. Negligence laws are generally thought to have a purpose of deterring wrongful conduct. It is true that they *also* provide remedies for such conduct, and, in that sense, “allocate losses” between the parties. But if the Third Restatement is correct that conduct-regulating laws are those “whose primary purpose is to impose liability for conduct deemed socially undesirable,”³⁴ it would seem that negligence liability fits perfectly into that definition. Is negligent supervision or negligent hiring that leads to the rape of a child “socially undesirable”? Of course it is, and liability for acting in this way would seem to fit easily into the “conduct-regulating” category. If that is true, then the Third Restatement would require application of

²⁹ *Schutz v. Boy Scouts of Am.*, 480 N.E.2d 679 (N.Y. 1985).

³⁰ *Id.* at 680–82.

³¹ *Id.* at 681.

³² *Id.*

³³ *Id.* at 686; *Restatement Third, Prelim. Draft 3*, *supra* note 18, at 6.03(a).

³⁴ *Restatement Third, Prelim. Draft 3*, *supra* note 18, at §6.01(1).

New York, not New Jersey law, because both the conduct and injury took place in a conduct-regulating state.

Alternatively, the court might believe that the injury actually took place in New Jersey where the boys and their parents lived. Although there were immediate injuries in New York, where the boys were raped, the boys suffered the ultimate consequences back home in New Jersey. If we think the bulk of the injuries occurred in New Jersey, then this becomes a cross-border tort governed by the rule described below in this article. That rule suggests the plaintiff-protecting law should apply unless this is unfair to the defendant. Because the defendant acted in New York (negligent supervision of its employee), there is no fairness argument the defendant can make. That rule, too, points to New York law. Scholarly opinion goes the same way.

On the other hand, I have previously written that application of New Jersey law was arguably appropriate, and perhaps even the right result.³⁵ If we consider that no New Yorkers were put at risk (this was not dangerous driving on the road), then the case looks like *Babcock*, but in reverse. This is a relationship centered in New Jersey; New Jersey has views about the contours of the relationship, and it may be legitimate for New York courts to show comity to the New Jersey legislature by letting it govern a relationship centered in New Jersey.

Further, the New Jersey charitable immunity rule may not be solely loss-allocating in nature. The New Jersey charitable immunity law may both be (a) a determination that the Boy Scouts is not to blame for what happened, and (b) designed to promote charitable giving and charitable activity in New Jersey. If either of those are true, then New Jersey's rule is conduct-regulating, as the Third Restatement defines it, and we have a contest between two conduct-regulating rules. Determining which state has the strongest interest in applying its law requires debate and discussion rather than assuming that the case is easy because only one state has a conduct-regulating rule. Once again, the Third Restatement creates a field of debate rather than a rule than can applied mechanically.

For further proof of the need for debate about whether plaintiff-protecting rules are conduct-regulating, consider the case of *Saharceski v. Marcure*.³⁶ There two co-workers were driving in a single car through Connecticut while on the job and were involved in an accident.³⁷ The passenger sued the driver in state court in Massachusetts.³⁸

³⁵ Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 94–101 (1989).

³⁶ *Saharceski v. Marcure*, 366 N.E.2d 1245 (Mass. 1977).

³⁷ *Id.* at 1246.

³⁸ *Id.*

Connecticut would have allowed the suit, while the Massachusetts workers' compensation statute granted the co-employee immunity from the lawsuit.³⁹ Connecticut viewed workers' compensation laws as deals between employers and employees, granting employers immunity from tort suits while ensuring employees recovery for injuries on the job regardless of fault.⁴⁰ That quid pro quo does not extend to co-employees.⁴¹ Massachusetts, however, assumed that the guaranteed workers' compensation award meant that compensation for the injury was available from the employer's workers' compensation insurance and that further compensation was not warranted.⁴²

Massachusetts has an interest in extending its loss-allocating law to a relationship between co-employees based in Massachusetts and who are both domiciled in Massachusetts. Their common domicile has an interest in determining whether redress for wrongful conduct is appropriate. Because the Third Restatement classifies workers' compensation as a "loss-allocating rule,"⁴³ the law of the common domicile applies unless Connecticut's rule is conduct-regulating. The Third Restatement appears to classify negligence liability as a conduct-regulating rule; it relates both to "standards of conduct and safety"⁴⁴ and the "tortious character of conduct"⁴⁵ as well as the "duty owed plaintiff."⁴⁶ Negligence liability generally has both a conduct-regulating and a loss-allocating purpose. It is intended to deter wrongful, unreasonably dangerous behavior, but it also provides a remedy for that wrongful conduct that allocates the loss to the wrongdoer rather than to the victim. If I am correct that negligence liability has a conduct-regulating purpose, then, according to the Third Restatement, *Saharceski* was wrongly decided, and the court should have applied Connecticut, rather than Massachusetts, law.

Perhaps that is the right result. After all, the California Supreme Court held, in the well-known case of *Hurtado v. Superior Court*,⁴⁷ that "[i]t is manifest that one of the primary purposes of a state in creating a cause of action in the heirs for the wrongful death of the decedent is to deter the kind of conduct within its borders which wrongfully takes

³⁹ *Id.* at 1247.

⁴⁰ *Id.* at 1247–48.

⁴¹ *Id.*

⁴² *Saharceski*, 366 N.E.2d at 1249.

⁴³ *Restatement Third, Prelim. Draft 3*, *supra* note 18, at §6.03(j).

⁴⁴ *Id.* at §6.02(a).

⁴⁵ *Id.* at §6.02(b).

⁴⁶ *Id.* at §6.02(e).

⁴⁷ *Hurtado v. Super. Ct. of Sacramento Cty.*, 522 P.2d 666 (Cal. 1974).

life.”⁴⁸ That suggests that negligence liability for injury (as well as death) is partly designed to deter dangerous driving. The *Saharceski* court came to the opposite conclusion; it did not even recognize the possibility that the place of the accident might have an interest in liability for negligent driving to deter that very conduct.

That view is not irrational, but it is premised on the idea that driving puts everyone—including the driver himself—at risk, so there are sufficient incentives to drive carefully already, and liability adds nothing to deterrence. If you are not afraid of dying when you drive fast and recklessly, why will the possibility of liability suddenly change your mind? This argument is premised on looking to the marginal effect of liability on conduct (focusing on real world consequences) rather than the purpose of the rule. The Third Restatement chooses to focus on the *purpose* of the rule instead, thus avoiding complicated empirical questions about the actual effects of legal rules.

My point here is that the Third Restatement’s classification of negligence as a conduct-regulating rule may not be sufficient to cause courts like the Massachusetts Supreme Judicial Court to refrain from applying their own workers’ compensation laws to lawsuits between Massachusetts employees just because the accident occurred in a plaintiff-protecting state. At the very least, courts will need to wrestle with the relative strength of Connecticut’s conduct-regulating rule and Massachusetts’s loss-allocating rule to determine whether it is appropriate to apply the law of the common domicile or the law of the place of the conduct and injury. The Third Restatement usefully shapes the contours of that debate and asks us to consider which is the “most appropriate law,”⁴⁹ given “the specific policies of the relevant internal law rules[,] . . . the general policies relating to multistate occurrences and policies relating to the predictable and efficient conduct of litigation and the protection of the rights and justified expectations of the parties.”⁵⁰ What the Third Restatement does not do is adopt a set of rules that puts this type of controversy to rest.

II. SPLIT DOMICILE CASES

Split domicile cases involve parties domiciled in different states. The “true conflict” pattern occurs when the plaintiff is from a plaintiff-protecting state and the defendant is from a defendant-protecting state. What we call the typical “no interest” pattern occurs when the plaintiff is from a defendant-protecting state and the defendant is from a

⁴⁸ *Id.* at 672.

⁴⁹ *Restatement Third, Prelim. Draft 3*, *supra* note 18, at § 5.02.

⁵⁰ *Id.* at § 5.01.

plaintiff-protecting state. Within each of these patterns are sub-patterns that vary depending on where the accident occurs. Each of these split domicile patterns involves conduct and injury in the same state.

The Third Restatement has a simple rule for these cases.

Split domicile rule. When conduct and injury are in the same state as the domicile of one of the parties, apply the law of that state, whether its rule is loss-allocating or conduct-regulating.⁵¹

The Third Restatement essentially sees these cases as “lonely domicile” cases where the only contact in one of the states is the domicile of one party, while all other contacts are in the other state.

A. True Conflicts

1. Plaintiff Travels to a Defendant-Protecting State (Pattern 3: *Foster, Cipolla*)

David Cavers proposed a simple rule that was effectively adopted by the New York Court of Appeals in *Neumeier v. Kuehner*.⁵² When someone goes away from home and is involved in an accident elsewhere, apply the law of the place of conduct and injury, whether it is plaintiff-protecting or defendant-protecting, unless the parties have a relationship centered elsewhere and that state has a greater claim to govern the parties’ relationship than does the place of conduct and injury.⁵³ The Third Restatement embraces this rule without providing any exception whatsoever. “When the relevant parties have central links [domiciles] to different states, and conduct and injury occur in a single state, that state’s law will govern an issue of loss allocation.”⁵⁴ Similarly, “[w]hen conduct and injury occur in the same state, the law of that state will govern an issue of conduct regulation.”⁵⁵

Stated in an abstract, general manner, the rule makes sense. When you go to another state, you have a duty to comply with that state’s rules; you cannot claim immunity from its regulations just because you come from another state. Conversely, when your home state imposes obligations on you, you do not carry them around with you as if they

⁵¹ *Id.* at § 6.04 (conduct-regulating rule); *id.* at § 6.07(1) (loss-allocating rule).

⁵² *Neumeier v. Kuehner*, 286 N.E.2d 454, 457–58 (N.Y. 1972).

⁵³ DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 146, 159 (1965).

⁵⁴ *Restatement Third, Prelim. Draft 3*, *supra* note 18, at § 6.07(1).

⁵⁵ *Id.* at § 6.04.

were a raincoat when you travel to other states. If you engage in conduct in another state that is perfectly lawful there, it would seem unfair to hold you responsible for violating the laws of your home state; you have as much right to the benefits of that state's law as do its residents. These cases might be characterized as "lonely domicile" cases.⁵⁶ All the contacts are in one state (conduct, injury, domicile of one party) while the other state has only one contact, i.e., the domicile of one of the parties.

Cavers, but not the Third Restatement, proposed an exception, when the parties have a relationship centered elsewhere. A perfect example is *Foster v. Leggett*.⁵⁷ In that case, a domiciliary of Ohio was driving in Ohio with a friend from Kentucky.⁵⁸ The accident occurred in Ohio, which had a guest statute immunizing the driver from liability to his passenger.⁵⁹ Surely he has a right to drive at home and claim the protection of the law of his home state. The fact that his passenger comes from Kentucky should not place greater duties on him than would otherwise be the case.

However, he also had a residence in Kentucky, where he rented a room for several days a week, and where he had established a relationship with the passenger.⁶⁰ Although Kentucky was his residence but not his domicile, the case looks more like a common domicile case akin to *Babcock* where the law of the place of common domicile applies, assuming that guest statutes are not intended to promote tourism or business activity in Ohio. Of course, the case is unlike *Babcock* because the place of the accident is also the defendant's domicile. Such cases require interpretation of the facts to determine whether the place where the relationship is centered should control, even if it is not technically a common domicile.

The Third Restatement uses the term "central link" to refer both to domicile and the principal place of business for a company, and it defines the central link for persons to be their domicile. It defines domicile as "the place where the person's life is centered and the person is physically present."⁶¹ Figuring out "where a person's life is centered depends on objective evidence of the person's domestic, familial, social, religious, economic, professional, and civic activities."⁶² As with

⁵⁶ See JOSEPH WILLIAM SINGER, CHOICE OF LAW: PATTERNS, ARGUMENTS, PRACTICES (forthcoming, 2020).

⁵⁷ *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972).

⁵⁸ *Id.* at 827–28.

⁵⁹ *Id.*

⁶⁰ *Id.* at 828.

⁶¹ *Restatement Third, Prelim. Draft 3*, *supra* note 18, at § 2.03(1).

⁶² *Id.* at § 2.03(2).

the Second Restatement, this requires reducing complex evidence to identify the *single state* that is the “center” of a person’s life. Doing that in *Foster v. Leggett* would require an analysis more typical of a novel than a statute. Was the defendant’s life centered in Ohio where his home was, or was it centered in Kentucky where he had his most important relationship? And is residence actually less important than domicile in determining what law to apply in *Foster*? Is the Third Restatement correct to focus solely on domicile rather than “where the parties’ relationship is centered”?

The Third Restatement rule will, unfortunately, not necessarily prevent courts like the Kentucky Supreme Court from applying forum law, as it did in *Foster v. Leggett*. After all, the facts involved a short trip away from the plaintiff’s home in Kentucky to Ohio and a clear intent on the part of both parties to return to Kentucky where their relationship was centered.⁶³ It is not at all clear that Ohio’s is the “most appropriate law,” as the Third Restatement requires.⁶⁴ While Ohio has an interest in regulating conduct on Ohio roads, the guest statute is likely to be a loss-allocating rule (as the Third Restatement provides⁶⁵), and an Ohio court might consider engaging in restrained interpretation of its law when the host has a prior relationship with the guest that is centered in Kentucky, and when the trip began and was to end in Kentucky. Unlike *Cavers*, the Third Restatement seeks to shut down consideration of the law of the place where the relationship is centered. My prediction is that the courts will not go along, at least if the case is heard in the courts of the plaintiff-protecting state, as occurred in *Foster v. Leggett*. That suggests that the Third Restatement rule will not be applied as mechanically as the drafters may suppose.

A different example is *Cipolla v. Shaposka*.⁶⁶ There two friends were students at the same school in Delaware.⁶⁷ They went on a short trip from Delaware, where the driver lived, to Pennsylvania, the home of the passenger.⁶⁸ The accident occurred in Delaware, and the court applied the law of the place of conduct and injury, just as *Cavers*, the Third Restatement, and the *Neumeier* court would suggest.⁶⁹ The defendant was driving on the roads of his home state, whose law immunized him from a tort suit by his passenger.⁷⁰ Surely that law applies

⁶³ *Foster*, 484 S.W.2d at 828.

⁶⁴ *Restatement Third, Prelim. Draft 3*, *supra* note 18, at § 6.08.

⁶⁵ *Id.*, at § 6.03(i).

⁶⁶ *Cipolla v. Shaposka*, 267 A.2d 854 (Pa. 1970).

⁶⁷ *Id.* at 855.

⁶⁸ *Id.*

⁶⁹ *Id.* at 856–58.

⁷⁰ *Id.*

when he is driving at home, and the victim cannot be unfairly surprised by application of that law.

There is one complication, of course. What if the accident had occurred a few miles down the road in Pennsylvania? Delaware, after all, is a small state. Would that—*should that*—completely change the outcome of the case? Cavers, the *Neumeier* rules, and the Third Restatement all say “yes.” Cavers straightforwardly admitted that he had a “territorialist bias,”⁷¹ while also acknowledging “there are circumstances where the citizen may properly, if metaphorically, be considered to carry a law of his state about with him.”⁷² And one can understand why the place of accident might be legitimately outcome-determinative. If the accident takes place in Pennsylvania, then it is the defendant who voluntarily entered the plaintiff’s home state, and the defendant cannot claim immunity from its regulatory laws, especially if negligence liability is classified as a conduct-regulating rule.

And yet, the ultimate standard we are applying is the “most appropriate law,” given the two states’ policies, the desire to show comity to the laws of other states, and the rights and reasonable expectations of the parties. The Third Restatement standard requires that a judgment be made, *all things considered*. The rules are a shorthand to answering the question of which law is the most appropriate law to apply. While the Third Restatement is hoping to bring order and predictability to the field of conflict of laws by putting a much heavier thumb on the scale for its proposed rules, it cannot escape the truth that those rules emerged because of more than fifty years of interest analysis. The purpose of choice of law rules is to choose the state with the strongest interest in applying its law and to protect the rights of the party with the best claim to the protection of a particular state’s law. Given that background, should the decision in cases like *Cipolla* turn *solely* on the place where the accident happens? Does an accident a few miles later, just across the border, really justify an entirely different result? How is this less arbitrary than tossing a coin? And if we do not think judges should decide cases by tossing coins, then why is a “place of the injury” rule the correct deciding factor in cases like this?

Perhaps it is, but perhaps courts will continue to reflect on state policies, the significance of various contacts, and give significance to the fact that the defendant began a trip that was to end in Pennsylvania, and that he did not plan to have his accident on the Delaware side of the line. While a Delaware court will be surely inclined to apply Delaware law to a Delaware accident, must a state court in Pennsylvania

⁷¹ CAVERS, *supra* note 53, at 134.

⁷² *Id.*

do the same? *Cipolla* was heard, after all, in the Pennsylvania courts. That suggests *either* that the defendant had some contact with Pennsylvania, giving it personal jurisdiction over the defendant, or that the defendant waived any objection based on lack of personal jurisdiction.

A Pennsylvania court sees before it a Delaware tortfeasor who is immune from liability for wrongful, negligent conduct that injured a Pennsylvania resident under the law of the tortfeasor's home state, and perhaps the tortfeasor has a right to the protections of his home state's law. Yet it is not clear that the defendant *relied* on that law in deciding how to act, and we have before the court a forum resident who was injured and who has a right under forum law to recover for that injury. Does the forum have no real interest in applying its plaintiff-favoring law here? Perhaps not. Perhaps the court should engage in restrained interpretation and refrain from asserting its compensatory policy when the accident occurred in Delaware. Yet if the accident had occurred just a few miles later, then what? Everything would be different? Is Delaware's interest any weaker? Is Pennsylvania's interest any stronger? Does the defendant lose his right to the benefits of Delaware law the moment he crosses the line? Does the plaintiff all of a sudden jump into the privileged position?

The Third Restatement may be right to choose a strict rule to govern cases like this. Yet we must recognize that the Third Restatement privileges one set of territorial contacts (place of conduct and injury) over other factors, such as the place of departure and the place of destination. Note that in cross-border torts, where conduct and injury are in different states, the Third Restatement *takes an entirely different approach*. It effectively adopts a rule (addressed below) that states that, when conduct and injury are in different states, pick the law that favors the plaintiff unless the defendant could not foresee the injury occurring there.⁷³ Suppose we adopted the same rule here: the plaintiff wins unless the defendant could not foresee the injury happening there. Could the defendant foresee the injury happening in Pennsylvania? The answer is "yes" because that was the destination of the trip.

This puts in relief the difference between the Kentucky forum law approach in *Foster v. Leggett* and the Pennsylvania Supreme Court's place of injury tie-breaker in *Cipolla*. The Third Restatement seems to deny any significance to the fact that the parties in *Cipolla* were *in transit from a defendant-protecting state to a plaintiff-protecting one*. The forum had the plaintiff-protecting law, and the defendant did not rely on the defendant-protecting rule. Does the defendant's right to the immunity of his home state outweigh the plaintiff's right to redress for

⁷³ *Restatement Third, Prelim. Draft 3, supra* note 18, at §6.07(2), (3).

conduct that *both states consider wrongful*? That is a normative question that rules cannot stop courts from considering, no matter how rigid those rules seem to be. And because the Third Restatement adopts a plaintiff-favoring stance for cross-border torts, there is a normative tension between a rule based on substantive justice (plaintiff wins unless this is unfair to defendant), and a rule based on territorial contacts (place of conduct and injury) when the plaintiff-favoring rule is conduct-regulating and the defendant-protecting rule is loss-allocating. The Third Restatement will likely not end debate in cases that involve short trips between states like those in *Foster* and *Cipolla*.

2. Defendant Travels to a Plaintiff-Protecting State (Pattern 4: *Pelican Point*; *Hall*; *Hyatt*)

Thankfully, we have finally come to an easy, easy case. A defendant who travels to a plaintiff-protecting state cannot claim immunity from its regulatory laws, whether conduct-regulating or loss-allocating. The prime example here used to be *Nevada v. Hall*.⁷⁴ There an employee of the University of Nevada went to California and harmed a California resident in an auto accident there.⁷⁵ Nevada, but not California, granted immunity to the driver's employer.⁷⁶ The case was heard in state court in California, and that court had no trouble applying forum law.⁷⁷ You cannot wrap your home state's immunizing law around you like a shield and take it with you into a plaintiff-protecting state and claim immunity from the conduct-regulating laws of the state you voluntarily entered.⁷⁸

The wrinkle in the case is that the University of Nevada is a public university, effectively part of the state of Nevada, and the immunizing rule was one of sovereign immunity.⁷⁹ While the Supreme Court held in *Hall* that one state cannot enter another and claim immunity from its conduct-regulating rules,⁸⁰ it reversed course in 2019 in the case of *Franchise Tax Board of California v. Hyatt (Hyatt III)*,⁸¹ where it held that states cannot entertain lawsuits in their own courts against other

⁷⁴ *Nevada v. Hall*, 440 U.S. 410 (1979).

⁷⁵ *Id.* at 411.

⁷⁶ *Id.* at 411–12.

⁷⁷ *Id.*

⁷⁸ Recall that the California Supreme Court had ruled that negligence liability in auto accidents is intended to deter negligent conduct on its roads to protect its people and all others present there. *Hurtado v. Superior Court of Sacramento Cty.*, 522 P.2d 666, 672 (Cal. 1974).

⁷⁹ *Hall*, 440 U.S. at 411–18.

⁸⁰ *Id.* at 424.

⁸¹ *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1490 (2019).

states without the consent of those other states. That means that states, alone among defendants, are free to enter other states and avoid the liabilities imposed by the law of the place of conduct and injury unless they waive their sovereign immunity from such claims. And they cannot claim immunity for themselves while denying similar liability to sister states.⁸²

But private parties have no such power. A case on point is *Pelican Point Operations, LLC v. Carroll Childers Co.*⁸³ In that case a Texas company went to Louisiana and engaged in self-help to disable and repossess equipment it had sold to a Louisiana company.⁸⁴ While lawful under Texas law where the machine was sold, self-help was illegal in Louisiana.⁸⁵ The Louisiana court had no trouble holding that a Texas company cannot commit a property tort in Louisiana in violation of Louisiana rules regardless of what its home state law allows.⁸⁶ While the case involved a combination of contract and tort law, the trespass and conversion torts were committed against an actor who was not a party to the agreement.⁸⁷ Such cases are easy ones, and the Third Restatement rule will be welcome despite the fact that it cannot apply in the case of sovereign immunity.

B. “No Interest” Cases

1. Defendant Travels to a Defendant-Protecting State (Pattern 5: *Erwin; Neumeier*)

“No interest” cases involve plaintiffs from defendant-protecting states and defendants from plaintiff-protecting states. In such cases, it is sometimes not implausible to believe that neither state has a real interest in applying its law. The first “no interest” pattern occurs when the defendant travels to a defendant-protecting state and injures someone domiciled there. Two famous cases that fit this pattern are *Erwin v. Thomas*⁸⁸ and *Neumeier v. Kuehner*.⁸⁹

Erwin involved an Oregon resident who traveled to Washington

⁸² That was the holding of *Franchise Tax Bd. of California v. Hyatt (Hyatt II)*, 136 S. Ct. 1277, 1283 (2016).

⁸³ *Pelican Point Operations, LLC v. Carroll Childers Co.*, 807 So. 2d 1171 (La. Ct. App. 2002).

⁸⁴ *Id.* at 1172–73.

⁸⁵ *Id.* at 1173.

⁸⁶ *Id.* at 1175–76.

⁸⁷ *Id.* at 1174.

⁸⁸ *Erwin v. Thomas*, 506 P.2d 494 (Or. 1973).

⁸⁹ See *Neumeier v. Kuehner*, 286 N.E.2d 454, 458–59 (N.Y. 1972) (holding that Ontario law applied although the driver was domiciled in New York).

state and caused an accident there, harming a Washington domiciliary.⁹⁰ Oregon, but not Washington law, gave the victim's spouse a right to recover damages for loss of consortium.⁹¹ Black's Law Dictionary defines consortium as "[c]onjugal fellowship of husband and wife, and the right of each to the company, society, co-operation, affection, and aid of the other in every conjugal relation."⁹² The case fits the traditional "no interest" pattern because Oregon's loss of consortium claim extends to Oregon-domiciled spouses and possibly spouses domiciled elsewhere who are injured in Oregon. If that is so, then Oregon has no interest in extending its plaintiff-protecting law to a spouse who lives and is injured in Washington where she has no claim to recover for loss of consortium. If Washington law applies to any negligence claim by the direct victim of the defendant's conduct in Washington, then any conduct-regulating purpose Washington has will likely to be vindicated. Adding a claim for loss of consortium is not likely to have the purpose or effect of deterring negligent driving. While the Third Restatement does not directly address the issue, it would likely classify loss of consortium claims as loss-allocating rules because the absence of such a claim does not "negate wrongfulness"⁹³ and seems closer to a damage limitation rule.⁹⁴

"No interest" cases have excited scholarly interest because they seem to escape the bounds of interest analysis, and it is not clear how to conceptualize them. One way to think about a case like this is to recognize that it is a "lonely domicile" case, arguably similar to *Cipolla v. Shaposka*. Someone goes to another state and is in an accident there. The mere fact that the defendant comes from elsewhere is not a reason to depart from the law of the place of conduct and injury, whether the rule of law there is conduct-regulating or loss-allocating.

Dean Larry Kramer agrees with that approach, but on other grounds. He argues that the defendant should win on the equivalent of a Rule 12(b)(6) motion.⁹⁵ No state gives the plaintiff a remedy; Oregon's loss of consortium claim does not extend to a Washington spouse injured in Washington, and Washington does not provide her with a remedy either. Because neither state recognizes a claim, the complaint should be dismissed for failure to state a claim upon which relief may

⁹⁰ *Erwin*, 506 P.2d at 495.

⁹¹ *Id.*

⁹² *Consortium*, BLACK'S LAW DICTIONARY 309 (6th ed. 1990).

⁹³ *Restatement Third, Prelim. Draft 3*, *supra* note 18, at § 6.02 cmt. b.

⁹⁴ *Id.* at § 6.02 cmt. d.

⁹⁵ Larry Kramer, *The Myth of the Unprovided-For Case*, 75 VA. L. REV. 1045, 1050-52 (1989).

be granted.⁹⁶

I have argued precisely the opposite.⁹⁷ Both states recognize that the defendant should be liable when acting negligently, and no state gives the defendant a defense from the claim for damages arising from the defendant's wrongful conduct. Because Washington's negligence law will apply, the tortfeasor should pay for the damages it caused. The defendant's home state of Oregon thinks that loss of consortium to the victim's spouse is a harm that the defendant caused and that he should pay for, and Washington has no interest in protecting him from that claim. The immunity rule in Washington was not intended to promote tourism in Washington or business investment. If domicile is what matters, then Washington has no interest in protecting the Oregon defendant from the claim, and Oregon has an interest in making him pay for the harm he did unless doing so violates the sovereignty of another state or is unfair to him. Imposing liability will not hurt Washington because its rule is not conduct-regulating (it is not tourism- or business-promoting); nor will it be unfair to the defendant who could not have relied on Washington law in deciding how to act given that his negligent driving was already unlawful in Washington.

The *Erwin* court cut through all this and applied forum law.⁹⁸ The plaintiff smartly sued in the defendant's home state, getting general jurisdiction over him there, and the forum saw no reason to depart from its view that tortfeasors have a duty to compensate the spouses of their victims for the harm their wrongful actions have caused.⁹⁹ As a property matter, the defendant has money in the bank that Oregon believes rightfully belongs to the spouse in Washington, and requiring him to compensate her for her losses violates no policy of Washington state.

The Third Restatement adopts Kramer's approach, at least in effect if not in design. An Oregon resident who travels to Washington and causes injury there should not carry the higher regulatory standards of his home state with him. He has the right to act in Washington under the same laws as Washington residents. Nor will application of Washington law be unfair to the Washington plaintiff. When someone goes to another state and causes injury there, the Third Restatement requires

⁹⁶ See FED. R. CIV. P. 12(b)(6) ("failure to state a claim upon which relief can be granted"); Larry Kramer, *The Myth of the Unprovided-For Case*, 75 VA. L. REV. 1045, 1050-54 (1989).

⁹⁷ See Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197, 202 (1991). See also Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991); See also Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595 (1984).

⁹⁸ *Erwin*, 506 P.2d at 494-97.

⁹⁹ *Id.*

applying the law of the place of conduct and injury.¹⁰⁰ The rule is simple and easily administered.

This is not a bad rule, but it will not stop courts like the Oregon Supreme Court from asking whether there is a good reason not to provide a nonresident with a claim that would certainly be available for a forum resident. Recall that if the plaintiff were domiciled in Oregon, then we would have a common domicile case in the *Babcock* pattern, and Oregon law would apply. Why deny a remedy to a nonresident when the defendant did not rely on the Washington rule, and that rule was not designed to attract tourism or investment in Washington? Clearly Washington has no interest in denying money to its resident if that money comes from a nonresident whose own legal system thinks he should pay it over.

It was that exact problem of discrimination against a nonresident plaintiff that led Judge Bergan to dissent in *Neumeier v. Kuehner*.¹⁰¹ In *Neumeier*, as in *Erwin*, a New York resident drove to Ontario and caused injury there to an Ontario resident.¹⁰² Everything is the same as the facts of *Babcock* except that the plaintiff lives in Ontario. Judge Fuld adopted rules like those in the Third Restatement that apply to lonely domicile cases.

When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.¹⁰³

But Judge Bergan was highly disturbed by the application of these rules in this case.

What the court is deciding today is that although it will prevent a New York car owner from asserting the defense of a protective foreign statute when a New York

¹⁰⁰ *Restatement Third, Prelim. Draft 3*, *supra* note 18, at 6.07(1).

¹⁰¹ See *Neumeier v. Kuehner*, 286 N.E.2d 454, 460 (N.Y. 1972).

¹⁰² *Id.* at 455.

¹⁰³ *Id.* at 457–58.

resident in whose rights it has an “interest” sues[,] it has no such interest when it accepts the suit in New York of a nonresident. This is an inadmissible distinction.¹⁰⁴

If Judge Bergan is right, it suggests that the forum law solution that the *Erwin* court adopted for this type of case might not be so bad a resolution after all, especially if the court is worried about the appearance of discrimination against a non-resident. If that is the case, courts in *Erwin*-type cases may well depart from the proposed Third Restatement rule.

To sharpen the discrimination worry, consider *Edwards v. Erie Coach Lines Co.*¹⁰⁵ A charter bus owned by an Ontario company carrying members of an Ontario women’s hockey team plowed into the rear end of a tractor-trailer parked on the shoulder of a highway in New York.¹⁰⁶ Three passengers died, and several were seriously hurt.¹⁰⁷ The victims sued both the bus company and the owner of the trailer.¹⁰⁸ While the bus company’s principal place of business was in Ontario, the owner of the trailer was domiciled in Pennsylvania.¹⁰⁹ New York law allowed full recovery for both economic and noneconomic harms (pain and suffering, for example), while Ontario law capped the amount of damages that could be awarded for noneconomic harms.¹¹⁰

The *Neumeier* court had adopted three rules. First was the *Babcock* rule: when the parties are domiciled in the same state, apply the law of the common domicile, at least when the rule at the place of conduct and injury is not a conduct-regulating rule (Rule 1). Second was the lonely domicile rule: when the only contact with one state is the domicile of one of the parties, and all other contacts are in the same state (conduct, injury, domicile of the other party), apply the law of the place of the injury (Rule 2). Third, in split domicile cases, apply the law of the place of injury (Rule 3).¹¹¹

Applying the *Neumeier* rules separately for each defendant in *Edwards*, the court chose the law of the common domicile in Ontario to the defendant domiciled there (Rule 1) and the law of the place of injury to the defendant domiciled in Pennsylvania (Rule 3). It did so without careful consideration of whether New York had a conduct-regulating

¹⁰⁴ *Id.* at 461 (Bergan, J., dissenting).

¹⁰⁵ *Edwards v. Erie Coach Lines Co.*, 952 N.E.2d 1033 (N.Y. 2011).

¹⁰⁶ *Id.* at 1034-35.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1035.

¹⁰⁹ *Id.* at 1045.

¹¹⁰ *Id.* at 1040.

¹¹¹ *Edwards*, 952 N.E.2d at 1034-35. *See Neumeier* 286 N.E.2d at 457-58.

purpose to its law allowing fuller damages, and the court failed even to address what the law of Pennsylvania was, instead simply applying the place of injury law given the split domiciles of Ontario and Pennsylvania. If Pennsylvania law were even more plaintiff-favoring than that of New York, the case would have resembled *Erwin* and raised the question of whether the defendant could or should be required to pay what his domicile considered fair if the New York rule was not a liability-limiting one designed to promote business investment or commerce in New York.

The case raises several issues. First is the issue of discriminatory treatment of nonresidents. Is it discriminatory to limit damages for one defendant but not another when the dispute arises out of a single accident taking place in New York? The answer might be “no” because the court is engaged in careful interest analysis, and defendants only have the right to an immunizing law when both parties are domiciled there (as in *Schultz*).¹¹² The answer might be “yes” because there is something untoward in denying immunity from unlimited noneconomic damages to the second defendant when it was only ten percent responsible for the crash and the other defendant is relieved of such liability by the happenstance of being domiciled in the same state as the plaintiffs. Judge Ciparick certainly thought it was discriminatory to treat the defendants differently when the “causes of action arise from a single incident in New York.”¹¹³ That issue of discrimination is not one that is going to go away. If application of the Third Restatement rules appears to treat a party worse because of his residence, some judges will rebel, either by altering the rule or interpreting it not to apply by distinguishing the case.

The second issue *Edwards* raises is whether we are better off mechanically applying choice-of-law rules, as the court seemed to do in *Edwards*, or we are better off engaging in a more searching analysis to determine whether the case warrants an exception to a seemingly applicable rule. Confining analysis to the rules makes cases easier to adjudicate and may give clearer guidance to people acting in the world. But rigidly applying rules without careful analysis can lead to both irrationality and arbitrariness. Balancing these competing interests is a never-ending task of choice of law analysis.

¹¹² See *Ginsberg v. Quest Diagnostics, Inc.*, 147 A.3d 434, 440–41 (N.J. 2016) (conducting a defendant-by-defendant analysis and applying New York law to New York defendants and New Jersey law to New Jersey defendants).

¹¹³ *Edwards*, 952 N.E.2d at 1045 (Ciparick, J., dissenting).

2. Plaintiff Travels to a Plaintiff-Protecting State (Pattern 6: *Hurtado*)

Here we find a second easy case that is the obverse of Pattern 4. There we had a defendant who traveled to a plaintiff-protecting state and committed a tort there. Here we have a plaintiff who travels to a plaintiff-protecting state and is harmed there by the negligence of a local resident. That was the situation in *Hurtado v. Superior Court*.¹¹⁴ A resident of the state of Zacatecas in Mexico traveled to California where he was killed in a car accident.¹¹⁵ His family sued the defendants for wrongful death.¹¹⁶ All other parties were domiciled in California.¹¹⁷ Mexico, but not California, limited the damages that could be awarded for wrongful death.¹¹⁸

The Supreme Court of California had no trouble finding the case to be a false conflict of the “lonely domicile” kind. Mexico’s damage limitation law was designed to protect Mexican defendants from ruinous liability. Alternatively, the law was directed at any defendant who caused harm inside Mexico. But this case involved an accident outside Mexico, and the defendants were all domiciled in California. So the court concluded that Mexico had no interest in applying its damage-limitation law.¹¹⁹

The court could have decided that California’s law was merely loss-allocating and that it extended only to forum residents. If so, there would be no reason to give a Mexican plaintiff more damages than he would receive under the law of his home state. The court could not stomach that outcome because it would be discriminatory. It would deny a nonresident damages that would be awarded to a resident of the forum without furthering any policy of Mexico. Mexico’s law is not intended to *deny* plaintiffs recovery, just to protect *defendants*.

As it happens, the court did not need to worry too much about this because it classified its rule as a conduct-regulating rule. There was no doubt that California negligence law applied to the auto accident, and the court forthrightly rejected the argument that had been accepted by the Supreme Judicial Court in Massachusetts in *Saharceski* that negligence liability in auto accident cases is loss-allocating. Instead, the California Supreme Court not only classified wrongful death liability as conduct-regulating but also extended that classification to California’s unlimited damages rule for wrongful death cases:

¹¹⁴ *Hurtado v. Superior Court*, 522 P.2d 666 (Cal. 1974).

¹¹⁵ *Id.* at 668.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 668.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 671.

It is manifest that one of the primary purposes of a state in creating a cause of action in the heirs for the wrongful death of the decedent is to deter the kind of conduct within its borders which wrongfully takes life. It is also abundantly clear that a cause of action for wrongful death without any limitation as to the amount of recoverable damages strengthens the deterrent aspect of the civil sanction: 'the sting of unlimited recovery . . . more effectively penalizes the culpable defendant and deters it and others similarly situated from such future conduct.'¹²⁰

So, California had a conduct-regulating purpose to its unlimited damages rule while Mexico had no interest in applying its law: the case is a false conflict, and the law of the only interested state applies (California).

The Third Restatement rule led to the same result. If we agree with the *Hurtado* court that the California rule is conduct-regulating, then the law of the place of conduct and injury apply. "When conduct and injury occur in the same state, the law of that state will govern an issue of conduct regulation."¹²¹ The same result occurs if the California rule is thought to be loss-allocating. "When the relevant parties have central links to different states, and conduct and injury occur in a single state, that state's law will govern an issue of loss allocation."¹²²

As a matter of interest, is California's lack of a damage limitation a conduct-regulating rule or a loss-allocating one? The *Hurtado* court was confident that higher damages were intended to produce greater deterrence, whether or not they did so in fact. Yet the Third Restatement is less than clear on the matter. It defines "damage limitations" as loss-allocating rules.¹²³ But does that mean a law that does *not* limit damages is conduct-regulating? The answer is not clear. A rule that defines conduct as wrongful (liability for wrongful death) is clearly conduct-regulating under the Third Restatement definition,¹²⁴ but it is not clear that a choice about high or low damages is also conduct-regulating. That damages measure may, instead, be a matter of loss-

¹²⁰ *Hurtado*, 522 P.2d at 672.

¹²¹ *Restatement Third, Prelim. Draft 3*, *supra* note 18, at § 6.04.

¹²² *Id.* at § 6.07(1).

¹²³ *Id.* at § 6.03(d).

¹²⁴ *Id.* at § 6.01(1) ("Conduct-regulating rules . . . are rules whose primary purpose is to impose liability for conduct deemed socially undesirable . . .").

allocation, i.e., determining the fair distribution of the costs of the loss.¹²⁵ The Third Restatement language seems to place the measure of damages on the loss-allocating side of the line.

If that is so, then, as we have seen, the Third Restatement clearly wants the law of the place of conduct and injury to apply because it was also the domicile of one of the parties.¹²⁶ However, a court that views the damage measure as merely loss-allocating might consider the place of conduct and injury to be irrelevant. If the issue is the just relationship between the parties and they are domiciled in different states, then the question becomes whether a forum resident should be impoverished to compensate a family that is domiciled in a state that is content with far lower damages.

Both *Edwards* and *Neumeier* were content to treat plaintiffs differently based on their domicile on the ground that the place where a relationship is centered gets to determine the fair allocation of loss between the parties. That approach makes the relationship more important than the conduct and injury when the place of the accident has only a loss-allocating rule. It does lead to the question of when denying a remedy is discriminatory.

Hurtado suggests that courts are unwilling to deny the full benefit of their own law just because a plaintiff is a nonresident, even if that hurts a forum defendant. That impetus should lead us to question whether “no interest” cases like *Erwin* and *Neumeier* should be treated similarly; in other words, perhaps there should be a presumption that a claim is available to a nonresident if it would be available to a resident of the forum. If so, then *Erwin* was correctly decided, and *Neumeier* was not. We might note that the Third Restatement goes the other way, adopting the *Neumeier* rule while rejecting the decision in *Erwin*. Once again, while the Third Restatement rules provide guidance, they do not save us from having to consider hard questions about how to distinguish choice of law cases and where to draw lines.

III. CROSS-BORDER TORTS

Cross-border torts involve conduct in one state and injury in another. The true conflict pattern presents a plaintiff who is domiciled and injured in a plaintiff-protecting state and a defendant who acts and is domiciled in a defendant-protecting state (Pattern 7). These are among the hardest true conflicts we face. The “no interest” pattern

¹²⁵ *Id.* at § 6.01(2) (“Loss-allocating rules . . . are rules whose primary purpose is to assign loss among relevant parties on the basis of considerations other than the mere wrongfulness of conduct.”).

¹²⁶ *Id.* at § 6.07(1).

presents a plaintiff who lives and is injured in a defendant-protecting state and a defendant who acts and is domiciled in a plaintiff-protecting state (Pattern 8).

The Third Restatement has a somewhat convoluted rule for these cases for reasons we will discuss below. We can simplify it for ease of understanding. Essentially, the Third Restatement tells us this:

Cross-border tort rule. When conduct and injury are in two different states, choose the law that favors the plaintiff unless the defendant could not foresee the injury occurring there. This rule applies whether the rules in question are conduct-regulating or loss-allocating.¹²⁷

A. True Conflicts: Conduct in Defendant-Protecting State & Injury in Plaintiff-Protecting State (Pattern 7: Blamey)

The case of *Blamey v. Brown*¹²⁸ illustrates the typical cross-border, true conflict tort. A bar in Wisconsin sold liquor illegally to a seventeen-year-old minor (Mike Martin) domiciled in the neighboring state of Minnesota.¹²⁹ Martin drove back to Minnesota where the car was in an accident, injuring a fifteen-year-old passenger from Minnesota named Lisa Blamey.¹³⁰ Minnesota, but not Wisconsin, imposed civil liability on bars for selling liquor to minors, making them liable to those injured by their actions.¹³¹ The facts present the paradigm case of a true conflict. The defendant is located and acts in a defendant-protecting state, and the plaintiff lives and is injured in a plaintiff-protecting state. Each state has an interest in applying its law: the place of conduct to protect the defendant from ruinous liability and the place of injury both to deter the wrongful conduct and to compensate the victim while providing the victim civil recourse against the defendant for its wrongful act.

While we might question whether Minnesota has the right to regulate a Wisconsin bar, we should remember that it cannot be the case that someone can stand across the border intentionally firing a gun into Minnesota and hope to escape its regulatory power. Minnesota views

¹²⁷ *Restatement Third, Prelim. Draft 3*, *supra* note 18, at §§ 6.05, 6.07.

¹²⁸ 270 N.W.2d 884 (Minn. 1978), *overruled by* *West American Ins. Co. v. Westin, Inc.*, 337 N.W.2d 676, 679 (Minn. 1983).

¹²⁹ *Blamey*, 270 N.W.2d at 885–86.

¹³⁰ *Id.* at 885.

¹³¹ *Id.*

the sale of liquor to a minor as an intentional act as morally-repugnant as firing a weapon over the border. Because firing the weapon would constitute a crime that could be prosecuted inside Minnesota, an act outside Minnesota with foreseeable harmful effects inside the border is something Minnesota wants to deter and punish. We can call this the *Hobbes argument*. According to Thomas Hobbes, the first job of government is to protect us from violent harm at the hands of others.¹³² Surely the place of the injury has an interest in protecting its people from harmful conduct across the border likely to harm its people.

That does not mean that there is no argument for applying the law of the place of the conduct. If the bar could not anticipate that its customers would travel to Minnesota and wreak havoc there, then application of the law of the place of injury might unfairly surprise the defendant who may have relied on the law of the place where it was acting to determine its potential civil liabilities. Whether liability does or does not cause unfair surprise is both a factual and a normative question. Either way, the case presents a true conflict that cannot be adjudicated by pretending that one of the states has no interest in applying its law.

The Third Restatement elliptically chooses the law that favors the plaintiff as long as the defendant could anticipate the injury occurring there, as is clearly the case with a bar near the border of another state. That is particularly true (a) when its bars are open later than those of the neighboring state, (b) its drinking age is lower, and (c) it is just off an interstate highway a few miles over the border. At the same time, the Third Restatement is remarkably reticent about admitting that it has adopted a rule with a substantive bias in favor of recovery for victims.

Rather than state the rule as I have described it, the Third Restatement adopts a place of conduct rule for cross-border torts.¹³³ It then recognizes an exception when the plaintiff chooses the law of the place

¹³² THOMAS HOBBS, *LEVIATHAN* (1651).

¹³³ *Restatement Third, Prelim. Draft 3*, *supra* note 18, at § 6.05. (“When conduct in one state causes injury in another, the [conduct-regulating] law of the state of conduct will govern an issue of conduct regulation. However, if the location of the injury was foreseeable, the injured person may select the law of the state of injury. If the injured person selects the law of the state of injury for any issue, that law will govern every issue of conduct regulation presented by the same tort claim.”); *id.* at § 6.07 (“(2) When the relevant parties have central links to different states, and conduct and injury occur in different states, the law of the state of conduct will presumptively govern an issue of loss allocation unless (a) the injured person is linked to the state of injury, (b) the occurrence of injury in that state was objectively foreseeable, and (c) the injured person requests application of the law of the state of injury. (3) If the injured person requests application of the law of the state of injury for any issue, that law will govern every issue of loss allocation presented by the same tort claim.”).

of injury.¹³⁴ What might justify this rule? The place of the injury has a strong interest in protecting its people from harm. But it will or should engage in restrained interpretation of forum law and refrain from applying its plaintiff-protecting rule to a defendant who acted elsewhere in a place where the law does not subject it to liability when the defendant could not have reasonably anticipated that its conduct would cause harm in a plaintiff-protecting state.

Of course, the place where the defendant acts may also have a strong interest in immunizing it from liability. In *Blamey*, for example, Wisconsin may not even see the bar as a proximate cause of the harm; to Wisconsin, the responsible party is not the one who sold the liquor but the drunk driver.¹³⁵ After all, we do not hold Ford Motor Company liable when someone drives one of its cars negligently. Wisconsin may also want to protect its businesses from the problem of having to decide when a customer should be “cut off” from further liquor and from the need to purchase insurance for injuries caused by drunk driving by its customers. It may also recognize that minors obtain fraudulent IDs, and bars find it hard to tell whether they are under age.

Both states have interests in applying their law, and both parties can claim rights to the protection of their state’s law. The victim can claim the right to the protection of Minnesota law when she is injured there by conduct that foreseeably harms people there.¹³⁶ The defendant can claim the right to run its business based on the rules of the only place where it does business. These cases are among the hardest-to-resolve true conflicts we can imagine. Traditional law chooses the place of injury to resolve these cases, and that traditional approach seems to play some role in the Third Restatement approach. It suggests that actors cannot claim surprise that they may be governed by the law of a nearby state when their conduct causes harm there. Moreover, the right to be safe from harm may seem to be an interest that outweighs the right to run a business for profit without buying insurance against harms caused by that very business. For these reasons, the courts have traditionally applied the law of the place of injury in cross-border torts, at least when that is not unfair to a defendant who could or should have foreseen that its conduct might cause harm there.

At the same time, because both states may have strong interests and both parties have viable rights claims, the outcome of these cases

¹³⁴ *Id.* at § 6.05.

¹³⁵ *Blamey*, 270 N.W.2d at 889.

¹³⁶ It may seem relevant that the victim went to Wisconsin as well and drank there with the defendant. But since she is a minor, we cannot attribute the harm to her; she arguably does not have the legal capacity to waive the protections of her home state’s law.

is not certain, particularly when we consider the effect of personal jurisdiction law. When the defendant advertises in the forum, and those ads attract forum residents to the defendant-protecting state, we may be able to conclude that the defendant is, in some sense, “doing business” in the forum and legitimately subject both to its laws and to personal jurisdiction in its courts. That would allow the plaintiff to sue in the state where the injury occurred. The courts there are likely to be more sympathetic to the plaintiff than to the defendant and are more likely to apply plaintiff-favoring law.

But what happens if a defendant does no business in the forum and posts no ads there? A local actor that has no contacts with the forum, other than having a noninteractive website, may well be immune from personal jurisdiction at the place of the injury. Current personal jurisdiction law may deny the place of injury the power to hear the case when a defendant conducts no business in the forum and does not advertise there.¹³⁷ For that reason, *Blamey* was overruled five years later by *West American Insurance Co. v. Westin*,¹³⁸ when the Minnesota Supreme Court held that Minnesota courts have no personal jurisdiction over Wisconsin bars that do not advertise or conduct any business inside Minnesota.¹³⁹

If that ruling is correct, then lawsuits of this character can only be brought in the state where the defendant is located and acts. Will those courts be as sympathetic to the Third Restatement rule as are the courts at the place of the injury? My guess is that some may still apply a place of injury rule to benefit the plaintiff when the plaintiff chooses that law, but they will most likely be more sympathetic to their resident defendant who acted locally and is immune under local, forum law. Those courts may be reluctant to adopt the Third Restatement rule. Or they may expansively interpret the exception in the Third Restatement that denies application of the plaintiff-protecting law of the place of injury when a defendant could not foresee the injury happening there. If that exception is interpreted broadly, it may morph into a general principle that plaintiff-protecting law should not be applied in a cross-border tort case when doing so would be unfair to the defendant. If courts adopt that approach to the Third Restatement rules, and if personal jurisdiction rules limit cases to being heard in defendant-protecting jurisdictions, then the Third Restatement’s plaintiff-protecting choice of law

¹³⁷ *Walden v. Fiore*, 571 U.S. 277, 283–84 (2014); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980). *But see* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985); *Calder v. Jones*, 465 U.S. 783, 788 (1984); *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978).

¹³⁸ *Westin*, 337 N.W.2d at 680.

¹³⁹ *Id.* at 680–81.

rule will be quite narrowly interpreted. Whether that is what the drafters of the Third Restatement intend is not clear.

On the other hand, it is important to know that not a single Supreme Court precedent on personal jurisdiction involves a cross-border tort where the conduct is just over the border from the place of the injury. The precedents all involve nations or states much farther apart, such as New York versus Oklahoma,¹⁴⁰ United Kingdom versus New Jersey,¹⁴¹ California versus Taiwan,¹⁴² Georgia versus Nevada.¹⁴³ It is not impossible to imagine that the Supreme Court might find that personal jurisdiction over the defendant does exist over defendants like the tavern in *Blamey* when it serves residents of the forum routinely and repeatedly causes harm right across the border line. If that happens, and courts at the place of injury have personal jurisdiction over the defendant, then the Third Restatement's plaintiff-favoring rule will be more expansively interpreted. As with the other patterns and other Third Restatement rules, we find the proposed rule for cross-border torts leaves room for interpretation and normative criticism that will undermine its potential to settle these disputes without considerable need for discussion, debate, careful thinking, and human judgment.

B. "No Interest" Cases: Conduct in Plaintiff-Protecting State & Injury in Defendant-Protecting State (Pattern 8: Ling, Spider)

The "no interest" cross-border tort involves conduct in a plaintiff-protecting state and injury in a defendant-protecting state. Some cases in this pattern are easy, false conflicts. A typical example is *Ling v. Jan's Liquors*.¹⁴⁴ A store located in Missouri sold liquor to a minor in violation of Missouri law.¹⁴⁵ That minor drove to Kansas and struck a Kansas resident, Lyllis Ling, as she stood by her disabled car.¹⁴⁶ Missouri law places liability on the liquor store for violating state laws against the sale of liquor to minors while Kansas imposes no such liability, granting stores immunity from civil liability in such cases.¹⁴⁷ The court applied the First Restatement, classified the issue as one of tort, and applied the law of the place of the injury (Kansas), thereby letting the defendant store off the hook.

¹⁴⁰ *Woodson*, 444 U.S. at 286.

¹⁴¹ *Nicastro*, 564 U.S. at 877–78.

¹⁴² *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 105–07 (1987).

¹⁴³ *Walden*, 571 U.S. at 279.

¹⁴⁴ 703 P.2d 731 (Kan. 1985).

¹⁴⁵ *Id.* at 733.

¹⁴⁶ *Id.* at 732–33.

¹⁴⁷ *Id.* at 733, 735.

From a modern standpoint, the result in the case is irrational. Missouri law deters stores from selling liquor to minors; the store was located in Missouri and within the scope of the law. It is an accident that the accident happened across the border in Kansas. The minor could have injured someone inside Missouri. Missouri has every reason to apply its law to the Missouri store, and there is no unfair surprise to the store owner in doing so. Missouri has a conduct-regulating interest in defining the sale of liquor to minors as “socially undesirable conduct.” The “primary purpose” of liability here is to deter that conduct and to impose financial consequences for violation of important norms of conduct.¹⁴⁸ Nor could the store have relied on application of Kansas law in deciding to violate Missouri liquor laws, so there could be no unfairness in subjecting the defendant to the regulatory law of the place where it acted.

Conversely, Kansas has no interest in extending its immunity to a nonresident store whose conduct was illegal under the law of the state where it is located and where it acted. The Kansas immunity rule is intended to protect Kansas stores from liability, but this was not a Kansas store. Kansas has no interest in applying its law to this case, while Missouri does have an interest. If that is so, it is irrational to apply Kansas law to adjudicate the case. It is a false conflict, and the plaintiff-protecting law of the place of conduct should apply; nor will the plaintiff ask for the law of the place of injury to apply, so the defendant is bound by the law that favors the plaintiff.

One might argue that the plaintiff has no remedy under the law of the state where she lives, and that Missouri has no interest in providing a remedy to residents of other states that have not entered Missouri and been injured there. One might also argue that placing full responsibility on the drunk driver better deters drunk driving than does sharing liability between the drunk driver and the store; perhaps the minor’s parents will more carefully supervise him in the future. While that argument is not an entirely irrational one, it is more likely that the nonliability rule in Kansas is based on the idea that the store is not the proximate cause of the harm or that the criminal law is the better way to deter the illegal sale of liquor to minors. Either way, those policies do not extend to the Missouri store. Moreover, the Third Restatement focuses on the “primary purpose” of a rule to determine whether it is conduct-regulating, and the Kansas immunity rule is not designed to promote the sale of liquor to minors in another state; nor is it premised on the notion that the behavior of selling liquor to minors is “not socially undesirable.” If Kansas has no interest in applying its law to immunize a nonresident

¹⁴⁸ *Restatement Third, Prelim. Draft 3*, *supra* note 18, at § 6.01(1) cmt. c.

store that violated its own state standards of conduct, and the place of conduct is interested in deterring its stores from that conduct, then it would make sense to apply the law of the only state interested in applying its law to the case.

Consider also that the plaintiff's lawyer made a big mistake by bringing the claim in a Kansas court. There was jurisdiction over the Missouri store in Missouri, and if the case had been brought there, the court might well have applied its own law to its resident business that violated the law of the place where it does business. The Missouri court might have been reluctant to dismiss the claim just because the plaintiff was a nonresident when the defendant breached a duty in the forum and that breach caused the harm. Why deny a remedy just because the plaintiff is a nonresident? Why is the place of injury relevant at all? What matters is the conduct-regulating law of Missouri and the fact that the conduct happened there in violation of Missouri regulatory laws.

If that is the case, then there is little reason for a Kansas court to immunize a Missouri business from liability imposed on it by the place where its business is located and where its conduct caused the harm. Kansas law protects Kansas stores from liability, and it has no interest in denying a resident of Kansas a remedy under the law of another state that is interested in regulating its own businesses to prevent a harm that could easily have happened in Missouri.

The "no interest" case becomes much harder if the defendant has some connection with the place of the injury. That is what happened in *Johnson v. Spider Staging Co.*¹⁴⁹ In *Spider*, plaintiff Jack Johnson lived and worked in Kansas where he bought scaffolding from a Washington company named Spider Staging.¹⁵⁰ The scaffold was manufactured in Washington and shipped to the consumer (Johnson) in Kansas where he used the scaffold, fell sixty feet from it, and was killed. Kansas, but not Washington, had a wrongful death damage limit of \$50,000.¹⁵¹

The case may look like a "no interest" case because the Kansas damage limitation is arguably designed to protect Kansas companies; here, however, we have a Washington company whose home state has no objection to assessing full damages against it for its wrongful conduct in designing an unreasonably dangerous product. Conversely, Washington's full compensation law may be intended to ensure that Washington victims receive full compensation, but here we have a Kansas plaintiff whose state is content with a more limited recovery. It

¹⁴⁹ *Johnson v. Spider*, 555 P.2d 997, 999 (Wash. 1976).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 999.

can be argued that neither state has an interest in applying its law.

The problem is that this analysis ignores the fact that the Kansas tort reform act limiting damages protects *all* companies doing business in Kansas, not just those that have their headquarters there. Spider Staging has no operations in Kansas, but it did *sell its product to a Kansas resident for use in Kansas*.¹⁵² In that sense, we may understand it as effectively doing business in Kansas, just as if it had opened a store there. It would arguably be discriminatory to deny the Washington-based company the right to engage in business transactions in Kansas under the same rules that apply to other businesses operating there. If Washington law applies to a Washington company's commercial activities in Kansas, then that company is subject to a competitive disadvantage. Kansas companies will face lower liabilities than will companies based elsewhere, even though they are both competing for sales to Kansas residents. Far from being a "no interest" case, Kansas has an interest in limiting damages for all businesses operating in Kansas, including those who sell products to Kansas residents for use in Kansas. If that is so, then Kansas has an interest in applying its law to extend its damage limitation to the Washington defendant.

Conversely, if Washington's refusal to limit damages is even partly related to a goal of deterring negligent design of products, then why should that interest evaporate when the Washington conduct causes injury elsewhere?¹⁵³ Why does the domicile of the plaintiff or the place of injury matter at all? If the scaffold is defective, it could have been sold in Washington and injured a Washington resident. Protection of its own residents is a strong interest. Regardless of that, however, Washington does not want to be a haven for manufacturers of defective products that ship them around the country. The defendant acted wrongfully in Washington, and Washington law gives the victim

¹⁵² *Id.*

¹⁵³ See *Chen v. L.A. Truck Ctrs., LLC*, 213 Cal. Rptr. 3d 142, 157 (App. Ct. 2017), *review granted*, 444 P.3d 727 (Cal. 2017) ("California [has] a strong interest in imposing its products liability law on a California defendant allegedly importing defective products for sale in California"); *Danganan v. Guardian Prot. Servs.*, 179 A.3d 9, 17 (Pa. 2018) (applying Pennsylvania's consumer protection law against a Pennsylvania-based company that continued to charge a D.C. customer for home security services after the customer had sold his D.C. house); *Kubbernus & Balatan Grp., Inc. v. ECAL Partners, Ltd.*, 574 S.W.3d 444, 472–73 (Tex. Ct. App. 2018) (applying Texas securities law to a Texas company for its conduct in Texas that violated Texas law to provide claims for victims located in other states); *Thornell v. Seattle Serv. Bureau, Inc.*, 363 P.3d 587, 592 (Wash. 2015) (holding that Washington's consumer protection law applied to a Washington company even though plaintiffs were domiciled and injured elsewhere). *But see Thornell v. Seattle Serv. Bureau, Inc.*, 742 F.App'x 189, 192 (9th Cir. 2018) (refusing to apply that Washington statute to benefit victims domiciled in Texas).

civil recourse against the defendant. Washington may therefore have both a nondiscriminatory compensatory interest (granting the nonresident the same rights it would grant a resident victim) and a deterrent interest (directed at stopping its resident corporations from making and selling defective goods both in Washington and for export elsewhere). If those arguments are correct, instead of a “no interest” case we have a *true conflict*: both states are interested in applying their law.

The converse argument—that Kansas has “no interest” in protecting a foreign corporation that sells products to Kansas residents—is weak because it is impermissibly discriminatory against interstate commerce. Some advocates of interest analysis have tied interests to residency in all cases; if that were true, then Kansas is not interested in benefiting a foreign corporation. That argument is weak because it does not tie to the *reasons* for the damage limitation law, i.e., to protect businesses operating in Kansas. A Washington company that shipped a product to Kansas would be bound by the Kansas consumer protection law when the law gives a Kansas resident a remedy. There is no good reason to say that a Kansas defendant-protecting law should not similarly extend to the nonresident corporation when it ships products for use inside Kansas.

Despite these criticisms, the Washington Supreme Court held that the Kansas protective policy did not extend to nonresident companies.¹⁵⁴ It found the case to be a false conflict because Washington had an interest in deterring its resident business from making and marketing dangerous products while Kansas had “no interest” in limiting the liability of a “foreign” company, despite the fact that the death in this case arose because that company sold its product to a Kansas resident.¹⁵⁵ That way of understanding the case was a mistake.

Courts frequently argue that defendant-protecting laws do not extend to companies that are based elsewhere, even if those companies do business in the defendant-protecting state. My view is that this assumption is both discriminatory and not sensible; damage limitation laws were passed as part of the tort reform efforts of the late twentieth century, and they were intended to promote business investment. That interest does not extend only to companies that have their headquarters within a state but to all businesses that operate there or sell their goods and services to residents of the state. Theoretically, those damage limitations should reduce the price of products by lowering the costs of doing business. Interest analysis has been misused when it has interpreted *Babcock* to suggest that states only care about helping their

¹⁵⁴ Johnson v. Spider, 555 P.2d 997, 1002 (Wash. 1976).

¹⁵⁵ *Id.*

residents and extending that idea to corporations who do business in the state but do not have their headquarters there.

All that being said, it means that *Spider* represents a true conflict rather than a false one. Unlike *Ling*, it is a hard case. The Third Restatement resolves it by choosing the plaintiff-favoring law. The defendant cannot be surprised that it is held to the regulatory standards of the place in which it acts. If that is so, *Spider* is no different from *Ling*, and the Third Restatement rule is justified. If, however, as I have argued, Kansas has significant interests in extending its defendant-protecting law to a nonresident company that ships its products into Kansas for use by Kansas residents, then the Third Restatement rule fails to adequately balance the interests of the two states. A court that understands all of this would want to more directly consider the relative interests of Kansas in limiting the liability of product manufacturers and of Washington in deterring the manufacture and marketing of defective products. That would suggest that it would be appropriate to ignore the Third Restatement rule and go directly to the ultimate test adopted by the Third Restatement: choose the “most appropriate law,” taking into account state substantive policies, multistate policies, and the rights and reasonable expectations of the parties. When courts do that, they may or may not agree that *Spider* was correctly decided.

IV. LEGAL RULES V. THE RULE OF LAW

The emerging Third Restatement rules are to be applauded. They are much better than the Second Restatement rules, and they will be more likely to be followed by the courts and to give helpful advice to clients. I have tried to show here, however, that the Third Restatement rules, clear and sensible as they may be, may require both interpretation and critical analysis to determine whether and how they should apply. Those rules will be helpful and will shape debate. But they cannot—and will not—be applied mechanically. And they will not relieve judges of the need to engage in careful decision making to reach wise and defensible judgments that can adequately explain to the losing side why they are losing.

Clear and predictable rules are valuable because they constrain judicial discretion, give judges guidance on how to decide hard cases, and allow like cases to be treated alike. They also enable citizens to know what their rights and obligations are so that they can plan their actions and so that they are not unfairly surprised. But rigid rules are never as rigid as their advocates may imagine.¹⁵⁶ That is because rules

¹⁵⁶ Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1412 (2013).

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do not determine their own scope. When a case is hard, judges need to determine whether to distinguish the case from prior cases. That requires them to figure out whether the precedent (or the rule in force) actually applies to the new situation. Cases are hard when there are plausible arguments on both sides. We have seen that almost all choice of law cases are hard ones. If that is so, it is impossible to resolve them mechanically. We will be using standards, such as consideration of internal and multistate policies and the rights and justified expectations of the parties, to resolve ambiguities in the rules and to resolve conflicts among them. That is not a terrible thing. It is part of what we mean by the “rule of law.”

The Third Restatement rules will guide decisions in the future, but they will not protect judges from the need to make judgments in hard cases. While that may seem regrettable, I would argue that we should recognize it as the cost of doing business. The rule of law is not a law of rigid rules; it is the never-ending task of shaping law to fit current social conditions and values and using judgment and careful thinking to decide what cases actually deserve to be treated alike and which deserve to be treated differently.