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## SYMPOSIUM

### INTEREST ANALYSIS, PARTY EXPECTATIONS AND JUDICIAL METHOD IN CONFLICTS TORTS CASES: REFLECTIONS ON *COONEY v. OSGOOD MACHINERY, INC.*\*

*Robert A. Sedler*\*\*

#### INTRODUCTION: INTEREST ANALYSIS AND JUDICIAL METHOD

In my many years of writing about the conflict of laws, I have focused on essentially two themes. On the one hand, I am a strong proponent of interest analysis as the preferred approach to choice of law. I maintain that interest analysis is the preferred approach because it provides functionally sound and fair solutions to the choice-of-law issues arising in actual cases. Interest analysis simplifies the choice-of-law process by focusing on what the courts consider to be the most rational considerations in making choice-of-law decisions: the policies reflected in a state's rule of substantive law and a state's interest in applying its law in order to implement those policies in a particular case.<sup>1</sup> Furthermore, I have demonstrated that in

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\* 81 N.Y.2d 66, 612 N.E.2d 277, 595 N.Y.S.2d 919 (1993).

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<sup>1</sup> See generally Robert A. Sedler, *Professor Juenger's Challenge to the Interest*

practice, all the courts that have abandoned the traditional approach to choice of law<sup>2</sup> generally reach results that are consistent with the results that would be reached under the interest analysis approach, regardless of which "modern" approach to choice of law they are purportedly following.<sup>3</sup>

On the other hand, I have also emphasized judicial method in conflicts cases. I have distinguished between the function of a court in a conflicts case and the use of the interest analysis approach by the court in performing that function. I relate the function of a court in a conflicts case to what I see to be the general purpose of conflicts law: providing functionally sound and fair solutions for the *relatively few cases* that arise in practice for which a court has to make a choice-of-law decision.<sup>4</sup> Therefore, the court's focus in a conflicts case should be on the precise choice-of-law issue presented for decision in the case before it, and the court's objective should be to resolve that issue in such a way that will produce a functionally sound and fair result.

Some years ago, I analyzed the choice-of-law process in terms of *judicial method and the policy-centered conflict of laws*.<sup>5</sup> I maintain that, in accordance with the common law tradition, courts should apply judicial method to the resolution

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*Analysis Approach to Choice-of-Law: An Appreciation and a Response*, 23 U.C. DAVIS L. REV. 865 (1990) [hereinafter Sedler, *Juenger's Challenge*]; Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics"*, 34 MERCER L. REV. 593 (1983) [hereinafter Sedler, *New Critics*]; Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181 (1977) [hereinafter Sedler, *Governmental Interest Approach*].

<sup>2</sup> The traditional rule in tort cases was *lex loci delicti* (law of the place of the wrong).

<sup>3</sup> See Sedler, *Governmental Interest Approach*, *supra* note 1, at 190-220; Sedler, *New Critics*, *supra* note 1, at 635-43.

<sup>4</sup> For a discussion of why relatively few conflicts cases arise in practice, see Sedler, *New Critics*, *supra* note 1, at 597-98.

<sup>5</sup> Robert A. Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 KY. L.J. 27 (1967) [hereinafter Sedler, *Judicial Method*]; Robert A. Sedler, *Choice of Law in Michigan: Judicial Method and the Policy-Centered Conflict of Laws*, 29 WAYNE L. REV. 1193 (1985); Robert A. Sedler, *Judicial Method is "Alive and Well": The Kentucky Approach to Choice of Law in Interstate Accident Cases*, 61 KY. L.J. 378 (1973) [hereinafter Sedler, *The Kentucky Approach*]. Other writings developing this thesis include Robert A. Sedler, *Characterization, Identification of the Problem Area and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUT.-CAM. L.J. 8 (1970).

of conflicts problems, as they apply it in other areas of law.<sup>6</sup> Under judicial method, a court should render the choice-of-law decision with reference to the fact-law pattern presented in the particular case. The decision in that case would serve as a precedent for decisions in other cases presenting the same fact-law pattern, and the decision's rationale would serve as a guide to the resolution of future cases presenting different fact-law patterns. In time, depending on the number and kinds of cases that arose in each state, a body of conflicts law would emerge in that state through the normal workings of binding precedent and *stare decisis*.<sup>7</sup>

Furthermore, the criteria for the choice-of-law decision should be based upon considerations of policy and fairness to the parties. The rationale here is that the *criteria* for the choice-of-law decision—the decision to displace the forum's own law and to look to the law of another state, in whole or in part, for the rule of decision in the case—should relate to the underlying *justification* for such displacement. Under the "criteria-justification" rationale, the forum's law should be displaced in a particular case only when either policy considerations, such as recognition of the legitimate interest of another state in having its law applied,<sup>8</sup> or a concern for fairness, such as protecting the reasonable expectations of the parties, dictate the displacement of the forum's law in favor of another state's law. In the absence of such considerations, the law of the forum should apply, just as it would in a purely domestic case.

Under a judicial method and policy-centered conflict of laws approach, then, the choice-of-law process would operate in accordance with the following premises: (1) the basic law is the law of the forum, which will be applied in the absence of valid reasons for its displacement;<sup>9</sup> (2) the choice-of-law decision

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<sup>6</sup> Sedler, *Judicial Method*, *supra* note 5, at 42-45, 57-58.

<sup>7</sup> *Id.* at 82-87.

<sup>8</sup> An example of such a situation, using the interest analysis approach, is the "false conflict" brought in the disinterested state. Since the forum does not have a real interest in having its law applied in order to implement the policy reflected in that law, while the other state does, the forum should apply the law of the only interested state. In practice, this is the most common situation where the forum will displace its own law. See Sedler, *Governmental Interest Approach*, *supra* note 1, at 186-87, 222-27.

<sup>9</sup> As to the reasons why the law of the forum is the basic law, see BRAINERD CURRIE, *SELECTED ESSAYS IN THE CONFLICT OF LAWS* 75-76 (1963); Sedler, *Judicial*

will be made with reference to the fact-law pattern presented in the particular case; and (3) the choice-of-law decision will be based on considerations of policy and fairness to the parties.<sup>10</sup>

In Part I, I begin by discussing what I have called "rules of choice of law." Here I will emphasize the ninth "rule of choice of law," which the New York Court of Appeals effectively applied in its 1993 decision, *Cooney v. Osgood Machinery, Inc.* In Part II, I next discuss the *Cooney* decision itself and relate it to the operation of the ninth "rule of choice of law." Finally, in Part III of this Article, I will raise a question about the continued viability of the *Neumeier* rules in New York in light of the Court of Appeals' treatment of them in *Cooney*.

## I. "RULES OF CHOICE OF LAW"

The operation of judicial method in practice will lead to the development of what I have called "rules of choice of law." I have demonstrated that in the torts area, at least, there are in fact "rules of choice of law" that have emerged from the practice of the courts in deciding the conflicts torts cases that have come before them.<sup>11</sup> I distinguish these "rules of choice of law" from choice-of-law rules, including both the broad, state-selecting rules of the traditional approach, and narrow, policy-based choice-of-law rules, such as the "*Neumeier* rules," which the New York Court of Appeals established in 1972.<sup>12</sup> Choice-of-law rules are formulated *a priori* and then applied to the facts of a particular case.<sup>13</sup>

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*Method*, *supra* note 5, at 87-95.

<sup>10</sup> For a discussion of the operation of judicial method in one state, Michigan, see Robert A. Sedler, *Continuity, Precedent and Choice of Law: A Reflective Response to Professor Hill*, 38 WAYNE L. REV. 1419, 1429-37 (1992).

<sup>11</sup> Robert A. Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975 (1977).

<sup>12</sup> *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 33 N.Y.S.2d 64 (1972). Under the first *Neumeier* rule, where the parties are from the same state, the law of their home state applies. Under the second and third *Neumeier* rules, where the parties are from different states, the law of the state where the accident occurs generally applies. See generally Robert A. Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 130-37 (1973), for my discussion of the *Neumeier* rules.

<sup>13</sup> Any "precedential effect" of a case in which a court has simply applied a choice-of-law rule is dubious, since the court's decision was made neither independently of the rule nor with reference to the precise choice-of-law issue presented in

A "rule of choice of law," by contrast, emerges from the decisions of the courts in the actual cases coming before them for decision. Thus, the "rule of choice of law" may be considered a true precedent. I should add, however, that the tort "rules of choice of law" that I have identified are based solely on the *results* of the decided cases. They are not based on the courts' explanations for their decisions in these cases or on the application of the particular choice-of-law approach that the courts are purportedly applying. And the courts generally do not refer to "rules of choice of law" as such.<sup>14</sup> Nonetheless, it does seem very significant that, at least in the torts area, all the courts that have abandoned the traditional, *lex loci delicti* approach have reached fairly uniform solutions in the different fact-law patterns presented to them for decision. When the courts have differed, the differences are sufficiently clear as to indicate "majority" and "minority" views, as in other areas of law.

There are several reasons for this uniformity. First, the fact-law patterns in conflicts torts cases are easy to identify. The fact part of the fact-law pattern relates to the states where the parties reside, the state where the harm occurred and, if it differs, the state where the act or omission causing the harm took place. The law part relates to whether the law in question allows or denies recovery, whether it reflects an admonitory or compensatory policy or both, and whether it involves other considerations, such as those applicable to workers' compensation. Thus, a case may present a fact-law pattern of an injury in a non-recovery state involving two parties from a recovery state, an injury in a recovery state involving two parties from a non-recovery state, or an injury in either a recovery or a non-recovery state involving parties from different recovery or non-recovery states. A case may also involve a law reflecting

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the particular case. Thus, when courts abandoned the traditional approach to choice of law, as the New York Court of Appeals did in *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), the court's prior decisions that were based on the traditional approach necessarily lost their precedential effect.

<sup>14</sup> But see *Sexton v. Ryder Truck Rental*, 320 N.W.2d 843, 851 (Mich. 1982) (referring to the "most universal rule of choice of law:" when two residents of the forum are involved in an accident in another state, the law of the forum applies) (quoting Robert A. Sedler, *Choice of Law in Michigan: A Time to Go Modern*, 24 WAYNE L. REV. 829, 849 (1978)).

an admonitory policy, which may give rise to a different interest mix than would be present in the same fact-law pattern if the law reflected only a compensatory policy.

The use of interest analysis by the courts in practice has also contributed to fairly uniform solutions in the fact-law patterns of conflicts torts cases. Contrary to the contentions of many critics of interest analysis, in actual cases the policies and interests of the involved states are not at all difficult to identify.<sup>15</sup> In the ordinary accident case, the states primarily interested in applying their respective laws are the parties' home states where the consequences of the accident and of imposing or denying liability will be felt by the parties and their insurers. Where the law of the plaintiff's home state allows recovery, that state is interested in applying its own law to allow recovery to the resident plaintiff irrespective of where the accident occurs or where the defendant resides. Similarly, where the law of the defendant's home state denies recovery, that state is interested in applying its law to deny recovery, again irrespective of where the accident occurs or where the victim resides. Conversely, the state where the accident occurs has no interest in applying its law to deny recovery to a non-resident injured there and, in my opinion, no real interest in applying its law to allow recovery to a non-resident injured there.<sup>16</sup> Finally, when a state's law reflects an admonitory or regulatory policy, its interest in applying its law in order to implement that policy is not predicated on its connection with any party, but rather on its connection with the conduct sought to be deterred or the activity sought to be regulated.

Fairness to the parties is an independent choice of law consideration. Even though a state may have a real interest in applying its own law in order to implement the policy reflected in that law, that state will not and, as a matter of due process, cannot constitutionally apply its own law where the application of that law would be fundamentally unfair to the other party.<sup>17</sup> Moreover, a state is reluctant to apply its own law, de-

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<sup>15</sup> See Sedler, *Juenger's Challenge*, *supra* note 1, at 880-84; Sedler, *New Critics*, *supra* note 1, at 617-20; Sedler, *Governmental Interest Approach*, *supra* note 1, at 194-204.

<sup>16</sup> See Sedler, *The Kentucky Approach*, *supra* note 5, at 382-83.

<sup>17</sup> See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), and the discussion in Robert A. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of*

spite a real interest in doing so, where the application of its law may produce *some unfairness* to the party against whom it is being applied, although the degree of unfairness may not rise to constitutional dimensions. In the tort area, fairness relates to foreseeability and reliance. The application of a state's law may produce unfairness if the party against whom that state's law is sought to be applied could not foresee the application of that law at the time the party acted *and*, in the circumstances presented, the party was entitled to rely on the law of another state and conform its conduct to the requirement of that state's laws.<sup>18</sup> Although such cases will be fairly rare, they do occur, and when they do, the forum will displace its own law despite a real interest in having that law applied.<sup>19</sup>

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*Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 85-92 (1981).

<sup>18</sup> Thus, there is no unfairness in applying the law of the victim's home state to allow recovery against a non-resident defendant for an accident occurring in the defendant's home state if, with respect to the matter in issue, the defendant did not rely on the law of its home state and conform its conduct to the requirements of that law. In *Schwartz v. Consol. Freightways Corp.*, 221 N.W.2d 665 (Minn. 1974), a Minnesota resident was involved in an accident with a truck driven by Consolidated's employee in Ohio, Consolidated's home state. Ohio law at that time made contributory negligence a complete bar to recovery. Minnesota was a comparative negligence state. In a suit in Minnesota, where Consolidated was subject to general jurisdiction on the basis of doing substantial business, Minnesota applied its own law on the issue of contributory fault. *Id.* at 668. This case, of course, presented a true conflict and, as is usual, Minnesota applied its own law in order to implement the policy reflected in that law. *Id.* There was no unfairness in Minnesota's doing so. While the application of Minnesota law on this issue was not foreseeable, since the accident occurred in Ohio, there was no reliance on the Ohio contributory negligence rule by Consolidated's driver—the driver did not deliberately become involved in an accident with the Minnesota driver on the theory that the Minnesota driver would be barred by contributory negligence from recovering for the accident.

<sup>19</sup> I consider *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721 (Cal. 1978), to be such a case. In that case, a "key employee" of Offshore, a California corporation, was injured while at Continental's facilities in Louisiana. Offshore claimed that California law would impose tort liability against Continental for causing the loss of its "key employee." *Id.* This kind of liability was not imposed under Louisiana law or under the law of any other state. The California court assumed for purposes of this case that California law did impose such liability (it later held in a purely domestic case that it did not, see *I.J. Weinrot & Sons, Inc. v. Jackson*, 708 P.2d 682 (Cal. 1985)), so that for purposes of interest analysis, there was a true conflict. California purportedly resolves true conflicts by the use of comparative impairment. See, e.g., *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal.) (Nevada gambling casino located across state line in Nevada advertised heavily in California, and California victim was injured in California in accident caused by one of casino's intoxicated patrons; California law imposing dram shop act liability applied instead of Nevada law which would not impose liability, since



California's interest would be "significantly impaired" if its law were not applied to impose liability against Nevada gambling casino that advertised heavily in California), *cert. denied*, 429 U.S. 829 (1976). In *Offshore*, the California court held that Louisiana's interest would be "more impaired if its law were not applied" in this case. 583 P.2d at 720. In arriving at this conclusion, the court emphasized that Continental had to deal with employees from many different states at its Louisiana facility, and that it would most reasonably have anticipated a need for protection of premises liability insurance based on Louisiana law, under which it could not incur tort liability for economic injury to the victim's employer. *Id.* at 728-29.

I think that the California court would have reached the same result even if there were a California statute specifically imposing tort liability for the loss of a "key employee." In that circumstance, California law would be imposing a very special kind of tort liability that did not exist under Louisiana law. The injury occurred on Continental's premises in Louisiana. *Id.* at 723. Since, as the court recognized in *Offshore*, Continental had to deal with employees from many different states, it would most reasonably have anticipated a need for the protection of premises liability insurance based on Louisiana law. Since liability is sought to be imposed against Continental solely for harm occurring on its premises in Louisiana, Continental was justifiably entitled to rely on Louisiana law and to conform its conduct and insurance protection to the requirements of Louisiana law. In this case, then, fairness considerations would dictate application of Louisiana law on the issue of tort liability for the loss of a "key employee" despite California's interest in applying its law imposing liability for the benefit of the California plaintiff.

In a similar vein is *Barrett v. Foster Grant Co.*, 450 F.2d 1146 (1st Cir. 1971) (applying New Hampshire law). In that case, a New Hampshire employee of a New Hampshire contractor suffered serious injuries while working on an electrical transformer in Massachusetts and brought suit in a federal court in New Hampshire against the New Hampshire landowner. *Id.* at 1148. The landowner would not be liable under Massachusetts law, under which the only duty imposed on a landowner in these circumstances was to warn of hidden dangers. *Id.* at 1149. The plaintiff contended the New Hampshire law imposed a higher duty of care. *Id.* The court held that Massachusetts law applied on the duty of care owed by landowners to persons on the land, emphasizing that the Massachusetts landowner was entitled to rely on the Massachusetts standard of care when acting on its Massachusetts land. *Id.* at 1154.

Still another "fairness" case is *Blakesley v. Wolford*, 789 F.2d 236 (3d Cir. 1986) (applying Pennsylvania law), in which a Pennsylvania resident was advised by her physician to have a complicated procedure performed by a Texas oral surgeon. The Texas oral surgeon met with the plaintiff when he was visiting in Pennsylvania, and arranged to perform the procedure at a hospital in Texas. *Id.* at 237. The operation was unsuccessful and, in fact, caused additional injury to the plaintiff. *Id.* In a malpractice action against the oral surgeon in Pennsylvania (the oral surgeon made no objection to Pennsylvania's exercise of jurisdiction, although such an objection might have been sustained), the court held that Texas law, which was more favorable to the defendant, applied on the issues of "informed consent" and limitations on malpractice damages. *Id.* at 243. The court emphasized that the plaintiff voluntarily went to Texas to have the procedure performed and, accordingly, the defendant was entitled to rely on the Texas law of "informed consent" and limited liability for damages. *Id.*

A final "fairness" case is *Bader v. Purdom*, 841 F.2d 38 (2d Cir. 1988) (ap-

I have identified several tort "rules of choice of law." They illustrate the operation of judicial method and the policy-centered conflict of laws approach in the tort area.<sup>20</sup> The first and most "universal" "rule of choice of law," followed by all of the courts that have abandoned the traditional, *lex loci delicti* approach, is that when two residents of the forum are involved in an accident in another state, the law of the forum applies. When the law of the forum allows recovery, the forum is interested in applying that law for the benefit of its resident plaintiff, and when the law of the forum denies recovery, the forum is interested in applying that law for the benefit of the resident defendant. Thus, the forum will apply its own law in this situation notwithstanding that the accident occurred in another state.<sup>21</sup> The second and also universally followed "rule of choice of law" is that when two parties from a recovery state are involved in an accident in a non-recovery state, recovery will be allowed. This is the classic false conflict, whether both parties are from the same or from different recovery states. Recovery will be allowed regardless of where suit is brought.<sup>22</sup>

The third "rule of choice of law" covers the situation where two parties from a non-recovery state are involved in an accident in a recovery state. Here, suit will be brought in the recovery state, since if it is brought in the non-recovery state,

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plying New York law), which involved the application of New York's *Neumeier* rules. When New York parents were visiting friends in Ontario, they left their small child unsupervised, and the child was injured by the friends' dog. *Id.* They brought a negligence action on behalf of the child in New York. Realistically, of course, the suit was against their friends' homeowners' insurer, and the insurer sought to recover contribution and indemnity from the allegedly negligent parents, which was permitted under Ontario law, but not under New York law. The court characterized this case as a true conflict and looked to Ontario law under the second *Neumeier* rule. *Id.* at 40. Here, it can be contended that the application of New York law on the issue of contribution and indemnity would have been unfair to the dog owners, the nominal defendants in the case. Since they were acting in Ontario, they were entitled to conform their conduct to the requirements of Ontario law, under which the parents were responsible for the child's protection. Thus, they would not have to be concerned about the child's safety while the parents were present.

<sup>20</sup> The seventh "rule of choice of law" deals with the situation of a law that reflects an admonitory or regulatory policy. The other "rules of choice of law" are predicated on the assumption that the laws in issue reflect only compensatory policies.

<sup>21</sup> See Sedler, *supra* note 11, at 1033-34.

<sup>22</sup> See *id.* at 1034.

that court will apply the first "rule of choice of law," and recovery will be denied. The plaintiff, however, can always bring suit in the recovery state, obtaining jurisdiction under its long-arm act. Here, the courts are divided, with the majority of the courts allowing recovery.<sup>23</sup> As discussed previously, in this situation I do not think that the recovery state has any real interest in applying its law, but the courts that do allow recovery here emphasize the forum's "better law" and the even-handed treatment of non-residents injured in the forum.<sup>24</sup>

The fourth "rule of choice of law" covers the true conflict, where the accident occurs in the plaintiff's home state, either because of an act done there, as in the ordinary automobile accident case, or because of an act done elsewhere that has created a foreseeable risk of harm in the forum and in fact has caused such harm.<sup>25</sup> Here, the plaintiff will sue in the home state, and in this true conflict situation, the forum will apply its own law allowing recovery.<sup>26</sup>

The fifth and sixth "rules of choice of law" cover the true conflict where the accident occurs in the defendant's home state, and indicate that the result will usually depend on whether suit can be brought in the plaintiff's home state. Frequently, jurisdiction can be obtained in the plaintiff's home state, either because the defendant is a corporation doing substantial business there,<sup>27</sup> or because the underlying accident had substantial factual contacts with the plaintiff's home state,<sup>28</sup> or even because the defendant is personally served in the plaintiff's home state.<sup>29</sup> In this situation, the forum will

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<sup>23</sup> See *id.* at 1035.

<sup>24</sup> See, e.g., *Milkovich v. Saari*, 200 N.W.2d 408 (Minn. 1973).

<sup>25</sup> The latter situation is illustrated by a case such as *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal.), *cert. denied*, 429 U.S. 829 (1976). Since the casino advertised extensively in California, it was subject to long-arm jurisdiction there, and, as pointed out previously, California applied its law imposing dram shop act liability. See *supra* note 19.

<sup>26</sup> See *Sedler*, *supra* note 11, at 1035-36.

<sup>27</sup> See, e.g., *Schwartz v. Consol. Freightways Corp.*, 221 N.W.2d 665 (Minn. 1974), in which the defendant was an interstate trucking company doing substantial business in Minnesota. It was sued there in a case arising from an accident in Ohio involving one of its vehicles and a Minnesota victim. *Id.* at 665.

<sup>28</sup> See, e.g., *Foster v. Leggett*, 484 S.W.2d 827 (Ky. Ct. App. 1972), in which the defendant was a resident of Ohio, but worked in Kentucky, and the parties went on a day trip from Kentucky to Ohio, intending to return to Kentucky that evening. The accident occurred while the parties were in Ohio. *Id.* at 828.

<sup>29</sup> See *Cipolla v. Shaposka*, 267 A.2d 854 (Pa. 1970), in which the plaintiff, a

almost always apply its own law allowing recovery.<sup>30</sup> If, however, suit is brought in the defendant's home state, that state will always apply its own law denying recovery.<sup>31</sup>

The seventh "rule of choice of law" is that where the law of the state in which an act or omission occurs reflects an admonitory or regulatory policy, the defendant will be held liable even if that act or omission causes harm in another state. Here, the state where the act or omission occurs has a real interest in applying its law in order to implement the admonitory or regulatory policy reflected in that law, and ordinarily the state in which the harm occurs will have no interest in insulating the actor from liability.<sup>32</sup>

The eighth "rule of choice of law" deals with what in terms of interest analysis is the unprovided-for case: the plaintiff is from a non-recovery state and the defendant is from a recovery state. In this situation, recovery usually will be allowed irrespective of where the accident occurs, although under New York's "*Neumeier*" rules, recovery will be denied if the accident occurs in the victim's home state.<sup>33</sup>

It is the ninth "rule of choice of law" that the New York Court of Appeals effectively applied in *Cooney*. This "rule of choice of law" is that the tort liability of an employer to an employee who is covered by workers' compensation or liability to a third-party for contribution resulting from a work-related injury is determined by the law of the state where the employer has taken out workers' compensation to cover the particular employee.<sup>34</sup> In commenting on this "rule of choice of law" in 1977, I stated that:

This rule of choice of law is as "universal" as the rule that the state of the parties' common residence will apply its own law to an accident involving those parties in another state. It illustrates the situa-

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Pennsylvania resident, and the nominal defendant, a Delaware resident, were friends, and the suit arose out of an automobile accident occurring while the parties were traveling in Delaware. The defendant was served while he and the plaintiff were playing golf together in Pennsylvania.

<sup>30</sup> See Sedler, *supra* note 11, at 1036-37.

<sup>31</sup> See *id.* at 1038.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.* at 1038-39.

<sup>34</sup> See *id.* at 1039. The rule as formulated here referred only to the employer's liability to the employee, but the cases on which it was predicated included the matter of liability to a third-party for contribution.

tion in which the courts have agreed that only one state has a real interest in applying its law on the point in issue. The policy of all states relating to workers' compensation recovery and considerations of fairness to the employer are best served by looking to the law of the state in which the employer has taken out workers' compensation to cover the particular employee.<sup>35</sup>

In commenting on this "rule of choice of law" some years later, I made the following additional observations:

The reason for this result is that the policy behind the law of workers' compensation is that workers' compensation should be the primary means of providing compensation for work-related injuries, and it will be the *exceptional* case where an employee covered by workers' compensation is able to maintain a tort action as well. Since the injured employee is entitled to receive workers' compensation payments, the employee's subsistence needs will be met, and the policy behind the workers' compensation law of the employee's home state will have been satisfied. Moreover, the employer is considered to be entitled to rely on the law of the state where workers' compensation, covering the particular employee, was taken out to immunize it from tort liability to that employee.<sup>36</sup>

As between employer and employee, the cases typically have involved the interstate sub-contracting situation, where one of the contractors is not required to take out workers' compensation insurance covering the particular employee under the workers' compensation law of one of the states, and so remains liable to the employee in a common law tort action under the law of that state. The employee who has received workers' compensation from one of the contractors then brings a tort action against the other contractor, who remains liable in a tort action under the law of one of the states. The "classic" case presenting this situation is *Wilson v. Faull*.<sup>37</sup> In *Wilson* the plaintiff, a New Jersey resident, whose immediate employer was the New Jersey sub-contractor, was sent to work on a site in Pennsylvania, where he was injured. The general contractor was required to carry workers' compensation covering the injured worker under Pennsylvania's workers' compensation law and did so. It was not required to carry workers' compensation insurance covering employees of sub-contractors

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<sup>35</sup> *Id.* at 1040.

<sup>36</sup> ROBERT A. SEDLER, *ACROSS STATE LINES: APPLYING THE CONFLICT OF LAWS TO YOUR PRACTICE* 62 (1989).

<sup>37</sup> 141 A.2d 768 (N.J. 1958).

under New Jersey law, and so remained liable to them in a common law tort action. After the accident, the plaintiff obtained workers' compensation from his New Jersey employer and then sought to maintain a tort action against the Pennsylvania general contractor in New Jersey. Emphasizing that the Pennsylvania general contractor was entitled to rely on Pennsylvania law immunizing it from tort liability, the New Jersey court held that suit would be barred notwithstanding New Jersey's interest in applying its law in order to allow greater recovery to the New Jersey employee.<sup>38</sup> Numerous other cases presenting this situation have reached the same result.<sup>39</sup> By

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<sup>38</sup> *Id.* at 779. The result in *Wilson v. Faull* was reaffirmed by the New Jersey Supreme Court in *Eger v. E.I. DuPont DeNemours Co.*, 539 A.2d 1213 (N.J. 1988). The court there noted that the decision in *Wilson v. Faull* "foreshadowed, if it did not fully comport with, contemporary choice-of-law doctrine in which the determinative law is that of the state with the greatest interest in governing the particular issue." *Id.* at 1216.

<sup>39</sup> See, e.g., *Durate v. McKenzie Constr. Co.*, 152 Cal. Rptr. 373 (App. Div. 1979); *Kabak v. Thor Power Tool Co.*, 245 N.E.2d 596 (Ill. App. Ct. 1969); *Busby v. Perini Corp.*, 290 A.2d 210 (R.I. 1972); *Osborn v. Kinnington*, 787 S.W.2d 417 (Tex. Civ. App. 1990); *Wheeler v. Parker Drilling Co.*, 803 P.2d 1379 (Wyo. 1991). States that still follow the traditional, *lex loci delicti* rule also reach this result, in that they will look to the law of the state where the employer has taken out workers' compensation to cover the particular employee rather than the law of the state where the accident occurred to determine the employee's entitlement to maintain a tort action. *Hauch v. Connor*, 453 A.2d 1207 (Md. 1983). Sometimes, as in *Hauch v. Connor*, *Lutz v. DeMars*, 559 N.E.2d 1194 (Ind. Ct. App. 1990), and *Garcia v. Public Health Trust of Dade County*, 841 F.2d 1062 (11th Cir. 1988) (applying Florida law), this "rule of choice of law" will result in the application of the law of the forum on this issue.

An interesting variation of this situation was presented in *Paulo v. Benex Corp.*, 792 F.2d 894 (9th Cir. 1986) (applying California law). The plaintiff was a resident of Ontario, Canada, who suffered a work-related injury there when he slipped into a meat grinder. *Id.* After receiving workers' compensation from his Ontario employer, he brought a products liability action against the manufacturer of the meat grinder in California, where it had been manufactured. The manufacturer, however, was also doing business in Ontario, and was subject to Ontario workers' compensation law. That law barred a tort action against any employer who was covered by the law, even if that employer was not the victim's employer. *Id.* at 895. Since the manufacturer was immune from a tort action under Ontario law, the court held that Ontario law applied and barred the suit.

This "rule of choice of law" is in effect embodied in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 184 (1971). The comment to this section states:

It is thought unfair that a person who is required to provide insurance against a risk under the workmen's compensation statute of one state which gives him immunity from liability for tort or wrongful death should not enjoy that immunity in a suit brought in other states. Also to deny a person the immunity granted him by a workmen's compensation

the same token, the law of the state where the employer has taken out workers' compensation to cover the particular employee also determines whether the employee can maintain an action against a co-employee for a work-related injury, since the employer ultimately will be liable for the negligence of the co-employee.<sup>40</sup>

Whenever the employee is able to maintain a tort action against a third-party, such as the driver of the other vehicle in a work-related accident or, more typically, against the manufacturer of the product causing the work-related injury, the third-party tortfeasor will try to obtain contribution from the employer, alleging that the employer's negligence contributed to the injury. As *Cooney* indicates, the states differ consider-

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statute of a given state would frustrate the efforts of that state to restrict the cost of industrial accidents and to afford a fair basis for predicting what those costs will be. All states are sympathetic with the policies underlying workmen's compensation, and all states grant certain persons immunity from liability for tort or wrongful death, although the provisions of the various statutes do differ in matters of detail. For all of these reasons, a state will not hold a person liable for tort or wrongful death under the circumstances stated in the present rule.

This "rule of choice of law" does not apply for the benefit of an employer who, although required under the law of the forum, failed to take out workers' compensation insurance to cover the particular employee. Since the sanction for non-compliance is tort liability, in that circumstance, the forum will apply its own workers' compensation law and hold the non-complying employer to tort liability. See, e.g., *Reid v. Hansen*, 440 N.W.2d 598 (Iowa 1989); see also *Davis v. Morrison-Knudsen Co.*, 289 F. Supp. 835 (D. Or. 1968) (applying Oregon law), in which the employer elected not to come under the Oregon workers' compensation law, and so remained liable in a common law tort action. The particular employee worked in both Oregon and Idaho, and received recovery under the Idaho workers' compensation law for the injury occurring there. The court held that because of the employer's election not to come under the Oregon workers' compensation law, it would be subject to a common law tort action in Oregon. *Id.* at 838.

<sup>40</sup> See, e.g., *Saharceski v. Marcure*, 366 N.E.2d 1245 (Mass. 1977); *LaBounty v. American Ins. Co.*, 451 A.2d 161 (N.H. 1982); *Hunker v. Royal Indem. Co.*, 204 N.W.2d 897 (Wis. 1973).

The law of the state where the employer has taken out workers' compensation insurance to cover the particular employee also determines the employer's subrogation rights in the employee's tort recovery against the third-party tortfeasor. See, e.g., *Brown v. Globe Union, A Division of Johnson Controls, Inc.*, 694 F. Supp. 795 (D. Colo. 1988) (applying Colorado law); *Perry v. Carter*, 620 S.W.2d 50 (Mo. Ct. App. 1981); *Breslin v. Liberty Mut. Ins. Co.*, 391 A.2d 342 (N.J. Super. Ct. 1975), *aff'd*, 354 A.2d 635 (N.J. 1976); *Allen v. American Hardwoods & Saif*, 795 P.2d 592 (Or. Ct. App.), *appeal denied*, 800 P.2d 789 (Or. 1990); *Davish v. Gidley*, 611 A.2d 1307 (Pa. Super. Ct. 1992); see also *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 185 (1971).

ably on the question of whether the employer is liable for contribution to the third-party tortfeasor. States like New York that allow contribution against the employer to the third-party tortfeasor clearly have an interest in applying their law allowing contribution for the benefit of the resident defendant, while the employer's home state has a similar interest in immunizing the employer from contribution. In terms of interest analysis, this situation presents the true conflict.<sup>41</sup>

However, when cases presenting this issue have arisen, the courts have generally drawn an analogy to the cases where the employee was seeking tort recovery against the non-covered employer, and have held that the law of the state where the employer has taken out workers' compensation to cover the particular employee determines the employer's liability for contribution to the third-party tortfeasor. Here, the "classic" case is *Elston v. Industrial Life & Truck Co.*<sup>42</sup> In that case, a Pennsylvania resident working in New Jersey was injured there while operating a fork-lift truck purchased from a Pennsylvania manufacturer. He obtained workers' compensation benefits from his employer under the New Jersey workers' compensation act, and then brought a products liability action against the Pennsylvania manufacturer in Pennsylvania. The manufacturer sought to join the employer as a third-party defendant in order to obtain contribution, which was not permitted by New Jersey law, but was permitted by Pennsylvania law. Despite Pennsylvania's interest in applying its law to enable the Pennsylvania manufacturer to obtain contribution against the New Jersey employer, the Pennsylvania court held that New Jersey law applied on this issue. As the court stated:

Were Industrial [the manufacturer] to prevail, the Pennsylvania policy of permitting contribution would be imposed upon the New Jersey program of workmen's compensation. Pennsylvania, thus, would interject a limitation on the manner by which New Jersey could determine to meet the social costs of its industrial accidents. Such an approach, in our view, would be unsound. The extent to which the New Jersey program of workmen's compensation should assimilate the equities underlying contribution is a determination

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<sup>41</sup> See *Cooney v. Osgood Mach. Inc.*, 81 N.Y.2d 66, 74, 612 N.E.2d 277, 282-83, 595 N.Y.S.2d 919, 923-24 (1993).

<sup>42</sup> 216 A.2d 318 (Pa. 1966).



more appropriately to be made by that state.<sup>43</sup>

In the same vein is *Vickrey v. Caterpillar Tractor Co.*,<sup>44</sup> where the facts were identical to those in *Cooney*,<sup>45</sup> even to the point that the employer was from Missouri. The Illinois court applied Missouri law, immunizing the employer from liability for contribution to the Illinois manufacturer. It specifically drew an analogy to its decision in an earlier case, *Kabak v. Thor Power Tool Co.*,<sup>46</sup> holding that the tort liability of an employer to an employee for a work-related injury was determined by the law of the state where the employer has taken out workers' compensation to cover the particular employee. Other cases involving this fact-law pattern have reached the same result.<sup>47</sup> As one court has put it, "[t]he place of the employer's benefits coverage is the single most important factor in determining which state's workers' compensation law to apply."<sup>48</sup>

Relating the results of these cases to the ninth "rule of choice of law," this "rule of choice of law" may thus be stated as follows:

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<sup>43</sup> *Id.* at 324.

<sup>44</sup> 497 N.E.2d 814 (Ill. App. Ct. 1986).

<sup>45</sup> See *infra* notes 50-51 and accompanying text.

<sup>46</sup> 245 N.E.2d 596 (Ill. App. Ct. 1969).

<sup>47</sup> See, e.g., *Moore v. The Wausau Club*, 777 F. Supp. 619 (N.D. Ill. 1991) (employee of Illinois orchestra brought tort action against Wisconsin club where employee was injured; Illinois law, under which employee received workers' compensation, but under which employer was subject to contribution, applied); *Lewis v. Chemetron Corp.*, 448 F. Supp. 211 (W.D. Pa. 1978) (injured employee brought action in Pennsylvania against Pennsylvania defendant for injuries caused in work-related accident in Ohio; law of Ohio, under which plaintiff had received workers' compensation, and under which employer was immunized from contribution, applied to immunize employer from contribution liability); *Roy v. Star Chopper Co.*, 442 F. Supp. 1010 (D.R.I. 1977) (employee of Rhode Island corporation with its principal place of business in Massachusetts injured in Massachusetts and received workers' compensation there; Massachusetts law immunizing employer against tort indemnity claim, applied). See also *Barry v. Baker Elec. Co-Op., Inc.*, 354 N.W.2d 666 (N.D. 1984), in which the forum applied its own law on this issue to immunize the forum employer from liability for contribution. A contrary result was reached in *Barringer v. State*, 727 P.2d 1222 (Idaho 1986), in which the Idaho court applied Idaho law to allow the state to recover contribution against the Washington employer of a Washington employee who was killed in an accident in Idaho, and whose beneficiaries successfully maintained a negligence action against the state based on the negligent design and construction of a runaway truck ramp.

<sup>48</sup> *Moore*, 777 F. Supp. at 621.

The tort liability of an employee who is covered by workers' compensation and the liability of the employer for contribution to a third-party tortfeasor in a claim involving that employee is determined by the law of the state where the employer has taken out workers' compensation to cover the particular employee.<sup>49</sup>

## II. THE COONEY DECISION: PARTY EXPECTATIONS AND THE NINTH "RULE OF CHOICE OF LAW"

*Cooney* was a typical employee products liability case brought by the injured employee against the manufacturer of the product that allegedly caused the injury. Cooney, a resident of Missouri, was injured there in 1978 while cleaning a machine used to shape large pieces of metal. The machine had been manufactured in New York in 1957 or 1958 by Kling Brothers, Inc. (succeeded in interest by Hill Acme Co.), and in 1958 it was sold to a New York company, American Standard, Inc., through New York sales agent, Osgood Machinery, Inc., which assisted American Standard in the setup and initial operation of the machine. The machine next surfaced in 1969, when Crouse Company, a New York company which had somehow obtained the machine, sold it to Cooney's employer, Paul Mueller Company. Mueller installed the machine in its Missouri plant and subsequently modified it by adding a foot switch. Cooney's injury occurred when he was unable to reach the foot switch in time to stop the machine.

Cooney filed for and received workers' compensation benefits from Mueller under Missouri law. Under Missouri law, Mueller was thereby released from any tort liability to Cooney or to a third party. As is typical in such cases, Cooney brought a products liability action against Osgood—the machine's initial sales agent—in a New York state court.<sup>50</sup> Osgood then brought a third-party action seeking contribution against Mueller, American Standard and Hill Acme. Mueller, in reliance on Missouri law immunizing it from contribution to third parties for this work-related injury, moved for summary judgment dismissing Osgood's third-party complaint. Under New York law, Mueller would remain liable to Osgood for contribu-

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<sup>49</sup> For original ninth "rule of choice law," see Sedler, *supra* note 11, at 1039.

<sup>50</sup> Osgood apparently was not subject to personal jurisdiction in Missouri.

tion. The trial court held that New York law should apply, but its decision was unanimously reversed by the New York Appellate Division, which dismissed the third-party complaint and all cross-claims against Mueller.<sup>51</sup> The New York Court of Appeals unanimously affirmed the decision of the Appellate Division.<sup>52</sup>

In retrospect, then, *Cooney* should have been an easy case for the New York Court of Appeals to decide, and perhaps it was. The Court of Appeals was unanimous in its decision, and the result in *Cooney* is consistent with the results that other courts have reached when dealing with this fact-law pattern, as reflected in the restated ninth "rule of choice of law." Indeed, *Cooney* demonstrates very clearly the operation of "rules of choice of law" in conflicts torts cases, and supports my submission that in conflicts torts cases, the courts have reached fairly uniform results regardless of which "modern" approach to choice of law the courts are purportedly following. What I am suggesting, then, is that the New York Court of Appeals "knew" the result that it wanted to reach in *Cooney* and then proceeded to reach that result. And although the court made no reference to the decisions of the other courts in the cases presenting this fact-law pattern, it nevertheless reached the same result as they did. Hence, the decision supports the submission that there are indeed "rules of choice of law" in conflicts torts cases.<sup>53</sup>

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<sup>51</sup> *Cooney v. Osgood Mach., Inc.*, 179 A.D.2d 240, 582 N.Y.S.2d 873 (4th Dep't 1992).

<sup>52</sup> *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 70, 612 N.E.2d 277, 279, 595 N.Y.S.2d 919, 921 (1993).

<sup>53</sup> I place great emphasis on the results that the courts reach in the actual conflicts cases coming before them for decision, because, as stated previously, I maintain that the function of a court in a conflicts case is to reach results that are functionally sound and fair to the parties. And it is from these results that "rules of choice of law" in conflicts torts cases have emerged. In my opinion, conflicts commentators—and this is true of commentators in other areas of law as well—tend to be much too concerned with and critical of the opinions that courts render and the *explanations* that they give for their decisions in a particular case. This is not to say that the courts' opinions and the explanations for their decisions are not important. The opinions serve as precedent, and the rationale of a court's decision must be relied on by lawyers and by lower courts as they respectively litigate and try to resolve future cases. Nonetheless, I maintain that in practice a court is much more concerned about the result that it reaches than about the precise rationale by which it arrives at that result. Courts have to decide many cases and to write many opinions supporting their decisions. Judicial

If the New York Court of Appeals had been consistently applying judicial method in conflicts torts cases, then reaching the result that it wanted to reach in *Cooney* would have been an easy matter *doctrinally*. The court simply could have invoked the considerations of policy and fairness reflected in the ninth "rule of choice of law." The most relevant policy considerations here are those relating to workers' compensation. In all of the states, workers' compensation is the primary means of providing compensation for work-related injuries, and the state where the employer has taken out workers' compensation to cover the particular employee has a strong interest in applying its law to implement the workers' compensation policy reflected in that law. And as regards fairness, the employer who has taken out workers' compensation to cover a particular employee should be entitled to rely on the law of the state where that workers' compensation coverage has been taken out immunizing it from tort liability to that employee. The workers' compensation policy of that state and the employer's reliance on that state's law immunizing it from tort liability are undermined if another state allows the employee to maintain a tort action or a third party to maintain a contribution action against the employer. Thus, a functionally sound and fair result in the fact-law pattern presented here is achieved by holding that the tort liability of the employer, both directly and indirectly by way of contribution, is determined by the law of the state where the employer has taken out workers' compensation to cover the particular employee.

It is evident that these were the considerations that in fact motivated the New York Court of Appeals in *Cooney* to hold that Missouri law applied on the issue of the Missouri employer's liability for contribution to the third party tortfeasor. Recognizing that both Missouri and New York had an interest in applying their conflicting laws in this case, the court stated that, "if neither [interest] can be accommodated without substantially impairing the other, [the court must

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opinions should not be expected to meet the "academic standards" of a law review article, and it is for this reason that I maintain that the brush of academic criticism should be lightly applied to judicial opinions. If the court has reached a result that is functionally sound and fair to the parties, it should not be criticized too harshly if its opinion is not a "textbook model of academic analysis."

find] some other sound basis for resolving the impasse.”<sup>54</sup> The court found this “other sound basis” in the matter of party expectations or, more specifically, in the entitlement of the Missouri employer to rely on Missouri workers’ compensation law to determine its tort liability to the employee and to the third-party tortfeasors. As the court stated, “In view of the unambiguous statutory language barring third party liability . . . Mueller [the Missouri employer] could hardly have expected to be haled before a New York court to respond in damages for an accident to a Missouri employee at a Missouri plant.”<sup>55</sup> The court went on to say that the New York manufacturer “could have had no reasonable expectation that contribution would be available in a products liability action arising out of the sale of industrial equipment,” both because its connection with the product occurred some years before New York recognized full contribution among joint tortfeasors, and because even under present New York law, the entitlement to contribution was not “foolproof.” That is to say, that in some cases New York jurisdiction could not be obtained over the other tortfeasor or the other tortfeasor might be insolvent.<sup>56</sup> Thus, the court concluded: “In sum, we conclude that Missouri law should apply because, although the interests of the respective jurisdictions are irreconcilable, the accident occurred in Missouri, and unavailability of contribution would more closely accord with the reasonable expectations of both parties in conducting their business affairs.”<sup>57</sup>

As I have stated previously, in evaluating the soundness of a court’s decision in a conflicts case, I maintain that the focus should be on the result that the court reaches rather than on the precise rationale it gives for reaching that result.<sup>58</sup> I do not think that the purported “expectations” of the New York manufacturer really played an important part in the decision in *Cooney*.<sup>59</sup> That is, I do not think that the result would have been different if the product had been manufactured at a time when New York law fully recognized contribution, and since

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<sup>54</sup> *Cooney*, 81 N.Y.2d at 74, 612 N.E.2d at 282, 595 N.Y.S.2d at 923.

<sup>55</sup> *Id.* at 77, 612 N.E.2d at 284, 595 N.Y.S.2d at 926.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See Sedler, *New Critics*, *supra* note 1, at 597-99.

<sup>59</sup> *Id.*

New York law now does fully recognize contribution, it should not matter that entitlement to contribution is not "foolproof." I would submit that it was the expectations of the Missouri employer that were significant in *Cooney*, coupled with the fact that the employer's immunity from contribution is an integral part of the Missouri workers' compensation policy that was involved in this Missouri work-related injury.

The application of the law of the state where the employer has taken out workers' compensation covering the particular employee to determine the employer's liability for contribution clearly illustrates the operation of fairness considerations in the choice-of-law process. As I have pointed out previously, fairness to the parties is an independent choice-of-law consideration.<sup>60</sup> Even where the application of the forum's law is not so fundamentally unfair as to violate due process, as *Cooney* indicates the forum will be reluctant to apply its own law, despite a real interest in doing so, if the application of its law will produce *some unfairness* to the party against whom it is being applied.<sup>61</sup> In *Cooney*, the application of New York's law to impose liability for contribution on Mueller, the Missouri employer, would not have been so fundamentally unfair as to violate due process. The Missouri employer had purchased the machine from a New York manufacturer, and in a general sense could foresee the application of New York law on the issue of its liability for contribution to the New York manufacturer. However, it could be subject to a contribution claim by the New York manufacturer only if the following factors coalesced: (1) the machine was defective and caused a work-related injury to the employer's Missouri employee; (2) its Missouri employee sued the manufacturer in New York; and (3) the manufacturer sought to join the Missouri employer in order to obtain contribution from it in New York, which it could do because the employer was doing unrelated business in New York.<sup>62</sup>

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<sup>60</sup> See *id.* at 613.

<sup>61</sup> *Id.*

<sup>62</sup> In *Cooney*, the New York Court of Appeals specifically considered whether the application of New York's contribution law to Mueller would be unconstitutional, and held that it would not be, noting that the machine was manufactured in New York and that Mueller did unrelated business there. 81 N.Y.2d at 72, 612 N.E.2d at 280, 595 N.Y.S.2d at 922.

As we have seen in the other cases presenting this particular issue, the courts are of the view that the employer should be able to *rely* on the law of the state where it has taken out workers' compensation covering the particular employee to determine its potential tort liability for work-related injuries.<sup>63</sup> Depending on the nature of its insurance coverage, it is possible that the employer would not be insured for tort liability for work-related injuries to employees who were already insured under its workers' compensation coverage. In any event, because the law of that state immunizes the employer from contribution for work-related injuries, the employer should not be expected to insure against the rare circumstance in which it might be held liable for contribution in the employee's action against a third-party tortfeasor.

I have thus explained the holding in *Cooney* in terms of *fairness*. New York would not apply its own law on the issue of contribution in this case, because the application of New York law on this issue would produce *some unfairness* to the Missouri employer, who was entitled to rely on the law of Missouri, where it had taken out workers' compensation coverage for that employee, and which in turn immunized it from liability for contribution to a third-party tortfeasor. Again, this is the result that the other courts have reached when presented with this situation, as reflected in the redrawn ninth "rule of choice of law:" the liability of an employer for contribution to a third-party tortfeasor in a suit arising out of a work-related injury is determined by the law of the state where the employer has taken out workers' compensation covering the particular employee. Clearly, in *Cooney*, the New York Court of Appeals reached a result that is functionally sound and fair to the parties.<sup>64</sup>

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<sup>63</sup> See *supra* notes 38-40.

<sup>64</sup> The result in *Cooney* may be compared to and is fully consistent with the result reached by a New York federal court in *Gregory v. Garrett Corp.*, 578 F. Supp. 871 (E.D.N.Y. 1983) (applying New York law), a case presenting a somewhat different fact-law pattern and a very different factual situation than *Cooney*. That case arose out of the crash of a corporate aircraft in New York. The aircraft was owned and operated by a New York corporation (TGA), which had been established as a wholly-owned subsidiary by a Connecticut corporation (TG), in order to maintain a fleet of readily available corporate aircraft for TG while complying with Federal Aviation Agency ownership requirements. All eight persons killed in the crash were employees of TG, TGA or both. *Id.* The survivors of the six Connecticut residents obtained workers' compensation under North Carolina law, and the

### III. A CONCLUDING THOUGHT: WHAT ABOUT THE *NEUMEIER* RULES?

As I have said, it is my submission that in analyzing conflicts cases, the emphasis should be on the soundness of the result that a court reaches, and if the result is functionally sound and fair to the parties, we should not be too concerned about the explanation that the court gives for reaching that result. Since the New York Court of Appeals clearly reached a result in *Cooney* that is functionally sound and fair to the parties, I should perhaps leave well enough alone and, at this point, end my commentary about the case. But I am left with a nagging question that is prompted by the New York Court of Appeals' treatment of the *Neumeier* rules in *Cooney*.

In *Cooney*, the New York Court of Appeals was confronted with the *approach* that it had adopted to choice of law in interstate accident cases, an approach that is an amalgam of interest analysis and what may be called "narrow, policy-centered" rules. Although New York generally follows interest analysis, its application of the interest analysis approach in interstate accident cases is qualified by the *Neumeier* rules. Under the first *Neumeier* rule, when both the plaintiff and defendant are from the same state, the law of that state applies. Under the second and third *Neumeier* rules, when the plaintiff and defen-

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survivors of the two North Carolina residents obtained workers' compensation under North Carolina law. *Id.* at 876. The survivors then brought products liability actions against a number of entities that had designed, manufactured and worked on the aircraft. The defendants sought to obtain contribution against TG and TGA. Some of the survivors of the TG employees also sought to maintain a tort action against TGA.

The court held that the law of Connecticut and North Carolina determined whether the survivors could maintain a tort action against TGA. However, the court held that on the issue of whether the product liability defendants could obtain contribution against TG and TGA, New York law allowing contribution applied instead of Connecticut and North Carolina law, which did not. The court based its decision on the fact that the accident occurred in New York; the allegedly negligent conduct of TGA occurred in New York; most of the product liability defendants resided in New York; the relationships between all of parties were centered in New York; and, New York was TGA's principal place of business. The court also held that under the second *Neumeier* rule, New York law would apply, since the accident occurred there. *Id.* at 881. Under the "protection of reasonable expectations" analysis subsequently employed by the New York Court of Appeals in *Cooney*, New York law was properly applied on the contribution issue in this case, because of the "massing of contacts" in New York.



dant are from different states—both the true conflict and the unprovided-for case—the law of the state where the accident occurs generally applies.<sup>65</sup> In *Cooney*, the New York Court of Appeals “faithfully” applied its stated approach to choice of law. It first found that this case presented a true conflict: Missouri had a real interest in applying its law protecting the employer from contribution, while New York likewise had a real interest in applying its law permitting contribution to enable the New York manufacturer to obtain contribution from the Missouri employer.<sup>66</sup> Because the case presented a true conflict, and because the parties were from different states, as the court recognized, the second *Neumeier* rule would call for the application of Missouri law on the issue of the New York manufacturer’s entitlement to contribution against the Missouri employer.<sup>67</sup>

But the New York Court of Appeals was *unwilling* to resolve this true conflict by applying the “place of the accident tiebreaker,” as would be required under the second *Neumeier* rule. The court stated that the rationale for the “place of the accident tiebreaker” was that, “ordinarily it is the place with which both parties have voluntarily associated.”<sup>68</sup> Here, however, the New York manufacturer did not directly sell the machine to the Missouri employer, and as the court noted, “[t]he record establishes that Osgood [the New York manufacturer] was not in the business of distributing goods nationwide, but limited its activities to New York and parts of Pennsylvania, and thus Osgood may not have reasonably anticipated becoming embroiled in litigation with a Missouri employer.”<sup>69</sup> The New York Court of Appeals then said that it would base its decision on “the protection of reasonable expectations,” and applied Missouri law on this basis.<sup>70</sup>

I have been a harsh critic of the *Neumeier* rules.<sup>71</sup> I have contended that the *Neumeier* rules, although purportedly narrow and policy-based, suffer from the vice of all choice-of-law

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<sup>65</sup> See *Cooney*, 81 N.Y.2d at 74, 612 N.E.2d at 281-82, 595 N.Y.S.2d at 923-24.

<sup>66</sup> *Id.* at 75-77, 612 N.E.2d at 282-83, 595 N.Y.S.2d at 924-25.

<sup>67</sup> *Id.* at 76, 612 N.E.2d at 283, 595 N.Y.S.2d at 925.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See generally Sedler, *supra* note 12, at 131-37.

rules: they were formulated *a priori* and then must be applied to the facts of particular cases.<sup>72</sup> I have also demonstrated that in practice, the application of the *Neumeier* rules may produce functionally unsound results in particular cases.<sup>73</sup>

It is the second *Neumeier* rule that I find the most troubling. Not only was the rule not based on the decisions of the New York Court of Appeals in prior cases, but, to the contrary, it is inconsistent with the result reached in the pre-*Neumeier* case of *Miller v. Miller*.<sup>74</sup> There, a New York resident was killed in Maine in an accident with a Maine defendant. When the Maine defendant moved to New York, the decedent's beneficiaries brought a wrongful death action against him there. At that time, Maine law limited recovery of damages for wrongful death, while New York law did not. In this true conflict situation,<sup>75</sup> New York applied its own law allowing recovery. The second *Neumeier* rule, if properly followed, would require the overruling of *Miller*. It would also require the overruling of another pre-*Neumeier* decision of the New York Court of Ap-

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<sup>72</sup> *Id.* at 132-37.

<sup>73</sup> For example, where a plaintiff and a defendant from different recovery states are involved in an accident in a non-recovery state, the case presents a false conflict, and under the second "rule of choice of law," recovery will be allowed. See Sedler, *supra* note 11, at 1034. Moreover, under the rationale of the first *Neumeier* rule, recovery should be allowed. But the case by its terms comes within the third *Neumeier* rule. When faced with such a situation in *Chila v. Owens*, 348 F. Supp. 1207 (S.D.N.Y. 1972) (applying New York law), the court correctly treated the case as presenting a false conflict and applied the first *Neumeier* rule. However, in *Rogers v. U-Haul Co.*, 41 A.D.2d 834, 342 N.Y.S.2d 158 (2d Dep't 1973), the Appellate Division was faced with the situation of an Alabama resident killed in a Pennsylvania accident as a result of the negligence of a New York driver operating a vehicle owned by U-Haul, a nationwide concern doing substantial business in New York. U-Haul would be considered a New York defendant for purposes of the *Neumeier* rules. Under New York law, U-Haul would be vicariously liable for the negligence of the driver, but under Pennsylvania law, it would not be. The court did not consider whether U-Haul would be vicariously liable under the law of Alabama, where the victim resided. Since the parties were from different states, the court applied the third *Neumeier* rule, and held that Pennsylvania law, barring recovery, applied. However, if Alabama law would have imposed vicarious liability on U-Haul, this case would have presented a false conflict, and liability should have been imposed.

<sup>74</sup> 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

<sup>75</sup> Maine's interest in applying its law limiting damages recoverable for wrongful death in this case was not affected by the nominal defendant's post-transaction move to New York, since the accident would still be charged to the insurer's Maine loss experience, and Maine would still have a real interest in having its law applied in order to limit recovery.

peals, *Kilberg v. Northeast Airlines, Inc.*,<sup>76</sup> where the New York Court of Appeals refused on "public policy" grounds to apply Massachusetts law limiting recovery for wrongful death in a case involving a New York victim and a Massachusetts airline, with the fatal crash occurring in Massachusetts.<sup>77</sup>

In the years since *Neumeier* was decided, the New York Court of Appeals has not been directly confronted with a case presenting the issue of whether the law of the state of injury will be applied to deny or limit the recovery of a New York accident victim injured or killed by a non-recovery state defendant in the defendant's home state. The Second Circuit, however, has been faced with a case presenting this issue in regard to limitations on wrongful death, and has held that notwithstanding the *Neumeier* rules, New York law would apply its own law in this situation, because it would be against New York's "public policy" to limit wrongful death recovery for a New York victim.<sup>78</sup> The Second Circuit has also held that where a New York employee of a New York employer was

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<sup>76</sup> 9 N.Y.2d 34, 172 N.E.2d 380, 211 N.Y.S.2d 133 (1961).

<sup>77</sup> At this time New York was following the "place of the wrong" rule of the traditional approach. Under the proper application of the methodology of the traditional approach, a court would be justified in refusing to enforce a claim existing under the law of the "place of the wrong," but not in refusing to enforce a defense existing under that state's law. Thus, in *Kilberg*, New York was using "public policy" as a manipulative technique to bring about the application of New York law on the issue of damages recoverable for wrongful death. The application of New York law on this issue was fully foreseeable to the defendant, since it did extensive business in New York, where the fatal flight originated.

In *Cooney*, the New York manufacturer argued that it would be against New York's "public policy" to apply Missouri law on the issue of contribution. The manufacturer relied on another case where the New York courts had used "public policy" as a manipulative technique to bring about the effective application of New York law. In that case, *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1928), two New York spouses were involved in an automobile accident in Connecticut. At that time, New York law recognized spousal immunity, while Connecticut law did not. In a suit in New York, the New York court held that it would be against New York's "public policy" to allow the suit between spouses, as permitted by Connecticut law. In *Cooney*, the New York Court of Appeals held that there was no "public policy" objection to applying Missouri law on the issue of the employer's liability for contribution to the New York manufacturer. *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 79, 612 N.E.2d 277, 285, 595 N.Y.S.2d 919, 925 (1993).

<sup>78</sup> *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973). The district court in *Warren* held that the second *Neumeier* rule did not apply to questions of charitable immunity either, so that New York law would apply to allow recovery to the beneficiaries of the New York victim against the Massachusetts charity, although the fatal injury occurred in Massachusetts. 374 F. Supp. 522 (S.D.N.Y. 1974).

killed while temporarily working on a project in Virginia due to the negligence of an employee of another company working on the project, New York workers' compensation law (which did not consider the two employees to be in the "same employ" for workers' compensation purposes) rather than Virginia law applied, thus allowing a tort action against the other company. The Second Circuit held that, notwithstanding the *Neumeier* rules, New York would apply its own law in this case on "public policy" grounds.<sup>79</sup>

In *Cooney*, the New York Court of Appeals specifically recognized that the second *Neumeier* rule had adopted a "place of injury" test for interstate accident cases presenting the true conflict. The court was unwilling to use the *Neumeier* rules to resolve the true conflict in that case, because the New York manufacturer "did nothing to affiliate itself with Missouri."<sup>80</sup> This observation would not apply in a case like *Miller*, since the New York decedent was driving in Maine, or in *Kilberg*, since the fatal accident occurred during a flight to Massachusetts. Nonetheless, the New York Court of Appeals long ago abandoned the "place of injury" rule in *Babcock*,<sup>81</sup> where two New Yorkers were involved in an accident in a non-recovery state, and has also held that the law of the parties' home state rather than New York applies when two non-residents are involved in an accident in New York.<sup>82</sup> Therefore, it may be queried why New York should look to the law of the "place of injury" as a viable means of resolving a true conflict, especially when, as in *Miller* and *Kilberg*, doing so would require the court to sacrifice New York's own policies and interests. To put

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<sup>79</sup> *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir. 1978). I do not consider the result in this case to be inconsistent with the ninth "rule of choice of law," because the New York victim was not doing work for the company whose employee had caused the fatal injury. Virginia had a broad definition of what employees were in the "same employ" for purposes of its workers' compensation law, which conflicted with New York's narrower definition of "same employ." In this circumstance, the policy and fairness concerns which are at the basis of the ninth "rule of choice of law" would not seem to be implicated if the Virginia company did not obtain the benefit of Virginia law to avoid liability to the New York victim, who was not in any way doing any work for that company.

<sup>80</sup> 81 N.Y.2d at 75, 612 N.E.2d at 283, 595 N.Y.S.2d at 924.

<sup>81</sup> *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

<sup>82</sup> *Schultz v. Boy Scouts*, 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

it another way, perhaps the New York Court of Appeals, when and if it is faced with this situation, will be willing to consider anew whether New York, which generally follows interest analysis, should sacrifice New York's policy and interest in a true conflict situation, merely because the accident occurred in another state. In any event, since the New York Court of Appeals did not enthusiastically embrace the second *Neumeier* rule in *Cooney*, there is at least the possibility that the court will reconsider the utility of that rule when it is sought to be applied in a true conflict situation, such as *Miller* or *Kilberg*, where, unlike *Cooney*, there are no fairness considerations that would dictate the displacement of New York law.

But it will be time enough for the New York Court of Appeals to reconsider this question when and if such a case arises. In *Cooney*, the New York Court of Appeals dealt with the issue at hand, and applying considerations of policy and fairness, reached a result that is functionally sound and fair to the parties. In so doing, it performed the proper function of a court in a conflicts case, and regardless of whether the court so intended, its decision in *Cooney* serves as a very good example of the operation of judicial method in conflicts torts cases.