Interest Analysis: For Those Who Like It and Those Who Don't

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In Abendschein v. Farrell,¹ the Supreme Court of Michigan declined to embrace the “heady stuff”² of interest analysis and decided instead to retain lex loci delicti as the method of resolving choice-of-law problems in tort cases. While my own inclination is toward interest analysis, rather obviously the highest appellate court of any state has the right and the capacity to utilize any constitutionally permissible technique to resolve conflicts problems, and to hell with my personal preference. Still, the result achieved by the court in Abendschein has continued to trouble me. I think now I know why, and, in the process of figuring out why, I think I may have arrived at some conclusions which may be of assistance to courts working with the complexities of interest analysis and of value to those courts which have elected to retain lex loci delicti. First, the facts of Abendschein.

Three domiciliaries of New York were passengers and a domiciliary of Michigan the driver in an automobile trip which began in Buffalo and was intended to end in Detroit. The car was owned (and apparently leased to the driver) by a Michigan-based corporation. In Ontario the car “rolled over several times”³ because, according to the complaint, the driver was operating it “at speeds of 90 miles per hour around curves while intoxicated.”⁴ One of the passengers died and the other two were injured. The two survivors and the personal representative of the decedent sued the driver and the owner in Michigan. De-

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2. Id. at 519, 170 N.W.2d at 140.
3. Id. at 514, 170 N.W.2d at 138.
4. Id.
fendants asserted the applicability of the Ontario guest statute which existed at the time of the operative facts and which precluded recovery by passengers irrespective of the degree of culpability of the host-driver.\(^{5}\) New York had no guest statute. Michigan had a guest statute which permitted passenger recovery for the "gross negligence or wilful and wanton misconduct"\(^{6}\) of host-driver. Plaintiffs asserted the applicability of the dispositive law\(^{7}\) of either New York or Michigan. Lex loci delicti inexorably led the Supreme Court of Michigan to the conclusion that the Ontario guest statute barred the action and, therefore, defendants' motions for summary judgment were granted. And that's the result which has troubled me.

With the reader's indulgence, I'd like to undertake an admittedly circuitous route which ultimately will lead us back to \textit{Abendschein} and what I think is wrong with its conclusion.

The Supreme Court of New Jersey, unlike the Michigan court, has adopted interest analysis. In \textit{Pfau v. Trent Aluminum Co.},\(^{8}\) the New Jersey court was confronted with these facts: Plaintiff, a Connecticut domiciliary, and defendant, a New Jersey domiciliary, were students at Parsons College, Iowa. Defendant's father "owned"\(^{9}\) Trent Aluminum Company and permitted his son to drive to Parsons a car registered and insured in New Jersey and owned by the close corporation. Plaintiff and defendant planned to drive from Parsons to Columbia, Missouri. En route, the car, operated by defendant, collided with another vehicle operated and occupied by Iowa domiciliaries. The claims of those Iowa residents were settled by the corporation's liability carrier. To recover for his injuries, plaintiff-passenger sued defendant-host and the corporate owner in New Jersey. Defendants pleaded the Iowa guest

\(^{5}\) \textit{ONT. REV. STAT.} ch. 172, § 105(2) (1960). Subsequently, the Ontario statute was amended to provide that:

\begin{quote}
[T]he owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle, except where such loss or damage was caused or contributed to by the gross negligence of the driver of the motor vehicle.
\end{quote}


\(^{6}\) \textit{MICH. STAT. ANN.} tit. 9, ch. 75b, § 9.2101 (1968).

\(^{7}\) The phrase "dispositive law" describes "those rules which are used to determine the nature of rights arising from a fact-group, \textit{i.e.,} those which dispose of a claim." \textit{Taintor, Foreign Judgment in Rem: Full Faith and Credit v. Res Judicata in Personam,} 8 \textit{U. PITT. L. REV.} 223, 233 n.58 (1942) [hereinafter cited as \textit{Taintor}]. It is my feeling that "dispositive law" is more accurate and useful than such phrases as "municipal law," "internal law," or "local law."


\(^{9}\) Id. at 514, 263 A.2d at 130.
Interest Analysis

statute,10 which holds the host immune from liability unless he was intoxicated or reckless. The New Jersey court began the process of interest analysis by noting: "In order to determine whether the Iowa guest statute should apply to this case, we must first examine its purposes as articulated by the Iowa courts."11 Just so. Examination of Iowa decisions led the court to conclude that the reasons underlying the Iowa guest statute were:

(1) "to cut down litigation arising from the commendable unselfish practice of sharing with others transportation in one's vehicle and protect the Good Samaritan from claims based on negligence by those invited to ride as a courtesy,"
(2) "to prevent ingratitude by guests,"
(3) "to prevent suits by hitchhikers," and
(4) "to prevent collusion suits by friends and relatives resulting in excessively high insurance rates."12

The court then determined that none of those reasons was convertible into a legitimate interest on the part of Iowa in having its guest statute applied. One might have thought that that determination would have disposed of the guest-statute defense, but such a one would have been mistaken. The court saw fit to buttress its opinion that the Iowa guest statute was inapplicable by looking to the dispositive laws of New Jersey, defendant driver's domicile, and Connecticut, plaintiff passenger's domicile, neither of which contained a guest statute. The absence of a guest statute in New Jersey combined with defendant driver's New Jersey domicile led the court to state:

It may well be that in this case . . . New Jersey has an interest. We are not certain that a defendant's domicile lacks an interest in seeing that its domiciliaries are held to the full measure of damages or the standard of care which that state's laws provide for. A state should not only be concerned with the protection and self-interest of its citizens.13

The absence of a guest statute in Connecticut and the plaintiff's Connecticut domicile led the court to determine that Connecticut, too, had

10. IOWA CODE ANN. ch. 321, § 321.494 (1966). The statute has since been amended to provide for liability if the host was:
   . . . under the influence of an alcoholic beverage, a narcotic, hypnotic, or other drug, or any combination of such substances, or . . . reckless . . . .
11. 55 N.J. at 516, 263 A.2d at 131.
12. Id.
13. Id. at 524, 263 A.2d at 136.
"a significant interest in having [its] law applied to this case."\textsuperscript{14} Since the dispositive laws of Connecticut and New Jersey were the same, the court concluded: "[T]his case presents a false conflict and it is unnecessary for us to decide whether this state [New Jersey] has an interest sufficient to warrant application of its law."\textsuperscript{15}

Having found Connecticut's dispositive law relevant to the choice-of-law problem, the New Jersey court apparently felt obligated to consider (before rejecting) defendants' suggestion that the court should take cognizance of Connecticut's indicative law,\textsuperscript{16} lex loci delicti. Defendants argued that, if the operative facts were laid before a Connecticut court, that court would impose the Iowa guest statute even to the economic jeopardy of its own domiciliary. That led defendants to assert a diminished interest on the part of Connecticut in having the Connecticut plaintiff recover from the New Jersey defendants. The court rejected the assertion because (1) that's renvoi and likely to result in a never-ending circle, and (2) Connecticut's lex loci delicti indicative law did not reflect Connecticut's view of its interest in conflicts cases. So the guest statute was held inapplicable.

I have no serious quarrel with that ultimate conclusion. The methods employed in achieving it, however, do trouble me. Since the court was required to decide only the applicability of the Iowa guest statute, once it determined that the reasons for that guest statute were not convertible into legitimate interests on the part of Iowa in the case before the court, the choice-of-law problem was resolved. The sole remaining reason for looking to the dispositive laws of New Jersey and Connecticut would have been to secure assurance that neither of those states had a guest statute which defendants had inadvertently failed to plead. But the court, sua sponte, utilized New Jersey's dispositive law as the source of a tentative interest on the part of New Jersey in having the New Jersey defendants held liable for simple negligence, and, in response to defendants' argument, declined to recognize Connecticut's indicative law as diminishing that state's interest. It seems to me, as is often the case when a court undertakes needless effort, the court's reaction to New Jersey's dispositive law and Connecticut's indicative

\textsuperscript{14} Id. at 525, 263 A.2d at 136.

\textsuperscript{15} Id.

\textsuperscript{16} The phrase "indicative law" is intended to refer to "those rules which indicate the system of dispositive rules which is to be applied." Taintor, supra note 7. It is my belief that "indicative law" is simpler and no less descriptive than such phrases as "conflict-of-laws laws" or "conflict-of-laws rules." I am indebted to the late Dean Taintor for creation of the phrases "indicative law" and "dispositive law."
law may not have been entirely appropriate. Since both reactions are a part of the court's opinion, and therefore available for precedential use, the potential impropriety should be examined and elaborated on so that the reader can determine whether or not those reactions deserve precedential effect.

Perhaps the most feasible way to do that is to create a situation in which the potential interests of New Jersey and Connecticut would have relevance. That can be accomplished simply by determining that Iowa did have a legitimate interest in having its guest statute applied. And that, in turn, can be effected by disagreeing with one conclusion of the New Jersey court. The court found that one of the reasons for the Iowa guest statute was to protect the Good Samaritan host from the ingratitude of the guest. As viewed by the New Jersey court, however, that reason was exclusively for the benefit of gracious Iowa hosts and to deter a display of ingratitude only by Iowa guests; therefore, the reason was not convertible into a legitimate Iowa interest since neither host nor guest was an Iowa domiciliary. One could (and for the purpose of examining the propriety of the court's treatment of New Jersey dispositive law and Connecticut indicative law, I shall) assert that Iowa's concern for the gracious host and disdain for the ungrateful guest exists as to any such host-guest relationship entered into in Iowa, regardless of the domiciliaries of host and guest. The assertion could be substantiated by an assumed Iowa purpose of thus encouraging one driving in Iowa to share his vehicle with a friend. Given that asserted reason for and purpose of the Iowa guest statute, Iowa would have a legitimate interest in having its guest statute applied. That makes the interests of New Jersey and Connecticut potentially relevant, since if either state has an interest adverse to that of Iowa the competing interests would have to be weighed by the court.

First, New Jersey's interest. As viewed by the court, the absence of a guest statute in New Jersey suggested an interest in having the New Jersey defendants in the case "held to the full measure of damages or the standard of care which that state's law provide for. A state should not only be concerned with the protection and self-interest of its citizens." As altruistic as that language may be, I would suggest that it was misdirected in Pfau. I think the intuitive reaction of the court in looking to New Jersey's dispositive law as the basic source of a potential New Jersey interest was entirely correct. But I do not accept

17. 55 N.J. at 524, 263 A.2d at 136.
the interest which the court discerned in that dispositive law. If New Jersey has no guest statute, it is probably because of a legislative decision that an innocent and injured guest-passenger should receive compensation from the negligent host-driver. The principal reason for that decision is to protect the economic integrity of that guest-passenger. He and all members of that specific class are those intended to be benefited and protected by New Jersey's dispositive law. Even more specifically, the class intended to be protected by that dispositive law consists of New Jersey domiciled guest-passengers injured by the negligence of host-drivers. Consequently, New Jersey's dispositive law (no guest statute) exists to benefit and protect New Jersey guest-passengers. It's true, of course, that such benefit and protection result in the imposition of liability on negligent host-drivers, but that isn't the critical reason for the dispositive law; it's simply an incidental consequence thereof. Thus, given the facts of Pfau, New Jersey's dispositive law should not be read as giving rise to a significant interest on the part of New Jersey. The injured guest was not domiciled in New Jersey, and, although the allegedly negligent host was, he isn't within the specific class of persons intended to be benefited or protected by New Jersey's dispositive law.18

It would seem, then, that simply because a litigant is domiciled in a state, that state doesn't invariably and automatically have a substantial interest in the choice-of-law problem to be resolved. Rather, the existence of such a substantial interest, and, if it exists, the degree and extent of such an interest, should be determined basically by examining that domicile state's dispositive law. If the dispositive law was intended to benefit and protect a specific class of which the domiciled litigant is a member, the domicile state has a substantial legitimate interest and the degree and extent of the interest is that spelled out in the dispositive law. Similarly, if the dispositive law was intended primarily to be punitive or adverse toward a specific class of persons of which the domiciled litigant is a member, the domicile state has a substantial legitimate interest—that spelled out in its dispositive law. Where the dispositive law is intended to have such an adverse effect

18. I am assuming that the absence of a guest statute is not intended primarily to be conduct regulating. However, even assuming such regulation to be a primary reason for New Jersey's dispositive law, the New Jersey host-driver would not have been within the specific class of persons intended to be so regulated since his conduct occurred in Iowa. For a judicial statement that the presence of a guest statute manifests a conduct regulating purpose see Clark v. Clark, 107 N.H. 351, 358, 222 A.2d 205, 211 (1966) (dissenting opinion).
on a specific class, in all likelihood, it is intended to be conduct regulating, in the sense of regulation through deterrence. And, given the usual paramount interest of each state in regulating conduct within its borders, the state's interest is most likely to be substantial in those cases where the conduct occurred in that state. Thus, the dispositive law of a state may be intended primarily to be either protective and beneficial or punitive and adverse toward a specific class of persons. In either event, where the dispositive law is thus sharply focused upon a specific class of persons, it manifests a significant interest on the part of the domicile state in the issue involving its domiciliary who is within that specific class. Conversely, if the domiciliary is not within the specific class intended to be benefited and protected or adversely affected by the dispositive law of his domicile state—even though he is incidentally affected by that law—his state of domicile does not have a significant interest in the resolution of the choice-of-law problem.

Now Connecticut. If we assume that the reason underlying Connecticut's dispositive law (no guest statute) is the same as that underlying the same New Jersey dispositive law, Connecticut does have a significant interest in the choice-of-law problem. The plaintiff, a Connecticut domiciliary and the injured guest-passenger, is within the specific class of persons intended to be benefited and protected by Connecticut's dispositive law. Having earlier concluded (for the purpose stated) that Iowa has a legitimate interest in the application of its guest statute, a conflict exists between that Iowa interest and the interest of Connecticut in having the injured guest recover from the negligent host. For a court engaged in interest analysis (as the New Jersey court was in *Pfau*) the chore now becomes to determine which of the "competing states" has the greater interest in the issue to be resolved.

Counsel for the defendants asserted to the New Jersey court that an examination of Connecticut's indicative law would be an appropriate means of determining the significance of that state's interest in having its guest recover. More precisely, counsel argued that, since a Connecticut court confronted with the *Pfau* facts would impose the Iowa guest statute, this evidenced a diminished interest on the part of Connecticut. The argument makes sense. Having determined from Connecticut dispositive law that Connecticut has a significant interest and the basic extent and degree of that interest, the court could gain enormous insight into how critical Connecticut considers that interest to be in a choice-of-law setting by determining how a Connecticut court would
react if the case were laid before it. If the Connecticut court would “prefer” Iowa’s interest in having its guest statute imposed over Connecticut’s interest in having its guest recover, why doesn’t that evidence a diminished interest on the part of Connecticut?

At least a part of the New Jersey court’s response to that question was that lex loci delicti (Connecticut’s indicative law) “does not identify that state’s interest in the matter.”19 Well, maybe so, maybe not. A clear implication in the court’s language is that (1) if Connecticut utilized interest analysis to resolve the same choice-of-law problem, and (2) concluded that the Iowa guest statute was applicable, then (3) Connecticut’s resolution of the conflicts issue would tend to “identify that state’s interest in the matter.”20 The question then becomes: Should the results achieved by a court employing lex loci delicti to resolve choice-of-law problems be used by courts in other states to enhance or diminish the interests of the lex loci state?

The question can arise in two different settings. In the first, the answer seems rather clear. If the forum determines that State A’s precedent utilized lex loci delicti, but the highest appellate court of State A hasn’t resolved a choice-of-law problem for twenty years, the forum probably should not permit State A’s interest in the particular issue to be affected by its hoary usage of lex loci delicti. After all, twenty years ago not many courts recognized the possibility that the manner in which they resolved conflicts problems could affect their states’ interests as viewed by courts in other states in such problems. But let’s take the second situation. If the highest appellate court of State A expressly rejects interest analysis and decides to retain lex loci delicti, it cannot come as an unfair surprise to that court if another forum reads the result achieved as evidencing State A’s interest in the issue. In effect, the State A court has determined that, notwithstanding any legitimate interests of State A in the issue presented, it will resolve the choice-of-law problem through lex loci delicti. For example, Connecticut’s retention of lex loci delicti in a case in which that indicative law operates to the detriment of a Connecticut domiciliary within the specific class of persons intended to be benefited and protected by Connecticut dispositive law is a conscious decision to “sacrifice” the Connecticut domiciliary to the presumed advantages of the retention of lex loci delicti, whether the advantages are stated in terms of ease of

19. 55 N.J. at 526, 263 A.2d at 137.
20. Id.
application or certainty of result. If Connecticut is willing to abstain from the imposition of its dispositive law intended to benefit a specific class of persons, including the Connecticut litigant before the court, and to apply the dispositive law of Iowa to the detriment of that Connecticut litigant, for the presumed advantages of retaining lex loci delicti, it has evidenced the degree of its interest in the Connecticut domiciliary, like it or not. In fact, if Connecticut's use of lex loci delicti to the detriment of the Connecticut domiciliary is not read as evidence of a diminished interest on the part of Connecticut, that state and all others retaining lex loci delicti would enjoy a seemingly inappropriate advantage over those states utilizing interest analysis. A court which determined to prefer the interest of Iowa in having its guest statute applied even to the detriment of a passenger-domiciliary of the forum state, and did so through interest analysis, could anticipate having that determination read as a diminished interest in the specific issue presented when the same issue arises in another forum. There seems to be no justification for ignoring the same result achieved by Connecticut simply because the result is the product of lex loci delicti.

In a dissenting opinion in *Cipolla v. Shaposka*, Mr. Justice Roberts of the Supreme Court of Pennsylvania went somewhat further. Confronted with a choice of law between Delaware's guest statute and Pennsylvania's common law, he noted that Delaware, through its "refusal to abandon the rule of lex loci," had declined to impose its own guest statute in a case between a Delaware passenger and a Delaware host where plaintiff's injuries were sustained in New Jersey, a common law state. Mr. Justice Roberts stated:

> Although the rationale for the choice of law was the court's refusal to abandon lex loci, the result of the decision is that Delaware itself limits the scope of its policy and the protection it will give to its resident-hosts.23

Justice Roberts found that decision relevant to a determination of Delaware's interest in having its guest statute applied even to a case in which a passenger sustained his injuries in Delaware. If I read Mr. Justice Roberts' opinion correctly, his feeling is that if Delaware is sufficiently disinterested in protecting its own defendant-hosts, by retaining lex loci delicti to the detriment of those hosts where the passen-

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22. 499 Pa. at 576, 267 A.2d at 861 (dissenting opinion).
23. *Id.*
gers' injuries are sustained in common law states, Delaware's interest in protecting its defendant-host is diminished even in a case where the passenger's injuries are sustained in Delaware—which was the case before the Pennsylvania court. His feeling, apparently, is that a state willing to have its interests in its domiciliaries depend on the "chance" outcome provided by lex loci delicti evidences a generally diminished degree of interest in those domiciliaries. I would not go that far. Even conceding the factual accuracy of the conclusion that having its protective dispositive law applicable to its domiciliaries only when lex loci delicti fortuitously so dictates is a kind of Russian roulette and, therefore, evidences a diminished interest on the part of the state involved, I would be reluctant to read lex loci delicti as inexorably diminishing the state's interest for a couple of reasons. First, it seems to me an inappropriate penalty to impose on a state simply because of the decision of its highest appellate court to retain lex loci delicti. Second, it seems to me a judicial impropriety for the forum to find a diminished interest on the part of a sister state in a set of operative facts in which even under lex loci delicti the court of that sister state would apply its protective dispositive law for the benefit of its own domiciliary.

Consequently, from Pfau and Cipolla, I draw these conclusions: First, whether or not a state has a substantial interest in protecting and benefiting (or adversely affecting) one of the litigants (even one domiciled within the state), and the degree and extent of that substantial interest if it exists, should be determined primarily from the dispositive law of that state. If the litigant is within the specific class of persons intended to be benefited and protected by the state's dispositive law, that substantial interest does exist; if he is not, it does not. Second, assuming such a substantial interest is found to exist in the state's dispositive law, that interest may be found by the forum to be enhanced or diminished as a result of the same state's indicative law, whether interest analysis or lex loci delicti.

Let's see what happens when those conclusions are applied to Chief Justice Traynor's decision in Reich v. Purcell.24 Mrs. Reich and her two sons, domiciled in Ohio, were driving west to California, (where, eventually, they contemplated establishing a new domicile) and the defendant Purcell, domiciled in California, was driving east on vacation. The vehicles met in a tragic collision in Missouri. Mrs. Reich and one of her two sons were killed in the collision. Subsequently, Mr.

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24. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).
Reich and the surviving son brought a wrongful death action against Purcell in California. At the time that action was commenced, the plaintiffs had abandoned their Ohio domiciles and had acquired California domiciles. Missouri had a $25,000 ceiling on wrongful death action recoveries; neither Ohio nor California has any ceiling on such recoveries. Defendant asserted the applicability of Missouri's ceiling and the trial court accepted the assertion "because the accident occurred there." Writing for the Supreme Court of California, Justice Traynor reversed.

Abandoning lex loci delicti and embracing interest analysis, Justice Traynor concluded that Missouri had "little or no interest" in having its ceiling imposed. Justice Traynor then made this observation about California's dispositive law and interest:

[S]ince California has no limitation of damages, it also has no interest in applying its law on behalf of defendant. As a forum that is therefore disinterested in the only issue in dispute, we must decide whether to adopt the Ohio or the Missouri rule as the rule of decision for this case.

The first sentence of that excerpt indicates that, despite defendant's California domicile, California had no substantial interest in preserving his economic integrity. The reason for that conclusion existed in California's dispositive law which imposed no ceiling on damages. That dispositive law could have been perceived in either of two ways: (1) it was intended to benefit and protect plaintiffs in wrongful death actions and therefore defendant was not within the specific class intended to be benefited and protected, or (2) it was intended to impose unlimited liability on defendants in wrongful death actions and therefore created a California interest in imposing such liability on Purcell. The New Jersey court in Pfau read its own dispositive law (no guest statute) in the second sense. I believe Justice Traynor read California's dispositive law in the first sense, since the next sentence in the above excerpt characterized the California court as a "disinterested" forum. Apparently, Justice Traynor concluded, that because the defendant was not within the specific class of persons intended to be affected by California's dispositive law, and that the adverse consequences of that

26. 67 Cal. 2d at 553, 432 P.2d at 729, 63 Cal. Rptr. at 33.
27. Id. at 556, 432 P.2d at 731, 63 Cal. Rptr. at 35.
28. Id., 432 P.2d at 730, 63 Cal. Rptr. at 34.
law on such defendants were merely incidental to the primary purpose of the law, California had no substantial interest in the issue as it affected the defendant, despite his California domicile. That conclusion is wholly consistent with the first conclusion drawn above by me from consideration of Pfau and Cipolla. It's comforting to find so eminent a jurist as Justice Traynor on my side—at least for me.

Confronted with an Ohio domicile of the Reich family at the time of the collision and a California domicile of the surviving Reich family when suit was initiated, Justice Traynor had to decide which domicile was legally controlling. He selected the Ohio domicile, because, "if the choice of law were made to turn on events happening after the accident, forum shopping would be encouraged." As between Missouri and Ohio, the court easily concluded that Ohio's interest was clearly superior. Ohio was the plaintiffs' (legally cognizable) domicile. Its dispositive law (no ceiling on recovery) was intended to benefit a specific class into which the plaintiffs fit perfectly. In fact, given the conclusions that California was "disinterested" and Missouri had "little or no interest," it would be fair to suggest that Ohio's interest was either exclusive or overriding. And that raises the second conclusion suggested earlier: forum recourse to the indicative law of a state having a substantial interest in the issue to be resolved. Unfortunately, Justice Traynor did not examine Ohio's indicative law. Instead, once finding Ohio's interest to predominate, he applied that state's dispositive law and no ceiling was imposed. Had the court looked to Ohio's indicative law as it existed at the time of the decision in Reich it would have discovered that the highest appellate court of that state resolved choice-of-law issues in tort cases through lex loci delicti. Thus, had the Reich case been laid before an Ohio court, the Missouri ceiling would have been imposed.

In this instance, the Ohio indicative law should not have been given the effect of enhancing or diminishing that state's interest. After all, that interest was already determined to be either exclusive or overriding; it could hardly have been enhanced. Once the forum determines that another state's interest in the issue to be resolved

29. Id. In my opinion, the change of domicile should have been recognized legally. See Seidelson, Interest Analysis and an Enhanced Degree of Specificity: The Wrongful Death Action, 10 Duq. L. Rev. 525, 529 (1972).

is exclusive or overriding, the forum should resolve the issue exactly as it would be resolved by a court sitting in that other state. I know, that's renvoi, and renvoi is a dirty word in most American courts. But only because they tend to misconceive its function. Had the California forum determined to "play" renvoi with Ohio because of Ohio's exclusive or overriding interest, it would not have embarked on an endless carrousel ride (despite the contrary suggestion in *Pfau*). It simply would have done what an Ohio court would have done: impose the Missouri ceiling. Instead, Justice Traynor wound up treating the plaintiffs differently and far better than they would have been treated by a court sitting in the state having the only substantial interest in the issue. Apparently, Justice Traynor would not concur in my second suggested conclusion: the forum should be mindful of and sensitive to an indicative law of a state whose dispositive law gives it a substantial interest in the issue to be resolved. Well, one out of two isn't too bad—for me.

That sensitivity to the indicative law of a state having a substantial interest in the issue to be resolved has been evidenced by the United States Court of Appeals for the District of Columbia in *Tramontana v. Varig Airlines*. Vincent Tramontana was a member of the United States Navy Band which was engaged in a concert tour of South America. The plane carrying the band collided in mid-air over Brazil with one of the defendant's commercial flights. All aboard both planes died. Mrs. Tramontana brought a wrongful death action against the defendant. It asserted the applicability of the Brazilian ceiling on recoveries arising out of airplane catastrophes: 100,000 cruzeiros, which at the time of suit converted into $170. Plaintiff asked the court to decline to impose the Brazilian ceiling because "it is contrary to [a] strong public policy of the forum." The court recognized that its role of "forum qua forum" did not justify a refusal to apply Brazilian law simply because it differed from that of the forum. Then, sua sponte, the court recognized the significant interest of Maryland in the specific issue presented, arising out of "decedent's and [plain-

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33. "Varig relied on Article 102 of the Brazilian Code, which limits liability for injury or death in aviation accidents to that amount." *Id.* at 469.
34. *Id.* at 470.
35. *Id.* at 476. The self-restraint of the forum in refusing to supplant applicable foreign law with forum policy, especially absent a full faith and credit mandate, is to be applauded. *See Seidelson, Full Faith and Credit: A Modest Proposal . . . Or Two*, 31 GEO. WASH. L. REV. 462, 469-76 (1962) [hereinafter cited as Seidelson].
tiff's] residence"\textsuperscript{36} there. Maryland's dispositive law imposes no ceiling similar to that of Brazil. Presumably that is so because Maryland wishes to protect and benefit those injured in airplane catastrophes and those who become surviving dependents as a result of such catastrophes. The plaintiff, surviving widow, clearly comes within the specific class intended to be protected and benefited. Thus, Maryland's dispositive law demonstrates a substantial interest in the plaintiff, a Maryland domiciliary. "[I]t is on the citizens of Maryland that the burden of her support, if she is unable to support herself, is likely to fall in the first instance."\textsuperscript{37} The court noted, too, the substantial interest of Brazil as evidenced by its dispositive law, imposing the ceiling on recovery:

Varig is a Brazilian corporation which, as a national airline, is an object of concern in terms of national policy. To Brazil, the success of this enterprise is a matter not only of pride and commercial well-being, but perhaps even of national security. The limitation on recovery against airlines operating in Brazil was enacted in the early days of commercial aviation, no doubt with a view toward protecting what was then, and still is, an infant industry of extraordinary public and national importance. . . . The focus of Brazilian concern could hardly be clearer.\textsuperscript{38}

Having identified substantial interests on the part of both Maryland and Brazil, the court was confronted with the most difficult aspect of interest analysis, determination of the superior interest. For assistance in that chore, the court looked to Maryland's indicative law. There the court found reason to conclude that if the operative facts of the case were laid before a Maryland court that court would impose the Brazilian ceiling. In the view of the forum, that diminished Maryland's interest in relation to that of Brazil:

[If] a Maryland court would not disregard Brazilian law for the benefit of one of its own residents in a suit brought there, why should a court sitting in the District of Columbia do so at the expense of substantial and legitimate interests of Brazil?\textsuperscript{39}

It should be noted that the court did not find Maryland's interest

\begin{itemize}
\item 36. 350 F.2d at 473.
\item 37. Id.
\item 38. Id. at 471.
\item 39. Id. at 475. Maryland has, since the decision in Tramontana, declined to embrace interest analysis and continues to utilize lex loci delicti in resolving choice-of-law problems in tort cases. White v. King, 244 Md. 348, 223 A.2d 765 (1966), noted in 27 MD. L. REV. 85 (1967).
\end{itemize}
exclusive or overriding. Therefore, the renvoi resolution suggested by me in regard to *Reich* would not be applicable. Instead, the court, having identified substantial interests on the part of two jurisdictions, examined the indicative law of Maryland to gain additional insight into the degree of Maryland's interest. That indicative law demonstrated to the forum a diminution of Maryland's interest. And the indicative law which had that effect—the indicative law which would have led a Maryland court to impose the Brazilian ceiling—was lex loci delicti. I take *Tramontana* to support the proposition that the indicative law of an interested state may enhance or diminish that state's interests in the issue to be resolved, even if the indicative law be lex loci delicti.

In *Gaither v. Myers*, the United States Court of Appeals for the District of Columbia had these facts: Defendant, domiciled in the District of Columbia, left his station wagon in the District of Columbia parked and unattended with the keys in the tailgate. This was in violation of a District of Columbia Traffic and Motor Vehicle Regulation. The wagon was stolen and the thief operated it in such a negligent manner that it collided with a car operated by the plaintiff, a Maryland domiciliary. The collision occurred in Maryland about five miles from the District of Columbia line. To recover for the personal injury and property damage he suffered, plaintiff sued defendant in the District of Columbia. The District of Columbia traffic regulation violated by the defendant has long been construed by District of Columbia courts to give rise to a cause of action on the part of an injured and innocent plaintiff against the violator for harm negligently inflicted by a thief. Maryland has a similar statute, but the Court of Appeals of Maryland has determined that its violation does not give rise to such a civil cause of action. The issue for the court was the applicability of the District of Columbia dispositive law to a claim for injuries sustained in Maryland by a Maryland domiciliary. In looking to the reasons underlying the District of Columbia dispositive law, the court found that one of its purposes was to deter drivers from leaving unattended parked cars with keys "to prevent strangers

40. 404 F.2d 216 (D.C. Cir. 1968).
from . . . stealing the car and injuring others." The court cited with approval language from Ross v. Hartman characterizing the District of Columbia law as a "safety measure." Thus, the dispositive law of the District of Columbia focused directly upon a specific class of persons which included the District of Columbia domiciled defendant—those leaving cars parked in the District with keys in the cars. That dispositive law was not intended to benefit or protect members of that class; rather, it was intended to sting them and, by the sting, to regulate their conduct. The law was found to be conduct regulating, in the sense of regulation through deterrence; the conduct occurred in the District of Columbia and the actor was a District of Columbia domiciliary. Defendant was indeed within the specific class of persons intended to be adversely affected by the dispositive law of the District of Columbia, and, therefore, the District had a substantial interest in having its dispositive law applied. And so the court concluded.

The court then examined the reasons underlying the Maryland dispositive law (no civil liability for violation of the statute). The court determined that the Maryland conclusion that the statute violator's act was not the proximate cause of the victim's injury, because the thief's conduct was an intervening, superseding cause, evidenced a protective policy directed toward Maryland drivers. Apparently, Maryland desires to protect its defendant-drivers from the economic impact of liability for injuries inflicted by car thieves. Since the defendant before the court was a District of Columbia domiciliary, he was not within the specific class of persons intended to be protected by the Maryland dispositive law. Consequently, Maryland had no substantial interest in the application of its dispositive law. Finding that the application of District of Columbia dispositive law would further that jurisdiction's substantial interest without frustrating any substantial interest of Maryland, the court characterized the conflict as "false" and applied the dispositive law of the District of Columbia. That's using the dispositive law of each potentially interested jurisdiction to determine whether or not each really has a substantial interest, and, if so, the degree and extent of that interest.

45. 404 F.2d at 220.
46. 139 F.2d 14 (D.C. Cir. 1943), cert. denied, 321 U.S. 790 (1944).
47. 404 F.2d at 220.
48. Id. at 224.
And now, back to *Abendschein*—almost. With the reader's continued indulgence, I'd like to take a preliminary liberty with the *Abendschein* case. Let's place it before a wholly disinterested forum which has embraced interest analysis, retaining all of the actual operative facts of the case. Confronted with defendants' assertion of the total immunity of the Ontario guest statute and plaintiffs' insistence that either the dispositive law of New York (no guest statute) or of Michigan (guest statute with partial immunity, but immunity not available to defendants on the basis of plaintiffs' pleadings), the court would be expected to identify the reasons underlying the dispositive laws of the potentially interested jurisdictions and then determine to what extent those reasons were convertible into legitimate interests in the particular case. Let's start with New York. Since it has no guest statute, its dispositive law presumably is aimed at benefiting and protecting guest-passengers injured by the negligence of host-drivers. To sharpen the focus somewhat, it could be said that New York's dispositive law is intended to benefit and protect New York domiciled guest-passengers injured by the negligence of host-drivers. The two surviving passengers and the deceased passenger whose death gave rise to the wrongful death action were domiciled in New York. Each fits within the specific class of persons intended to be benefited and protected by New York's dispositive law. New York, then, can be said to have a substantial interest in the application of its dispositive law.

The existence of a guest statute in Michigan indicates an intention on the part of that state to protect Michigan domiciled host-drivers (and perhaps Michigan based lessors of vehicles operated by those Michigan host-drivers). The degree and extent of that protective interest can be determined from the degree and extent of the protection provided by the Michigan guest statute. The statute grants Michigan host-drivers immunity from liability to injured guest-passengers unless the drivers' culpability rises to the level of "gross negligence or willful and wanton misconduct." Since the pleadings alleged that the host-driver was driving "at speeds of 90 miles per hour around curves while intoxicated," it seems fair to conclude that, on the pleadings, defendant driver was not intended to enjoy the partial immunity from liability extended by the Michigan guest statute.

New York's dispositive law provides a basis for determining that that state has a substantial interest in having its domiciled plaintiffs
recover. Michigan’s dispositive law evidences no substantial interest in having its domiciled defendants protected from liability. That leaves Ontario. “The object of Ontario’s guest statute, it has been said, is ‘to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies’... and, quite obviously, the fraudulent claims intended to be prevented by the statute are those asserted against Ontario defendants and their insurance carriers, not [non-Ontario] defendants and their insurance carriers.”49 Since defendants in Abendschein were Michigan-based and since the vehicle was presumably insured there, defendants were not within the specific class of persons intended to be protected by the Ontario statute. Examination of Ontario’s dispositive law, then, reveals no substantial interest on the part of Ontario in the defendants or in the application of Ontario law.

Our hypothetical disinterested forum would be left with the determinations that (1) New York has a substantial interest in the application of its dispositive law (no guest statute) and in the New York domiciled plaintiffs, (2) Michigan has a substantial interest in the application of its dispositive law (partial immunity guest statute) and in the Michigan-based defendants, but (3) the substantial interest evidenced in Michigan’s dispositive law does not reach the degree of culpability on the part of host-driver alleged by the plaintiffs, therefore (4) defendants’ motions for summary judgment must be denied. Hell, it’s an easy case for a court engaged in interest analysis, presenting as it does a Michigan guest statute permitting recovery for injuries occasioned by gross negligence, plaintiffs’ allegation of host-driver’s gross negligence, and defendants’ motions for summary judgment. Of course, later, when it might be required to determine whether New York or Michigan had the superior interest for the purpose of deciding the applicability of the Michigan guest statute (given a factual question as to the level of culpability of defendant-driver’s conduct), the forum would find the decision considerably more difficult. But that need not concern us now. For the present, it is adequate to conclude that a forum engaged in interest analysis would not utilize the Ontario guest statute since Ontario has no significant interest in the imposition of its guest statute.

If I may, let me suggest a couple of other reasons for the forum’s...
non-use of the Ontario guest statute: the full faith and credit clause and the due process clause of the Federal Constitution.

Were the forum to impose the Ontario guest statute to the jeopardy of the plaintiffs, they would seem to have a legitimate full faith and credit argument. Since the only jurisdictions having legitimate interests in the issue presented are New York and Michigan and since the forum is in a sister state, non-application of the applicable dispositive law of either interested state, resulting from application of the dispositive law of Ontario, a jurisdiction having no legitimate interest, violates the mandate of Article IV, section 1. Similarly, imposition of Ontario's dispositive law in circumstances where that jurisdiction has no legitimate interest in the issue to be resolved and to the jeopardy of the plaintiffs, denies them property without due process. There may even be a second approach available to the plaintiffs to make the due process argument. Since the reason underlying the Ontario

\[50.\] Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1. The “implementing” legislation provides:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory, or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the Clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken.


I am aware of the controversy surrounding applicability of the clause to the decisional law of a state. I believe it to be so applicable.

The Constitution by use of the term “public acts” clearly includes statutes. . . . But it makes no mention of decisional law. . . . It is not far-fetched to argue that full faith and credit for judicial proceedings requires recognition of their effect as decisional law, if they have that effect in the state where rendered, as well as of their res judicata effect. In any event, while the point seems not to have been discussed, the Court has so acted and talked that we may deal with this part of our subject on the assumption that what is entitled in proper cases to credit is the law of the state by whatever source declared. Royal Arcanum v. Green, 257 U.S. 531 (1915); Modern Woodmen v. Mixer, 267 U.S. 544 (1925); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 445 (1944). Jackson, Full Faith and Credit—The Lawyers' Clause of the Constitution, 45 Colum. L. Rev. 1, 12 (1945); Seidelson, supra note 35, at 464. Contra, Nadelmann, Full Faith and Credit to Judgments and Public Acts—A Historical-Analytical Reappraisal, 56 Mich. L. Rev. 33, 75 (1957). Compare Walker, A Criticism of Professor Weintraub's Presentation of Full Faith and Credit to Laws, 57 Iowa L. Rev. 1248 (1972), with Weintraub, Response to the Critique of Professors Sedler, Twerski, and Walker, 57 Iowa L. Rev. 1258, 1268 (1972), for more recent contrasting views concerning the potential applicability of the full faith and credit clause to the choice-of-law process.

51. U.S. Const. amend. XIV, § 1.
guest statute is wholly inapplicable to the facts of the case, utilization of that guest statute by the forum would deprive the plaintiffs of property by the imposition of a body of dispositive law they could never have contemplated being applied to defeat their action. Of course, the plaintiffs were in Ontario, volitionally and as guest-pas-

gengers. But their presence in Ontario as passengers in a Michigan car driven by a Michigan driver was wholly unrelated to the purpose to be served by the province’s guest statute. To utilize the statute to deprive the plaintiffs of their cause of action would be a little like determining the culpability of a driver on a New York highway pursuant to Ontario’s rules of the road because the driver had had lunch in Ontario.

I conclude, therefore, that imposition of the Ontario guest statute by the disinterested forum engaged in interest analysis would be painfully inept and constitutionally impermissible. What must be determined now is whether or not that same result achieved by the Supreme Court of Michigan by the application of lex loci delicti is any less inept or impermissible.

The substantial interests of New York and Michigan as manifested in their dispositive laws remain exactly the same: New York has a substantial interest in having the New York plaintiffs receive the benefit of recovery unimpeded by any guest statute. Michigan has a substantial interest in having the Michigan defendants receive the protection of immunity from liability unless host-driver’s conduct was grossly negligent; if it was, Michigan’s dispositive law evidences no interest in protecting the defendants from liability. Plaintiffs’ alleged the driver’s conduct was grossly negligent, and, in ruling on defendants’ motions for summary judgment, the allegation was accepted by the court. I find myself compelled to the conclusion that application of the Ontario guest statute by the Michigan court is as inept and impermissible as would have been the same result achieved by the disinterested forum. Since the competing interests of Michigan and New York are exactly the same, and since the total lack of legitimate interest on the part of Ontario remains the same, the only differences which arise by shifting the case from our disinterested forum to Michigan are: (1) the Michigan forum utilizes lex loci delicti instead of interest analysis, and (2) the full faith and credit clause may become inapplicable.
Let's begin with the full faith and credit clause. With Michigan the forum and an interested state, there can be no full faith and credit mandate that the forum apply the dispositive law of sister state New York. The Michigan forum would be justified in applying its own dispositive law, at least so far as the full faith and credit clause is concerned. But still recognizing the lack of any legitimate interest on the part of Ontario, the Michigan forum, in order to avoid constitutional impropriety, would be required to select the dispositive law of Michigan or of New York. Application of the dispositive law of Ontario would be as violative of due process as it would have been with the hypothetical disinterested forum. The Michigan forum, then, has three potential choices, the dispositive law of Michigan, the dispositive law of New York or the dispositive law of Ontario. The third choice is precluded by the due process clause. Since the remaining two choices require application of the dispositive law of a state of the United States, each substantially interested in the issue presented, each would be permissible under the full faith and credit clause. However, whichever of the two dispositive laws is utilized, New York's common law or Michigan's guest statute, the defendants' motions for summary judgment must be denied. Under the dispositive law of either state, the allegations in the plaintiffs' complaint set forth a legally sufficient cause of action. Consequently, even if the Michigan forum favors its own dispositive law over that of New York, plaintiffs prevail.

Can the Michigan forum justify application of the Ontario guest statute on the ground that it is, after all, simply the "chance" result produced by lex loci delicti? I think not. If imposition of the Ontario guest statute is precluded constitutionally, it cannot be imposed simply because the forum was "well intentioned." The majority opinion in Abendschein (as well as the separate opinion of the author of the majority opinion)\(^5\) makes clear that the court was not engaged in a calculated scheme aimed at violating any constitutional right of the plaintiffs. Still, if that is the consequence of the court's opinion, and I think it is, the unconstitutional result is not made acceptable simply because of the absence of judicial mala fides. Given the unchanged substantial interests of Michigan and New York, and the lack of any legitimate interest on the part of Ontario, application of the Ontario

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\(^5\) 382 Mich. at 524, 170 N.W.2d at 143.
guest statute by the Michigan forum through lex loci delicti is as inept and unconstitutional as it would have been for the disinterested forum utilizing interest analysis.

How in the world did the Supreme Court of Michigan arrive at a result so inept and impermissible? Part of the answer, of course, may lie in that court's disagreement with my conclusion that its result was constitutionally impermissible. Indeed, the reader may share in that disagreement. If so, my case is either untenable or not persuasively presented. That decision is for the reader. I believe, however, that the Michigan court's result manifests a couple of other shortcomings on the part of that court. First, the court seems not to have realized that, to the extent that Michigan was an interested state, the degree and extent of its interest should have been determined primarily from its own dispositive law. Second, the court seems not to have realized that, absent any legitimate interest on the part of Ontario, application of Ontario's dispositive law to determine the rights and liabilities of the parties is manifestly inappropriate. Neither of those oversights is terribly surprising, in view of Michigan's retention of lex loci delicti. After all, both of those considerations are intimately connected with interest analysis, and why should a court determined to eschew interest analysis and retain lex loci delicti be concerned with recognizing either the existence or the extent of potentially competing state interests? The answer suggested by Abendschein is that the absence of any judicial sensitivity to those interests may produce a result which is painfully inept or constitutionally impermissible. And I guess that's the message of prime importance to those courts which have elected to retain lex loci delicti.

So far, I have suggested that courts engaged in interest analysis may find it helpful in resolving choice-of-law problems to recognize and take advantage of certain legal facts. These are:

1. In determining whether or not a potentially interested state has a substantial interest in the issue presented, the forum should examine the dispositive law of that state. If one of the litigants is within the specific class of persons intended to be directly affected by that state's dispositive law, either beneficially or adversely, the state has a substantial interest in the issue. The degree and extent of that substantial interest should be determined by the state's dispositive law. If, on the other hand, neither of the litigants is within the specific class of persons intended to be directly affected by that state's disposi-
Interest Analysis

tive law, but, at most, is affected only incidentally by that dispositive law, the state lacks a substantial interest in the issue.

2. After determining that two or more states have substantial interests in the issue, and those substantial interests are in conflict, the forum should examine the indicative laws of the competing states for evidence of an enhanced or diminished interest in the issue. If the indicative law of one of the competing states indicates that, given the same set of operative facts, a court in that state would apply the dispositive law of the other competing state, the forum should take that as evidence of a diminished interest on the part of the state whose indicative law so indicates. If the indicative law of one of the competing states indicates that, given the same set of operative facts, a court in that state would apply its own dispositive law rather than that of the competing state, the forum should take that as evidence of an enhanced interest on the part of the state whose indicative law so indicates. That potential of enhancing or diminishing the substantial interest of a state exists whether that state's indicative law is lex loci delicti or the product of interest analysis.

3. If the forum determines that one state has exclusive or overriding interests in the issue to be resolved, the forum should resolve that issue as it would be resolved by a court sitting in the state having exclusive or overriding interests, i.e., the forum should utilize the indicative law of that state and then apply whatever dispositive law is referred to by that state's indicative law.

To those states desirous of retaining lex loci delicti, I would offer these suggestions:

1. If the application of lex loci delicti would result in the imposition of the dispositive law of a state having no legitimate interest in the issue to be resolved, the result is inappropriate and constitutionally impermissible.

2. Because of the first suggestion, the forum, despite its retention of lex loci delicti, must be willing and able to determine at least whether or not the state whose dispositive law is referred to by lex loci delicti has any legitimate interest in the issue to be resolved.

With the reader's indulgence (one more time), I'd like to try some of those suggestions on a couple of "problem" cases. Let's take first a hypothetical case put forth by Professor Weintraub and only

53. R. Weintraub, Commentary On The Conflict Of Laws 257 (1971) [hereinafter cited as Weintraub].
slightly altered by me. **D** manufactured a car in State **A**, its state of incorporation and principal place of business, which car it then shipped to a dealer in State **B**, the shipment being f.o.b. place of manufacture in State **A**. In State **B**, the dealer sold the car to **H**, whose spouse, **W**, then drove it and suffered personal injuries when the car crashed "because of a defect in construction."**54** **H** and **W** are domiciled in State **B**. To recover for her injuries, **W** sues **D** in State **B**, asserting breach of implied warranty of merchantability. State **B** engages in interest analysis. The dispositive law of State **A**, where **D** manufactured the car, does not require privity as a condition precedent for the assertion of breach of implied warranty. The dispositive law of State **B**, **W**'s domicile, does require privity. Which state's dispositive law should the forum apply? "Here, even among those who would abandon traditional conflicts rubrics in favor of a more functional analysis, opinion is divided."**55** I think I know why.

When the forum looks to the dispositive law of State **A**, which does not require privity, it may very well determine that the class of persons intended to be benefited or protected by that law consists of plaintiffs in product liability cases. More specifically, plaintiffs in product liability cases who are domiciled in State **A**. **W**, domiciled in State **B**, is not within the specific class. When the forum looks to State **B**'s dispositive law, which requires privity, it may very well determine that the class of persons intended to be benefited or protected by that law consists of defendants in product liability cases. Specifically, defendants in product liability cases who are domiciled (or incorporated or having a principal place of business) in State **B**. **D**, a State **A** corporation, is not within the specific class. Its true, of course, that an incidental effect of State **A**'s dispositive law would be to impose liability on **D**, and that an incidental effect of State **B**'s dispositive law would be to preclude recovery by **W**, at least on the theory of breach of implied warranty. But neither litigant is within the specific class of persons intended to be affected directly and primarily by the dispositive law of her or its domicile state. Consequently, following the first suggestion made by me to courts engaging in interest analysis, the forum would conclude that neither State **A** nor State **B** had a substantial interest in the issue to be resolved. Examination of the dispositive laws of the competing states leads to a negative stand-

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54. *Id.*
55. *Id.* at 258.

306
Interest Analysis

off. If there's one thing worse for a court engaged in interest analysis than an evenly balanced set of competing interests, it's an evenly balanced set of interests resulting from a determination that neither "competing state" has a substantial interest in the issue. What's a poor judge to do?

First, let me indicate a few things I think the court should not do. I think it should not indulge in the presumption that, unless and until some other state's interests are demonstrated to be clearly superior, the forum should apply its own dispositive law. That forum-favoring presumption seems uniquely inappropriate for a court purporting to engage in a legitimate effort at resolving choice-of-law problems through interest analysis. It smacks a little bit of a handicapped horse race in which the other fellow's horse always carries the greater avoirdupois. I think the forum should not resolve the conflict by determining which state's dispositive law is the "better rule of law." With apologies to Professor Leflar and those courts which have considered that "choice-influencing factor," it seems to me to convert the choice-of-law process into a study of "comparative jurisprudence." I concede that if the "better rule of law" is a legitimate "choice-influencing factor" anywhere, it should be so here, where neither state has a substantial interest in the issue. Arguably, that puts W and D "beyond the pale" and therefore susceptible to that dispositive law considered by the forum to be superior. But neither litigant is truly without the interest of its home state entirely. Although neither is a primary beneficiary of the dispositive law of its home state, so that neither state has a substantial interest in its domiciliary, each litigant is still domiciled in one of the states. The naked fact of domicile, uncomplemented by a dispositive law aimed at benefiting the dom-

56. For a judicial opinion applying this presumption in favor of forum law, see Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).
58. CAVERS, supra note 57. The phrase "comparative jurisprudence," used in this sense, is that of Professor Cavers. It seems to me that, as is often the case, his language perfectly characterizes the situation.
iciary, while not enough to create a substantial interest, may be sufficient to give rise to an interest less than substantial. After all, the legal fact of domicile does exist. It gives each state a minimal interest in its litigant and its litigant's economic integrity which should be adequate to preclude a determination that either litigant is truly "beyond the pale" and therefore subject to the forum's aloof determination of the better rule of law. Let's assume, then, that State A has a minimal interest in D, its corporation, and State B has a minimal interest in W, its domiciled plaintiff. Can the seemingly evenly balanced minimal interests be handled in some legitimate fashion which will permit the forum to make a reasoned choice-of-law decision through interest analysis?

One approach immediately available to the forum is an examination of the indicative laws of the competing states. We've already hypothesized that State B, the forum, utilizes interest analysis. Let's assume that State A characterizes warranty actions as sounding in contract and applies lex loci contractus, with the reference being to the place where manufacturer passes title to the goods. That means that if the operative facts were laid before a court sitting in State A, that court would apply the dispositive law of State A, and that dispositive law does not require privity. State A's indicative law, then, tends to diminish that state's minimal interest in D, since it would permit the warranty action to lie even though it threatens the economic integrity of D. In turn, State B's relative interest is enhanced. That should be adequate justification for the forum's application of State B's dispositive law.

Of course, examination of each state's indicative law may not lead to such a quick and easy solution. It may be that the indicative laws tend to enhance or diminish the interests of each state in precisely the same manner and degree. The forum may conclude that each state has a minimal interest in its own domiciliary which remains relatively consistent with the other state's interest even after consideration of the indicative laws of both states. State A retains a minimal interest in the economic integrity of D and State B a minimal interest in the economic integrity of W. The forum then should inquire as to the degree of frustration of each state's minimal interest depending on which state's dispositive law is applied. If State A's dispositive law is utilized, the warranty action will lie and that state's minimal interest in the economic integrity of D will be frustrated, but perhaps not as
Interest Analysis

much as State B's minimal interest in W's economic integrity would be frustrated by application of that state's dispositive law. After all, W is a natural person, not a corporate entity engaged in a manufacturing enterprise, and, therefore, not as likely to be able to withstand the violation of her economic integrity. Consequently, the forum may determine that its minimal interest in W's economic integrity justifies the application of State A's dispositive law.

In Ryan v. Clark Equipment Co., the California forum (apparently without realizing it) was confronted with an analogous negative standoff, another "problem" case. Plaintiff, an Oregon domiciliary, sued defendant, a Michigan corporation, in a wrongful death action arising from death-producing injuries suffered by plaintiff's late husband in Oregon, allegedly as a result of defendant's "negligence in design and manufacture and breach of warranty" in connection with a "front-end loader." Defendant asserted the Oregon ceiling on wrongful death action recoveries which existed at the time of decedent's death. Plaintiff argued that Michigan dispositive law, which had no such ceiling, was applicable. The forum found Reich v. Purcell to be controlling and imposed the Oregon ceiling. But Reich is easily distinguishable from Ryan. In Reich, the domicile state of the wrongful death action beneficiaries (Ohio, because of Justice Traynor's refusal to take cognizance of the domicile change effected after decedent's death but before trial) had no ceiling on wrongful death action recoveries. The plaintiffs, Ohio domiciliaries, were within the specific class of persons intended to be benefited by that dispositive law. Ohio had a substantial (indeed, exclusive or overriding) interest in the application of Ohio law. In Ryan, the plaintiff was certainly not within the specific class of persons intended to be protected by Oregon's dispositive law limiting recovery; that law was intended to benefit and protect Oregon defendants in wrongful death actions. The adverse effect of that law on Oregon plaintiffs was incidental to its primary purpose. Similarly, the Michigan defendant was not within the specific class of persons intended to be protected by Oregon's dispositive law. Michigan's dis-

61. Id. at 681, 74 Cal. Rptr. at 330.
62. Id.
positive law, containing no ceiling, was intended to benefit and protect Michigan plaintiffs in wrongful death actions; plaintiff was not within that specific class of persons. And the adverse effect on Michigan defendants in wrongful death actions, although real enough, is merely incidental to the principal purpose of protecting Michigan beneficiaries in wrongful death actions. Curiously, the court declined to accept plaintiff's argument that Michigan's no-ceiling law was intended to regulate manufacturing activities in Michigan without explicitly noting that, consistent with the court's declination, defendant was not within the specific class intended to be affected by Michigan's law but merely one incidentally adversely affected by it. If Michigan's no-ceiling law was not intended to be conduct regulating (and I think the court was correct in concluding that it was not), it probably was intended to benefit Michigan domiciled wrongful death action plaintiffs.

So in Ryan the forum had before it an Oregon plaintiff not within the specific class of persons intended to be benefited and protected by Oregon's dispositive law and a Michigan defendant not within the specific class of persons intended to be primarily affected by Michigan's dispositive law. Neither state had a substantial interest in its domiciled litigant. A negative stand-off, at least in terms of substantial interests. But each state could be said to have a minimal interest in its domiciled litigant, simply as the result of domicile. Thus, it's minimal interest against minimal interest before a disinterested forum utilizing interest analysis.

Had the forum looked to Michigan's indicative law for additional relevant information regarding Michigan's minimal interest, it would have found that law to be lex loci delicti, at least so far as the negligence count was concerned. (Remember Abendschein?). Thus, if the operative facts had been laid before a Michigan court, that court would have applied the dispositive law of Oregon, including its ceiling on recovery. That would seem to enhance Michigan's minimal interest in the economic integrity of the Michigan-based defendant. Had the

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64. So far as the warranty count is concerned, Michigan might determine that it sounds in contract and utilize lex loci contractus, with the reference being to the dispositive law of the state where defendant passed title to the goods. WEINTRAUB, supra note 55, at 254-55. Let's assume title passed in Michigan. Then the Michigan court would impose that state's no-ceiling dispositive law even to the economic jeopardy of the Michigan defendant. That would tend to diminish Michigan's minimal interest in its domiciliary. Thus, the forum might conclude from an examination of Michigan's indicative law that that state's minimal interest in the economic integrity of the defendant would be enhanced insofar as the negligence count is concerned and diminished

310
Interest Analysis

forum looked to Oregon's indicative law, it would have found that Oregon had embraced interest analysis. It may or may not have found an Oregon decision in point. If it found such an Oregon decision, that decision would indicate either that Oregon would apply its own dispositive law or that of Michigan. If Oregon, like Michigan, would apply Oregon dispositive law (ceiling on recovery), Oregon's minimal interest in the economic integrity of the Oregon plaintiff would be diminished. Given an enhancement of Michigan's minimal interest and a diminution of Oregon's minimal interest, as evidenced by the indicative laws of the states, the forum would apply Oregon's dispositive law to the economic advantage of the Michigan defendant and the disadvantage of the Oregon plaintiff. That's the result achieved by the court in Ryan, but on the basis of Reich, a clearly distinguishable case. Alternatively, if Oregon would apply Michigan dispositive law (no ceiling), Oregon's minimal interest in the economic integrity of the Oregon plaintiff would be enhanced. The forum would then have an enhanced minimal interest on the part of each of the competing states, and would have to go further to determine which state's interest was superior. The forum could conclude, as was suggested in the hypothetical case discussed above, that the greater economic capacity of the Michigan corporate defendant to withstand the impact of an adverse choice-of-law determination as compared with the Oregon widow indicated that application of Michigan's dispositive law (no ceiling) would do less violence to Michigan's enhanced minimal interest in the economic integrity of the defendant than application of Oregon's dispositive law would do to that state's enhanced minimal interest in the economic integrity of the plaintiff. In those circumstances, the forum would apply Michigan's dispositive law and impose no ceiling on recovery.

It would seem that even the problem cases can be handled rationally insofar as the warranty count is concerned. If those conclusions seem paradoxical at best and wildly divergent at worst, the explanation, I think, lies in Michigan's rejection of interest analysis. "One effect of acceptance of state-interest analysis will be a significant reduction, at least for choice-of-law purposes, in the importance of characterizing the products liability issue as one of 'contract' or 'tort.'" Weintraub, supra note 53, at 255. See Paoletto v. Beech Aircraft Corp., 464 F.2d 976 (3d Cir. 1972) (Aldisert, J.) (a judicial opinion in which the court avoided unnecessary consideration of whether a products liability case sounded in tort or contract).


66. In De Foor v. Lematta, 249 Ore. 116, 437 P.2d 107 (1968), all of the parties to the wrongful death action were Oregon domiciliaries and the court imposed Oregon's ceiling on damages. Obviously, Ryan presents a more difficult choice-of-law problem.
through interest analysis if the forum is properly sensitive to the potential effect of each state's dispositive and indicative laws. And, if the forum is one determined to retain lex loci delicti, it, too, should develop at least that degree of sensitivity to each state's dispositive and indicative laws necessary to avoid an inept and possibly unconstitutional resolution of a choice-of-law problem. There is, then, the potential in interest analysis, when rationally utilized, of improving choice-of-law solutions by courts embracing the methodology and of avoiding wholly inept and unconstitutional solutions to choice-of-law problems by courts determined to retain lex loci delicti.