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Interest Analysis: The Quest for Perfection and the Frailties of Man

David E. Seidelson

Those authors who encouraged the use of interest analysis as the appropriate method of resolving choice-of-law problems (and I count myself among the number)¹ and those courts that embraced the methodology have since sought to offer solutions to the difficult fact and law patterns which inevitably confronted the courts. These efforts show the high sense of professional responsibility of the proponents of interest analysis, both writers and judges; having invited the courts to employ interest analysis or having accepted the invitation, they subsequently recognized an obligation to provide guidance and counsel when use of the methodology became most difficult. That their suggestions are not entirely consistent² does not minimize either their sense of

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responsibility or the rationality of each suggestion. After all, hard
cases make for divergent views.

In the context of tort cases, perhaps no one has offered a more basic
and encompassing set of rules than Professor Weintraub:

1. "False conflict" cases: If, in the light of its contacts with the parties
or the transaction, only one state will have the policies underlying its tort
rule advanced, apply the law of that state.

2. "True conflict" cases: If two or more states having contacts with
the parties or the transaction will have the policies underlying their dif-
ferent tort rules advanced, apply the law that will favor the plaintiff
unless one or both of the following factors is present:
   a. That law is anachronistic or aberrational.
   b. The state with that law does not have sufficient contact
      with the defendant or the defendant's actual or intended course
      of conduct to make application of its law reasonable.

3. "No interest" cases: If none of the states having contacts with the
parties or the transaction will have the policies underlying its tort rule
advanced, apply the law that will favor the plaintiff unless one or both of
the following factors is present:
   a. That law is anachronistic or aberrational.
   b. The state with that law does not have sufficient contact
      with the defendant or the defendant's actual or intended course
      of conduct to make application of its law reasonable.²

So far as rule 1 is concerned, I think no one can take serious excep-
tion. If only one state has a local law based upon a policy which con-
verts into a significant interest on the part of that state in applying its
law, then there is no real conflict. That state's local law clearly should

²(1979)(apply the forum's local law); Twerski & Mayer, Multistate Choice-of-Law Rules:
Continuing the Colloquy With Professors Trautman and Sedler, 7 HOFSTRA L. REV. 843
(1979)(fashion and apply a multistate law accommodating the forum's essentially pro-
cedural concern); von Mehren, Special Substantive Rules for Multistate Problems: Their
Role and Significance in Contemporary Choice of Law Methodology, 88 HARV. L. REV. 347
(1974)(fashion and apply a multistate law accommodating some portion of each state's local
law).

³See also, e.g., Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64
(1972)(Fuld, C.J.)(three rules for guest statute cases; see discussion in text accompanying
note 28 infra); Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215
(Sullivan, J.), cert. denied, 429 U.S. 859 (1976)("comparative impairment"; see discussion in
text accompanying note 74 infra).

Obviously, the brief characterization I have given to each writer's or each court's sug-
gested approach does not begin to explicate the totality of each approach or its underly-
ing rationale.

The second edition of Professor Weintraub's Commentary, like the first, is a delight
to read. Professor Weintraub writes clearly, analyzes cases accurately, and states legal
conclusions precisely. Perhaps best of all, when in disagreement with existing judicial
methodology, he offers his own carefully considered alternatives. Those alternatives are
invariably stimulating and thought provoking.

³Weintraub's Commentary, supra note 2, at 346 (footnote omitted).
be applied; it's really a "no conflict" case. Then why the characterization "false conflict"? The answer, I think, is that, although the other state has no significant interest in the application of its contrary local law, it still has a minimal interest in the litigation. Upon examination, however, it is seen that the minimal interest is best served by the application of the first state's local law. Therefore, although the two states have different local laws (an apparent conflict), only the first state has a significant interest in the application of its own local law. The second state has only a minimal interest in the litigation which is best served by the first state's local law (a false conflict). Gaither v. Myers provides an excellent illustration of the false conflict case.

The defendant left his station wagon parked and unattended, with the keys in the tailgate, in the District of Columbia. A thief stole the vehicle. The negligent driving of the thief caused the station wagon to collide with an automobile in Maryland, some five miles from the District line. The plaintiff, driver of the Maryland car, sued the defendant in the District of Columbia. Both the District of Columbia and Maryland had similar traffic code provisions which made it illegal to leave an unattended vehicle parked without removing the keys. Moreover, under the District's local law, one who violates that provision is liable for injuries inflicted by the thief's negligent driving. Under Maryland's local law, however, the violator faces no such civil liability. The plaintiff, of course, asserted the applicability of the District's law and the defendant argued that Maryland's law should apply.

There are a couple of reasons underlying the District's law. One is to provide the collision victim of the thief's conduct with a financially responsible defendant. It may be that the class of plaintiffs intended to be so protected is limited to those domiciled in the District. Since the plaintiff in the case was domiciled in Maryland, he may have been without the protected class, so that the first reason for the District's law would not convert into a significant interest on the part of the

4. 404 F.2d 216 (D.C. Cir. 1968).
8. The court in Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968), stated that, "[a]side from the purpose served . . . in deterring highly hazardous motorist conduct, tort liability also has the purpose of shifting the loss from the injured victim . . . to the vehicle operator [or owner] who, in turn, if he chooses, may procure insurance." Id. at 223.
District in the application of its local law.\textsuperscript{9} The second reason for that law is conduct regulation.\textsuperscript{10} The District apparently believes that the sting of liability is an efficient and legitimate means of deterring such conduct, namely, violation of the traffic provision, in the District of Columbia. Since the defendant's conduct occurred in the District, that reason would seem to apply. Thus, the District had a significant interest in the application of its liability-imposing law.

Maryland apparently believes that the intervening conduct of the thief is superseding as a matter of law.\textsuperscript{11} More elaborately stated, Maryland may view the intervening, intentionally wrongful, criminal act of the thief (coupled with his negligent driving) as so overwhelmingly culpable that it would be offensive to impose liability for the consequences of that conduct on the actor who had merely neglected to remove the key after parking his vehicle. In such a situation, Maryland would protect the economic integrity of the neglectful parker.\textsuperscript{12} The class of parkers probably intended to be so protected by Maryland, however, would consist of those domiciled in Maryland. Since the defendant in the case was not a Maryland domiciliary, he would not be within the protected class.\textsuperscript{13} Consequently, Maryland would have no

\textsuperscript{9} Because of the unique historical and geographical relationship between Maryland and the District of Columbia, Judge Leventhal apparently was willing to describe the class of plaintiffs to be protected broadly enough to include Maryland domiciliaries:

It is true that this compensatory policy has the greatest relevance to cases when the mishap occurs in the District and when District residents are plaintiffs. However, to confine the benefits . . . to the territory ceded by the states of Maryland and Virginia to form the Nation's Capital would be to shun the present reality of the economically and socially integrated greater metropolitan area. It is a commonplace that residents of Maryland are part of the Washington metropolitan trading area, and that District residents and business have an interest in the well-being of these citizens of the Free State.

\textit{Id.}

\textsuperscript{10} The \textit{Gaither} court noted that: "[t]he strength of the District's policy of 'discouraging the hazardous conduct which the ordinance forbids' has not diminished . . . . On the contrary we have never had greater need for doctrines helping to deter injuries and crimes traceable in significant measure to keys left in unattended cars." \textit{Id.} at 222.

\textsuperscript{11} Concerning this aspect of Maryland law, the \textit{Gaither} court explained:

For although it is an offense in Maryland to leave one's keys in an unattended motor vehicle, the highest court of that state has ruled as a matter of law that the intervening conduct of the thief breaks the chain of proximate cause and insulates the offender from tort liability.

\textit{Id.} at 221 (footnotes omitted).

\textsuperscript{12} The \textit{Gaither} court took note of Maryland's interest in limiting the liability of a car owner who had neglectfully parked, stating: "Maryland . . . expresses an interest in protecting car owners from tort liability for injury caused by car thieves." \textit{Id.} at 224.

\textsuperscript{13} The \textit{Gaither} court, moreover, recognized the scope of Maryland's interest in protecting car owners, "that interest of Maryland in curtailing liability of a car owner, would not seem to extend to an owner like our defendant, who is not a citizen of Maryland but rather a resident of the District of Columbia." \textit{Id.}
significant interest in the application of its defendant-protecting law.

An interest analysis court, having concluded that: (1) the District has a significant interest in the application of its local law; and (2) Maryland has no significant interest in the application of its contrary law, could easily have ended its analysis at that point in order to apply the District's law. However, an extraordinarily able jurist, like the late Judge Leventhal, would pursue further analysis in order to demonstrate that the wholly rational and appropriate result, namely, application of the District's law, was also in fact an excellent result. Judge Leventhal noted that, although Maryland had no significant interest in the application of its defendant-protecting law, it did have a minimal interest in the litigation because the plaintiff was a Maryland domiciliary. Undoubtedly, that minimal interest of Maryland would best be served by the application of the District's plaintiff-protecting law. The court, by recognizing Maryland's minimal interest in the litigation and the fulfillment of that minimal interest through the application of the District's law, was therefore able to demonstrate that the case presented a false conflict. Similarly, Professor Weintraub's rule recognizes the wisdom of identifying the false conflict case and demonstrating the achievement of the best result in such a case. Virtually everyone would concur in that conclusion. However, I find acquiescence in Professor Weintraub's rules 2 and 3 considerably more difficult.

Because of my own rather strong plaintiff bias in tort actions, I find Professor Weintraub's approach in rules 2 and 3, and the results that approach would produce, personally pleasing.

These plaintiff-favoring rules, however, are a little bit difficult for me to accept objectively for several reasons. First, although I think his

14. Concerning the nonapplicability of Maryland's owner-protective policy to a nonresident, Judge Leventhal stated that, "[t]his seems especially true where it is a Maryland citizen who is being compensated for his injuries." Id.

15. Judge Leventhal cogently concluded that, under analysis, the seeming conflict disappeared:

Thus, we are not concerned with any real "conflict" between the interests of Maryland and the District in this case. The fact that two states have different rules where all the factors are oriented to one state does not necessarily mean that there is a "conflict" in which one state demands and the other rejects the application of its rule to a situation where the pertinent factors arise in two or more states. Where there is no such conflict of interest in a multi-state situation, as this court and others have noted, there is a "false conflicts" situation. In such a case application of the appropriate rule is simplified. We think the D.C. Court of Appeals was correct in its conclusion that [defendant's] liability turns on the District of Columbia's rule . . . .

Id. (footnote omitted).

16. See text accompanying note 3 supra.
The underlying rationale is quite accurately stated: "recovery, with loss-distribution through the tortfeasor's liability insurance, represents the most pervasive aspect of tort developments in this country over the past several decades," this statement, in my opinion, is essentially a sweeping conclusion as to what constitutes the "better rule of law." That local law which favors the plaintiff is the better rule of law. Because use of the "better rule of law" as a "choice influencing factor" has always disturbed me, I am critical of Professor Weintraub's expansion of the factor to an across-the-board rule.

I am compelled to concede immediately, however, that expansion of the factor into a general rule eliminates one (and perhaps the most critical) of my concerns with the "better rule of law": undue judicial parochialism. Once the better rule of law is defined as that law which is plaintiff-favoring, the forum's inclination to favor its own local law is markedly inhibited. The forum's law would be the better law only if it were the plaintiff-favoring law. Yet, Professor Weintraub's approach

17. Weintraub's Commentary, supra note 2, at 345 (footnote omitted).

There is at least one case in which the court recognized the other state's local law as being the better rule of law. See Maguire v. Exeter and Hampton Elec. Co., 114 N.H. 589, 325 A.2d 778 (1974). The court, however, applied its own (presumably poorer) local law after finding that the forum's interests were clearly superior. In Maguire the decedent, a Maine domiciliary, sustained death-producing injuries while working in New Hampshire for a New Hampshire employer as the result of the alleged negligence of the defendant, a New Hampshire corporation. The decedent left only a collateral relative. In such circumstances, the New Hampshire wrongful death statute imposed a $20,000 ceiling on recovery; the Maine wrongful death statute imposed no such ceiling. Assuming that the surviving relative was domiciled in Maine, that state would seem to have had a significant interest in the application of its local law, which was apparently intended to protect the economic integrity of Maine domiciled survivors. Although New Hampshire had a significant interest in the application of its local law, which law was apparently intended to protect the economic integrity of New Hampshire defendants, I confess I do not find New Hampshire's interest so clearly superior as did the court.
defining the better rule of law for all tort cases concerns me, despite its elimination of judicial parochialism. His approach seems to supplant that narrowness of judicial view with a rather rigid and conclusionary view of the better rule of law. Because of my own plaintiff bias, I can sympathize and even identify with Professor Weintraub's rules which would implement that bias. But I'm not sure that the plaintiff-favoring rules reflect an adequate sensitivity to those local laws which are defendant-favoring even in jurisdictions in which the general thrust of tort law "over the past several decades" has been toward compensating the plaintiff. If a given state generally favors compensation for the victim, yet has particular local laws protecting the economic integrity of defendants, that state presumably has concluded that, notwithstanding the general move toward compensation, there are situations in which a contrary view should prevail. Such a legislative or judicial conclusion should not be implicitly characterized as an anachronism ready for deposit in a reliquary. To do so may offend the judicial sensibilities of the courts sitting in that state.

This potential for discrediting pro-defendant local laws, in turn, suggests to me a second problem with Professor Weintraub's rules. In a case where a state's defendant-favoring local laws would be implicitly labelled as obsolete and relegated to some judicial attic for choice-of-law purposes, that state may be so disinclined to recognize a set of sweeping plaintiff-favoring conflicts rules that the rules become practically worthless. Consequently, I am inclined to think that Professor Weintraub's rules, however accurately stated their factual rationale, are not adequately sensitive to a state's decision to fashion or retain a defendant-favoring local law and may even offend a state's courts because of the implied denigration of such a law. Finally, for reasons which will appear shortly, I find it difficult to accept the "no interest" characterization which stimulates the application of rule 3; consequently, I find that rule additionally inappropriate.

Of course, it's relatively easy to label someone else's approach as less than perfect. What's considerably more difficult is to fashion a different approach which, at least arguably, may be somewhat better. What's my "magic rule"? Well, the truth is, I don't have one. I am inclined to think that careful, specific analysis of the particular case before the court, complemented by existing techniques with perhaps a slightly more ordered category of interests, may prove to be the best manner of using interest analysis to resolve even the tough choice-of-law problems. Perhaps the best way to compare Professor Weintraub's

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21. See note 17 and accompanying text supra.
22. See text accompanying notes 62-66 infra.
rules, my own suggested approach, as well as a third approach pro-
mulgated by the eminent jurist Judge Fuld, would be to apply them
to a case which has become generally well known and generally con-
sidered as a difficult test for interest analysis.

In Neumeier v. Kuehner, a New York domiciliary (host driver) and
an Ontario domiciliary (guest passenger) were killed when their car col-
lided with a Canadian National Railway train in Ontario. The
automobile trip of the two occupants had begun in Ontario (at the
passenger's home) and was intended to end in Ontario (at the
passenger's home after a visit to Long Beach, Ontario). The plaintiff,
surviving widow of the deceased passenger and an Ontario domiciliary,
sued the defendant, a New York domiciliary and the personal repre-
sentative of the deceased driver's estate, and the Canadian National
Railway in New York. The estate asserted the Ontario guest statute
which immunized the host driver from liability absent gross
negligence. The plaintiff argued that New York local law, containing
no guest statute, was applicable.

Whether one attributes Ontario's guest statute to a desire to pro-
tect Good Samaritan hosts domiciled in Ontario from ungrateful guests
or to prevent potentially collusive suits between overly friendly hosts
and guests, thus assuring Ontario drivers of relatively lower liability
insurance rates, Ontario would seem to have no significant interest in
the application of its local law. Since the host driver was domiciled in
New York, he was not within the class of Good Samaritans intended to
be protected by Ontario's guest statute.

Moreover, since any pay-out by the host's liability carrier would be

23. See text accompanying note 28 infra.
24. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). For a symposium on
Neumeier, see 1 Hofstra L. Rev. 93 (1973).
26. The Neumeier court mentioned both policies but gave preference to that of pro-
tecting drivers:
It is worth noting, at this point, that, although our court originally considered that
the sole purpose of the Ontario statute was to protect Ontario defendants and their
insurers against collusive claims (see Babcock v. Jackson, 12 N.Y.2d 473, 482-483,
revealed the distinct possibility that one purpose, and perhaps the only purpose, of
the statute was to protect owners and drivers against ungrateful guests." (Reese,
Chief Judge Fuld and Choice of Law, 71 Col. L. Rev. 548, 558; see Trautman, Two
Views on Kell v. Henderson: A Comment, 67 Col. L. Rev. 465, 469.)
31 N.Y.2d 121, 124, 286 N.E.2d 454, 455, 335 N.Y.S.2d 64, 67 (1972) (citations in original). In
support of the view that the Ontario guest statute was intended to protect against col-
lusive claims, see Baade, The Case of the Disinterested Two States: Neumeier v.
Kuehner, 1 Hofstra L. Rev. 150, 152 (1973).
charged to its New York business dealings, there would be no risk of higher premium rates for Ontario drivers.

New York's local law permitting a passenger to recover from a host on a finding of simple negligence presumably exists for the purpose of protecting the economic integrity of New York domiciled passengers by assuring them of the opportunity to recover from negligent hosts. This further ensures that such passengers will not become indigent wards of New York. Since the deceased passenger was domiciled in Ontario, that reason for New York's local law would not convert into a significant interest in the application of New York law. Consequently, neither Ontario nor New York had a significant interest in the application of its own local law. That negative stand-off is what made the case difficult.

The difficulty presented by Neumeier provided Judge Fuld with the opportunity to proffer his three rules for resolving all choice-of-law problems related to guest statutes:

1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.

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

3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less

27. Neumeier v. Kuehner, 31 N.Y.2d at 126, 286 N.E.2d at 456, 335 N.Y.S.2d at 68 ("It is clear that . . . New York has a deep interest in protecting its own [passenger] residents").

See Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), where the court stated:

New York's policy of requiring a tort-feasor to compensate his guest for injuries caused by his negligence cannot be doubted—as attested by the fact that the Legislature of this State has repeatedly refused to enact a statute denying or limiting recovery in such cases . . . and our courts have neither reason nor warrant for departing from that policy simply because the accident, solely affecting New York residents and arising out of the operation of a New York based automobile, happened beyond its borders.

Id. at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750 (citations omitted).
categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.\(^28\)

Judge Fuld found rule 3 to be applicable and discovered no justifiable reason for displacing *lex loci delicti*. As a result, Ontario's guest statute was applied.

What led Judge Fuld to fashion those three rules for the guidance of his and other courts confronted with guest statute choice-of-law problems? I think it's fair to infer that there were two major reasons.\(^29\) First, the guest statute cases decided by the New York Court of Appeals from *Babcock v. Jackson*\(^30\) through *Tooker v. Lopez*\(^31\) and the "bad press" those decisions had received in some quarters\(^32\) probably


\(^29\) For a discussion of the second reason, see text accompanying notes 49-52 infra.


\(^32\) See, e.g., Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d 137 (1969), where the court stated:

> Our misgivings [about departing from *lex loci delicti*] commence with the leading case cited *Babcock v. Jackson* . . . .

> It would lengthen this opinion unnecessarily to analyze all of the opinions which, since *Babcock v. Jackson*, have wrestled with the precepts thereof. Nonetheless, the prudence of *stare decisis* kept always in mind, the record of some of the dilemmas created by the *Babcock-Jackson* rule will serve to explain our wary abstinence. *Id.* at 517-20, 170 N.W.2d at 139-41.

The court in *White v. King*, 244 Md. 348, 223 A.2d 763 (1966), also abstained from adopting the *Babcock* line of cases:

In several of the jurisdictions which have discarded *lex loci delicti*, the rule which is to take its place seems still in the process of development. See *Dym v. Gordon* . . . . It is characteristic of our legal system that the emergence of a new doctrine depends for its clarification on case-to-case decisions, as its application to different factual situations presents new difficulties to be resolved and new factors to be weighed . . . . [U]nless and until what we deem a sound, practical alternative is evolved, we believe that any change should be made by the Legislature rather than by the courts. *Id.* at 355, 223 A.2d at 767.

In *Friday v. Smoot*, 58 Del. 488, 211 A.2d 594 (1965), the court pre-echoed most of the negative sentiments concerning the *Babcock* rule:

> The new rule is exemplified by such cases as *Babcock v. Jackson* . . . .

> The new test requires a court to determine which state has the more significant relationship with the tort and the parties, and to apply the substantive law of that
formed a principal reason. In Babcock, Judge Fuld rejected *lex loci delicti* as the one and only conflicts rule for tort cases and embraced a form of interest analysis. Finding the prevention of collusive suits to be the reason for Ontario's guest statute, and noting that the defendant host driver was a New York domiciliary driving a New York registered car when the car collided with a stone wall in Ontario, Judge Fuld concluded that Ontario had no significant interest in the application of its local law. Since the plaintiff passenger was also a New York domiciliary, New York did have a significant interest in the application of its local law which was intended to protect the economic integrity of New York domiciled passengers. Consequently, New York's local law was applied and Ontario's guest statute rejected.

*Dym v. Gordon* followed. Again, both plaintiff passenger and defendant host were New York domiciliaries, and the collision occurred in a jurisdiction (Colorado) having a guest statute. *Dym* was factually distinguishable from *Babcock* in at least two respects: (1) the New York car collided with another vehicle (operated by a Kansas domiciliary); and (2) the host-guest relationship had been entered into in Colorado where the New York domiciliaries were attending classes. Judge Burke found those factual distinctions to be legally significant. He concluded that there were three reasons underlying the Colorado guest statute: (1) "the protection of Colorado drivers and their insurance carriers against fraudulent claims," (2) "the prevention of suits state... The result is to substitute for a rule which was easy of application one where all manner of gradations of important contacts may be present. . . .

It may well be that the rule of *lex loci delicti* in some instances may appear arbitrary and unfair, but at the same time it has one positive asset. It is certain.

*Id.* at 491-93, 211 A.2d at 696-97 (citations omitted).

33. The *Babcock* court clarified the statute's purpose, stating:

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 New York defendants and their insurance carriers.

12 N.Y.2d at 482-83, 191 N.E.2d at 284, 240 N.Y.S.2d 750 (citation omitted).

34. *Id.*

35. See note 27 *supra*.


37. COLO. REV. STAT. § 13-9-1 (1963) (recodified at § 42-9-1-1 (1973)) (repealed 1975): No person transported by the owner or operator of a motor vehicle as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss in case of accident, unless such accident shall have been intentional on the part of such owner or operator or caused by his intoxication, or by negligence consisting of a willful and wanton disregard of the rights of others.
by "ungrateful guests," and (3) "the priority of injured parties in other cars in the assets of the negligent defendant."\(^3\)

Assuming that prevention of potentially collusive suits was intended to protect Colorado domiciled drivers from higher liability insurance premium rates and that the Good Samaritan hosts intended to be protected were those domiciled in Colorado, the first two reasons would not convert into significant interests on the part of Colorado in the application of its guest statute. This leaves the third reason discerned by Judge Burke, that injured parties in other cars should have priority in the assets of the negligent defendant.

That rather unique reason for a guest statute requires some thought. It isn't entirely clear from Judge Burke's opinion whether the protected class consists of passengers or drivers in the "other cars," so we should consider the wisdom of characterizing either as members of a protected class. Assume that two cars collide. In the first car are the driver-host (D) and the passenger-guest (P). In the second car are the driver-host (D\(^2\)) and the passenger-guest (P\(^2\)). Should P\(^2\) be considered a beneficiary of a guest statute which precludes P from recovering from D absent gross negligence? Judge Burke's opinion implies an affirmative answer based on his view that the guest statute would thus tend to assure P\(^2\) priority over P in reaching D's assets. But look at the price P\(^2\) must pay for that "benefit." The very same guest statute will preclude P\(^2\) from recovering from D\(^2\) absent gross negligence. That seems to be a poor bargain to impose on P\(^2\) and probably is the reason for the facial awkwardness of asserting that a guest statute was intended to benefit a guest passenger. How about D\(^2\)? Well, we know that, in the typical two-car collision in which a passenger is injured, counsel representing that passenger is likely to think of both drivers as potential defendants. If either is found negligent at trial, he will be liable for the passenger's injuries; if both are found negligent, both will be liable and the liability will be divided between them. But if we impose a guest statute on the facts, counsel for the injured passenger will almost certainly focus his attention on the driver of the other car (D\(^2\)) against whom liability may be imposed on a finding of simple negligence. Thus, the price D\(^2\) pays for the "benefit" of securing priority in reaching the assets of D is the loss of D as a potential co-defendant and payer of half the liability tab in P's action. Not much of a bargain; small wonder that Judge Burke's third reason for Colorado's guest statute is rather unique.\(^3\)

39. See E. SCOLES & R. WEINTRAUB, CASES AND MATERIALS ON CONFLICT OF LAWS 477 (2d ed. 1972), where the authors remark: "The principal case seems to stand alone in articulating as one policy of a guest statute, protection of the innocent driver of the other automobile from having the host's assets depleted by the guest's claim."
Despite his opinion's anomalies, Judge Burke did conclude that assuring the occupants of other cars priority in reaching D's assets was a reason for the Colorado guest statute. Accepting that conclusion, it must then be asked if that reason converts into a significant Colorado interest in having its guest statute apply in *Dym*. The driver of the other car was a Kansas domiciliary. Was he within the class intended to be benefitted by Colorado’s guest statute? Perhaps, since it is possible that Colorado intended to assure priority in reaching D’s assets to occupants of other cars involved in Colorado collisions irrespective of where those occupants were domiciled. Consequently, however awkward that third reason for Colorado's guest statute may seem, and however unlikely it may be that Colorado was interested in assuring such a benefit for Kansas domiciliaries, it is at least arguable that Colorado may have had a significant interest in the application of its guest statute to the facts of *Dym*.

In his opinion, Judge Burke distinguished *Dym* from *Babcock* by noting that in *Dym* “the parties were [temporarily] dwelling in Colorado when the [host-guest] relationship was formed and the accident arose out of Colorado based activity; therefore, the fact that the accident occurred in Colorado could in no sense be termed fortuitous.”

The only way that I can attribute legal significance to this factual distinction, however, is by redefining and enlarging the class of Good Samaritan hosts intended to be protected by Colorado’s guest statute to include both those domiciled in Colorado and those domiciled anywhere who enter into the host-guest relationship in Colorado. Although I think it unlikely that Colorado in fact intended to protect that larger class, it is possible. To the extent that the possibility is accepted, the fact that the host-guest relationship was entered into in Colorado gives that state another significant interest in the application of its guest statute. At least arguably, therefore, *Dym* is distinguishable from *Babcock* in two legally significant ways and the different results in the two cases, namely, nonapplication of the Ontario guest statute in *Babcock* and application of the Colorado guest statute in *Dym*, are explicable.

In the subsequent case of *Macey v. Rozbicki*, the plaintiff, Miss Macey, and the defendant, Mrs. Rozbicki, were sisters domiciled in New York. Mrs. Rozbicki and her husband owned a summer home in Ontario. Miss Macey visited her sister at the summer home. During the visit, the sisters were returning from church when the car, driven by Mrs. Rozbicki, collided with another vehicle driven by a Canadian. To recover for the injuries she sustained in the collision, Miss Macey

40. 16 N.Y.2d at 125, 209 N.E.2d at 794, 262 N.Y.S.2d at 467.
sued Mrs. Rozbicki. Factually, *Macey* resembles *Dym*. Although plaintiff and defendant were domiciled in New York, both were temporarily dwelling in Ontario, the guest statute jurisdiction; the host-guest relationship was entered into in Ontario; and the passenger was injured in a two-vehicle collision. However, the legal significance of those factual similarities cannot be determined without examining the reason for the Ontario guest statute.

Maintaining the reason identified by Judge Fuld in *Babcock,* some 5 maintaining the reason identified by Judge Fuld in *Babcock,* namely, preventing potentially collusive suits to assure Ontario drivers lower liability insurance premium rates, it becomes apparent that Ontario had no significant interest in the application of its guest statute in *Macey.* Any pay-out by the host-driver's liability carrier would be charged to its New York business dealings. Consequently, the factual similarities between *Dym* and *Macey* were without legal significance; the result in *Babcock* was equally appropriate, and did obtain, in *Macey.* That's not surprising, bearing in mind that *Dym* involved the potential application of the Colorado guest statute and *Macey* involved the potential application of the Ontario guest statute; the two guest statutes could actually have different underlying reasons. Only by identifying the reasons underlying each state's local law, and determining if any of those reasons converts into a significant interest in the application of that state's local law, can a court intelligently utilize interest analysis. With that in mind, and assuming *arguendo* that the reasons for Colorado's guest statute identified by Judge Burke are valid, it becomes clear that the "apparent" inconsistency among the results in *Babcock, Dym,* and *Macey* is resolvable.

It seems that the significance of identifying the reasons underlying a particular state's guest statute, and the realization that different states might have different reasons for guest statutes, eluded the New York Court of Appeals in *Tooker v. Lopez.* There, the deceased passenger and deceased driver had been domiciliaries of New York temporarily residing in Michigan where they attended college. On a planned drive to Detroit, the driver lost control of the car, which then left the travelled path of the roadway and overturned, killing both occupants. Again, the case possessed factual similarities to *Dym:* although the driver and passenger had been domiciled in New York, both were temporarily residing in Michigan, the guest statute state*45

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42. See note 33 and accompanying text supra.
44. See text accompanying notes 36 & 40 supra.
[N]o person, transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages
and the host-guest relationship had been entered into in Michigan. It was similar to Babcock in that no second vehicle was involved.\textsuperscript{46} The legal significance, if any, of those facts naturally depended upon the reasons underlying the Michigan guest statute.\textsuperscript{47}

If the Michigan statute existed to prevent potentially collusive suits, thereby assuring Michigan drivers of lower insurance premium rates, that reason would not convert into a significant Michigan interest in the application of its guest statute; any pay-out by the liability carrier would be charged to its New York business dealings. If the Michigan statute existed to protect Good Samaritan hosts from ungrateful guests, the convertibility of the reason would depend on the breadth of the class of Good Samaritans intended to be protected. If only Good Samaritan hosts domiciled in Michigan were within the protected class, the reason would not convert; if Good Samaritans wherever domiciled who entered into the host-guest relationship in Michigan were within the protected class, the reason would convert and Michigan would have a significant interest in the application of its guest statute. If Michigan intended to assure occupants of “other cars” priority in reaching host driver’s assets, that reason would not convert since no other car was involved. New York, as the domicile of the deceased passenger, obviously had a significant interest in the application of its local law (no guest statute) which presumably exists to assure the passenger of an opportunity to recover for the host’s negligent driving. The New York Court of Appeals implied that all guest statutes exist for the purpose of preventing potentially collusive suits.\textsuperscript{48} Given that

\begin{itemize}
\item against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator of such motor vehicle and unless such gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.
\end{itemize}

46. See text accompanying note 34 supra.

47. See Castle v. McKeown, 327 Mich. 518, 42 N.W.2d 733 (1950), where the Michigan guest statute was construed as follows: “The purpose of the guest act is to protect owners and operators of automobiles from liability for ordinary negligence arising during the gratuitous passage furnished to others.” Id. at 520, 42 N.W.2d at 734.

48. The Tooker court concluded that:

The primary point of division in Dym v. Gordon . . . focused not upon the choice-of-law rule quoted [therein], . . . but rather upon the construction placed on the Colorado guest statute which, upon reflection, we conclude was mistaken.

The teleological argument advanced by some . . . that the guest statute was intended to assure the priority of injured nonguests in the assets of a negligent host, in addition to the prevention of fraudulent claims, overlooks not only the statutory history but the fact that the statute permits recovery by guests who can establish that the accident was due to the gross negligence of the driver. If the purpose of the statute is to protect the rights of the injured “nonguest”, as opposed to the owner or his insurance carrier, we fail to perceive any rational basis for predicating
conclusion, the court found that Michigan had no interest in the application of its guest statute and the court applied New York's local law.

I have no quarrel with the ultimate conclusion achieved by the court. I do, however, have serious reservations about the court's assigning but one reason for every guest statute. It seems to me indisputable that different states could have guest statutes for different reasons. Identifying the particular reason or reasons for a particular state's statute is a necessary and critical step in interest analysis. Until that is done, the court cannot accurately determine whether or not the state has a significant interest in the application of its guest statute. I doubt that was done in Tooker.

Apart from that, however, the result in Tooker can be justified, even though contrary to the result in Dym, because of the difference in the reasons assigned to the guest statutes of the two states, Michigan and Colorado. Despite the factual similarities between the two cases, the difference in results is entirely rational.

That rational basis for the different results achieved in Babcock, Macey, and Tooker on the one hand (guest statute not applicable) and Dym on the other (guest statute applicable), however, seems to have escaped the attention of some other courts. To them, the different results implied some inherent weakness in the methodology of interest analysis, and they used that discerned weakness as a basis for their rejection of the methodology. That must have stung Judge Fuld, who had led his court into interest analysis in Babcock. In addition, Judge Fuld must have been a little bit discomfited by what he perceived (probably accurately) to be a misapplication of interest analysis in Dym. Presumably, if a majority of the court was capable of such a misapplication, then interest analysis might be a tad too sophisticated for general application. That concern, I think, may have been the second reason for Judge Fuld's formulation of the three rules in

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that protection on the degree of negligence which the guest is able to establish. The only justification for discrimination between injured guests which can withstand logical as well as constitutional scrutiny . . . is that the legitimate purpose of the statute—prevention of fraudulent claims against local insurers or the protection of local automobile owners—is furthered by increasing the guest's burden of proof. . . .

The failure to come to grips with this problem in Macey v. Rozbicki . . . resulted in a decision which has confused and clouded the choice-of-law process in New York. 24 N.Y.2d at 574-75, 249 N.E.2d at 397-98, 301 N.Y.S.2d at 523-24 (emphasis added). 49. See note 32 supra.

50. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); see text accompanying notes 30-35 supra.

51. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); see text accompanying notes 36-40 supra.
Neumeier. They were intended to resolve all prospective choice-of-law problems in guest statute cases. In this manner, Judge Fuld sought to provide judicial guidance for the resolution of the really difficult cases through interest analysis. How well do Judge Fuld's rules accomplish their intended purpose?

The first guest statute case to reach the New York Court of Appeals after Neumeier was Pahmer v. Hertz Corp. Plaintiff passenger, Mrs. Pahmer, and defendant driver, Mr. Cullen, were New York domiciliaries employed by the same employer and temporarily assigned to California. During the course of a non-business related shopping trip, the car occupied by them was involved in a collision. To recover for her injuries, the passenger sued the driver. The defendant driver asserted the California guest statute; naturally, the plaintiff asserted the applicability of New York's local law containing no guest statute. Which of Judge Fuld's three rules applies to the passenger's case against the driver?

The awkward answer to that question is that none of the three rules applies. Rule 1 is inapplicable because, although the passenger and the driver were both New York domiciliaries, the car was registered in California. Rule 2(a) doesn't apply because the driver's conduct did not occur in the state of his domicile. Rule 2(b) doesn't apply because the guest was not injured in the state of her domicile. And rule 3, the "catch-all," doesn't apply because the passenger and the driver were not domiciled in different states. The court was spared the awkwardness of conceding that none of the three rules applied only because the California guest statute had been declared unconstitutional by the California Supreme Court and thus was not available as a defense.

Pahmer strongly implies the futility of attempting to simplify the application of interest analysis to difficult choice-of-law problems through the formulation of a set of mechanical rules intended for pro-

52. See text accompanying notes 28 & 29 supra.
53. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); see text accompanying notes 24-28 supra.
55. CAL. VEH. CODE § 17158 (West 1959) (amended 1973), states: [N]o person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride . . . has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the . . . guest during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.
56. See text accompanying note 28 supra.
spective application. While the judicial aim for predictability of result and the relative comfort of stare decisis is wholly understandable, Judge Fuld's efforts to achieve those goals seem unrealistic on the whole. I believe instead that an interest analysis court simply ought to be more patient in its desire to achieve stare decisis. Once a court resolves a series of guest statute cases (Babcock through Tooker, for example), a natural form of stare decisis through accretion will emerge. It will become apparent that the particular reasons for a particular state's guest statute must be identified. Then those underlying reasons must be applied to the facts of the case to determine which, if any, convert into significant interests on the part of that state in having its guest statute applied. Precisely the same thing must be done with regard to the non-guest statute state. Only then can the court determine which state's interests are the more significant.

If the court concludes that State A's guest statute exists exclusively for the purpose of preventing potentially collusive suits, and that the host's car is garaged and insured in the forum state which has no guest statute, the court should certainly conclude that State A has no significant interest in the application of its guest statute. If the passenger is domiciled in the forum state and that state's law exists to enable a passenger to recover from a negligent host, the forum will have a significant interest in the application of its local law. The principle of stare decisis emerges the next time that court finds itself confronted with a similar choice-of-law problem presenting the same underlying reasons for each state's local law and the same factual pattern. But if the underlying reasons for the local laws or the factual pattern changes, the first case cannot be controlling. Stare decisis should not be tortured into a rigid rule which applies despite factual distinc-

59. On this point, I would concur in Professor Weintraub's particularly apt language:

The [New York] Court of Appeals' quest for conflicts rules is understandable. Given the complexity that is possible in the new conflicts analysis, a court may well wish to avoid treating every conflicts case as a new problem to be analyzed from scratch. The safest way to implement a rules approach is to wait until the court has decided a variety of cases focusing on the same choice-of-law problem. If the results of these cases can be succinctly and clearly summarized, this summary of the pattern of decided cases can provide "rules" to guide the court, lower courts, and attorneys. When, however, a rule articulated by a court purports to be broader than the pattern of already decided cases, this is a more hazardous undertaking. At the very least, the court should think through the fact patterns that are likely to occur in future cases and see whether in those situations it would desire the result dictated by the new rules.

WEINTRAUB'S COMMENTARY, supra note 2, at 317 (footnotes omitted).

60. See text accompanying notes 48-49 supra.
tions having legal significance. I think Judge Fuld's three rules as set forth in *Neumeier* would have that unfortunate effect.

Next to be considered are Professor Weintraub's plaintiff-favoring rules. After concluding that neither Ontario nor New York had a significant interest in the application of its local law in *Neumeier*, presumably the case would be characterized as a "no interest" case under rule 3. That rule directs the application of New York's plaintiff-favoring local law (no guest statute) so long as that law is not anachronistic or aberrational (I think it is neither) and so long as New York has a sufficient contact with the defendant (I think it does, since the driver was domiciled there). Therefore, New York's law would apply and the plaintiff could recover from the defendant on a showing of simple negligence. In a case where neither state has a significant interest in the application of its own local law, achieving the result under rule 3 is clean and simple. Since *Neumeier* is generally considered a difficult case, the relative ease of resolution presented by Professor Weintraub's rule 3 becomes especially appealing. Moreover, as it happens (in a wholly fortuitous manner, to borrow a popular phrase from the case law of conflicts) the forum state (New York) is the state with the plaintiff-favoring law, thus the forum is then less likely to be offended by Professor Weintraub's preference for that law. Of course, if Ontario were the forum, the court might not agree with Professor Weintraub's implied characterization of its defendant-protecting law as antiquated.

There is, I think, an additional problem with the application of Professor Weintraub's rule 3 to *Neumeier*. Rule 3 implies that, since neither Ontario nor New York had a significant interest in the application of its own local law, the facts present a "no interest" case. I disagree, for after a court concludes that neither state has a significant interest in the application of its own local law, it should then drop down to a somewhat lower level of interest and inquire if either state has a minimal interest in the litigation. Clearly, Ontario has a minimal interest in the litigation arising out of the Ontario domicile of the deceased passenger and his dependent survivors. In addition, it is equally

61. See text accompanying note 28 supra.
62. See text accompanying notes 3 & 17-21 supra.
63. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); see text accompanying notes 26-27 supra.
64. See text accompanying note 3 supra. I assume that Professor Weintraub's rule 3 would apply, notwithstanding the fact that one of the involved states is a Canadian province. Professor Weintraub considered rule 3 applicable, stating: "I would decide *Neumeier* under my rule 3 and reach the result opposite that reached by the New York Court of Appeals." WEINTRAUB'S COMMENTARY, supra note 2, at 347.
65. See text accompanying notes 3 & 22 supra.
clear that this minimal interest would best be served by the application of New York's local law affording the opportunity of recovery for the dependent survivors, thereby reducing the likelihood of their becoming indigent wards of Ontario. (Since we have already concluded that Ontario has no significant interest in the application of its guest statute, consideration of Ontario's minimal interest, even though best served by the application of New York's local law, creates no internal conflict for Ontario.) Therefore, Ontario does indeed have an interest: a minimal interest in the economic integrity of the Ontario domiciled survivors which is best served by the application of New York's local law.

Similarly, New York has a minimal interest in the litigation arising out of the deceased driver's New York domicile and the resulting presence of his estate and presumably the estate beneficiaries in New York. Clearly, this minimal interest of New York would best be served by the application of Ontario's guest statute, thereby diminishing the likelihood of recovery and preserving the New York estate. (Since we have already concluded that New York has no significant interest in the application of its local law, consideration of New York's minimal interest, even though best served by the application of Ontario's local law, creates no internal conflict for New York.) Therefore, New York does have an interest: a minimal interest in preserving the New York estate of the deceased driver for the New York beneficiaries, which interest is best served by the application of Ontario's local law.

Such recognition of a state's minimal interest in the litigation is by no means novel or extraordinary. It has been done, though perhaps with somewhat different nomenclature, in nearly all of those cases characterized as "false conflicts." As we have seen, the essence of a false conflict case is that one state has a significant interest in the application of its own local law, the second state has no significant interest in the application of its contrary local law; the second state, however, has a minimal interest in the litigation which is best served by the application of the first state's local law. All we have done is to utilize each state's minimal interest in the litigation in a true rather than a false conflict case, after determining that neither state has a significant interest in the application of its own local law.

The inquiry into the presence of a minimal interest on the part of each state, after having determined that neither state had a significant interest in the application of its own local law, reveals that, in fact, Neumeier is not a "no interest" case. (Indeed, it is unlikely that there are many, if any, "no interest" cases.) We have discovered instead that

66. See Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968); see text accompanying notes 4 & 13-15 supra.
each state has a minimal interest in the litigation best served by the application of the other state's local law. What was a negative stand-off at the first level of interest, has become a rather evenly balanced set of competing interests at the second level of interest. The next question is how to resolve that neatly balanced set of competing interests.

Assume that counsel for the plaintiff offers and the court receives information indicating that the deceased driver had liability insurance applicable to the collision and that the limits of that liability insurance policy are more than adequate to cover any recovery which the plaintiff may enjoy. How does that enhanced degree of specificity affect the competing interests? It becomes clear as a result that if Ontario's interest in the dependent survivors which is best served by New York's local law prevails, then New York's interest in the New York estate and its beneficiaries will not be adversely affected. Any recovery by the Ontario plaintiff will not reduce the dollar value of the New York estate or the share in the estate of any New York beneficiary. This would seem to indicate that the court should apply New York's local law.

Is there any impropriety in the court's consideration of the existence and amount of liability insurance? New York, like most states, will not permit the existence of liability insurance to be made known to a jury,67 lest that information distort the jury's two-step process of determining liability and (assuming an affirmative determination) damages into a single step of deciding how much to award the plaintiff. Judicial consideration of the insurance information can be easily accomplished, however, without apprising the jury of that information. Frequently, such as in Neumeier,68 choice-of-law issues are resolved long before jury selection and trial, so that providing the court with insurance information by brief and oral argument will not subvert the jury process. Moreover, even where the choice-of-law issue is reserved until trial, counsel and the court will have simple methods available for informing the court and not the jury: side-bar conferences or jury recesses. Therefore, judicial consideration of the insurance information need not frustrate the integrity of the jury's functions.

Perhaps a broader question should be asked. Generally, how should a court determine the propriety of considering additional information


68. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).
offered by counsel for the purpose of providing an enhanced degree of specificity in resolving a choice-of-law problem? I think the court should ask two questions: Would judicial consideration of the offered information be constitutionally permissible? Would judicial consideration of the offered information be unlikely to generate adverse consequences in the future? If both questions are answered affirmatively, then the court should consider the information. Does judicial consideration of the existence and amount of liability insurance violate any constitutional right of the defendant? Arguably, no. The constitutional provision most likely to be asserted would be the equal protection clause. Presumably, the defendant would assert that: (1) the wealthy are more likely to have liability insurance or liability insurance in a substantial amount than the not so wealthy; and, therefore, (2) considering that information may generate one conflicts rule for the rich and another for the poor, which jeopardizes the rich defendant's interest in the litigation. Economic status, however, has not been characterized as a suspect classification, so that the standard under the equal protection clause of strict judicial scrutiny is not applicable. Under the traditional standard of review, which requires only that the state action bear some rational relationship to a legitimate state purpose or interest, the court's consideration of the profered information is a reasonable means of resolving an evenly matched choice-of-law issue. Consequently, the equal protection argument would not be expected to prevail under the normal constitutional standard of review.

Presumably, then, the defendant would make the further argument that judicial consideration of the existence and amount of liability insurance, because of its ultimate harm to a defendant's position in litigation, will tend to dissuade drivers from purchasing substantial liability insurance. Is such a result likely? Probably not, since there are many cogent reasons for obtaining substantial liability insurance. Because of these reasons, basing the choice-of-law result on the existence and amount of liability insurance is not likely to dissuade drivers from purchasing such protection for themselves, their families, and their assets.

70. U.S. CONST. amend. XIV, § 1, states: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."
71. See Maher v. Roe, 432 U.S. 464, 471 (1977). ("[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis"). Absent a suspect class, "the . . . scheme must . . . be examined to determine whether it rationally furthers some legitimate, articulated state purpose . . . ." Id. at 470 (quoting San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)). See also Harris v. McRae, 100 S. Ct. 2671, 2691 (1980).
72. See note 71 supra.
Therefore, the evidence of liability insurance is an entirely appropriate object of judicial consideration and, obviously, such consideration would be highly relevant in determining which state's interest should prevail. In fact, in our analysis of Neumeier, such judicial consideration would probably be determinative. The evidence of liability insurance would apprise the court that Ontario's interest in the economic integrity of its domiciled dependents, served by the application of New York's local law, could be fulfilled without frustrating New York's interest in the New York estate and the beneficiaries of the estate. Upon such evidence, the court could identify an excellent solution to an apparently difficult choice-of-law problem, one which serves the legitimate interest of one state without frustrating the competing interest of the other state.

Suppose, however, there was no applicable liability insurance, or counsel did not offer such information and the court did not request it. The court would be left to decide between competing minimal interests of equal weight: Ontario's concern for the surviving dependents, best served by New York's local law, and New York's concern for the estate and its beneficiaries, best served by Ontario's local law. A court would have to seek another source of guidance in order to resolve that difficult choice-of-law issue.

It is here that I find helpful the "comparative impairment" phrase fashioned by the California Supreme Court for the guidance of courts confronted with difficult choice-of-law issues. Frankly, I'm not certain that I entirely and precisely understand what the California court contemplates when it utilizes the phrase. The best I can do is to indicate what the phrase implies to me. A court confronted with an evenly balanced set of competing interests should attempt to determine which state's interest would be more frustrated by the application of the disserving local law and then avoid that greater frustration. To my mind, that technique is an inherent part of interest analysis. It in part describes the process of determining which state's interest is the more intense. Moreover, it is useful both at the primary level of competing significant interests in determining the application of each state's own

73. See text accompanying note 65 supra.
local law and at the secondary level of competing minimal interests best served by the other state's local law. Applying the measure of comparative impairment to the facts of *Neumeier* illustrates the point.

It is apparent that Ontario's minimal interest in the economic integrity of the Ontario domiciled survivors, best served by New York's local law, would be frustrated by the application of Ontario's guest statute. The statute would render more difficult and might preclude a recovery for those survivors, thereby enhancing the possibility of their becoming indigent wards of Ontario. Similarly, New York's minimal interest in preserving the economic integrity of the New York estate and estate beneficiaries, best served by the application of Ontario's guest statute, would be frustrated by the application of New York's local law. Absent a guest statute, the threat of depleting the estate and diminishing each heir's share is enhanced. The question for the court would be which of the two possible results entails the greater frustration of a state interest.

The Ontario survivors, denied the family provider as the result of the alleged negligence of the New York driver, are dependent survivors because of that loss. Moreover, the dependent survivors should be viewed as occupying the position in which the passenger would have been, had he survived, vis-a-vis the culpable driver; the dependent survivors become the derivative victims of the driver's alleged negligence. In the position of substitute victims, the surviving dependents should be attributed as strong a right of recovery as the passenger would have possessed had he survived. Assume that the accident had not caused death, but that both passenger and driver had received injuries which incapacitated them to the extent that their indigency was likely. Since the passenger's incapacitating injuries and probable indigency were caused by the driver's alleged negligence, the passenger's plight would present a more compelling case for compensation than would the plight of the allegedly culpable driver. It seems appropriate to impute the position of the victim of the

76. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

77. Emphasizing the alleged negligence and culpability of the host driver in this analysis seems entirely appropriate, given that the issue before the court is one of choice-of-law. The court is deciding the limited question of whether the plaintiff may recover from the defendant, assuming arguendo that the host driver was negligent.

78. It is important to keep in mind at this point that Ontario has no significant interest in applying its guest statute and New York has no significant interest in applying its policy favoring recovery by passenger domiciliaries from negligent drivers; see text accompanying notes 26-27 supra. Since both the policy behind Ontario's local law and the policy behind New York's local law are now irrelevant, the question of compensation is open and must be decided on other grounds.
negligence to his dependent survivors in order to avoid indirectly "rewarding" the New York estate beneficiaries because of the driver's death. The beneficiaries of the driver's estate cannot be designated as victims since the driver's death resulted from his own negligence. Nor have the New York beneficiaries been denied the family provider because of any negligence attributable to the deceased passenger. It may even be the case that the New York beneficiaries were not financially dependent upon the driver. The Ontario survivors, however, would have to be dependent survivors of the deceased passenger, or the legal equivalent thereof, in order to share in any recovery which may be secured. The New York estate beneficiaries need not have been financially dependent upon the deceased driver; one may become the beneficiary of either an intestate or testate regardless of one's economic relationship with the decedent. Consequently, the interest of New York in keeping an estate intact for its beneficiaries, an interest predicated upon diminishing the risk that the beneficiaries will become indigent wards of the state, is less likely to be impaired by the absence of a guest statute.

On the other hand, the frustration of Ontario's minimal interest, by the application of Ontario's guest statute, would seem to be more likely to produce a result sought to be avoided, namely, having the Ontario dependents become indigent wards of that state. The application of New York's local law would be less likely to produce a result seriously frustrating New York's minimal interest. If the Ontario dependents are permitted a recovery based on the driver's negligence, the New York beneficiaries of the estate would lose only a diminished portion of a fund to which they had no legal right to look for continued subsistence. Therefore, Ontario's minimal interest in the litigation would seem to be more intense than New York's minimal interest, so that the court should apply that local law (New York's) which would not frustrate the Ontario interest.

That, of course, is the same result which Professor Weintraub's rule 3 produced much more quickly and easily. The facility of rule 3, however, can be achieved only at the price of ignoring the very real interest which each state has in the litigation and by imposing on the court an external conclusion that plaintiff-favoring laws are superior.


Every action brought under this [Fatal Accidents] Act is for the benefit of the wife, husband, parent and child of the person whose death was so caused . . . and in every such action such damages may be awarded as are proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered . . . shall be divided among the above-mentioned persons in such shares as are determined at the trial.
By identifying each state's minimal interest in the litigation, the premature and ultimately incorrect characterization of the case as being one of "no interest" is avoided. Moreover, encouraging the forum to engage in a judicial determination of "comparative impairment," invites the court to make its own reasoned decision as to which state's interest is the more intense. In my estimation, most courts in most circumstances, left to their own determination of comparative impairment, would find the state interest in the potential indigency of the victim more intense than a competing state interest in protecting the economic integrity of the defendant. In those cases where that does not occur, I would still be unwilling to impose on the courts a contrary determination based on an extrinsic conclusion that plaintiff-favoring laws are better.

In *Tramontana v. Varig Airlines*, a disinterested forum was required to determine whether to impose Brazil's ceiling on recovery in personal injury and wrongful death actions arising out of airplane disasters. The United States Navy Band was touring South America when a Navy plane carrying certain members of the band was involved in a catastrophic mid-air collision with a commercial Varig Airlines flight over Brazil. Everyone aboard both planes was killed. The plaintiff, a Maryland domiciliary and the widow of one of the band members, brought a wrongful death action against Varig. The defendant asserted the applicability of Brazil's 100,000 cruzeiro ($170) limitation on recovery in such actions. After rejecting the plaintiff's argument that the Brazilian ceiling should not be imposed because it was offensive to a public policy of the forum (the District of Columbia), the court examined the competing state interests. Maryland's local law contained no such ceiling, presumably for the purpose of protecting the economic integrity of injured Maryland domiciliaries. Since the plain-

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81. The court of appeals found that the District of Columbia did not have a significant interest at stake:

The District of Columbia's connection with the occurrence and with the parties, and its interest in the resolution of the issue before us, are, if not wholly remote, certainly less than Brazil's. Neither [plaintiff] nor her decedent are or were residents [sic] of the District of Columbia. Varig Airlines is subject to suit here only because of the international operations in which it is engaged. Whatever negligence it may have been guilty of assuredly did not occur here, nor, manifestly, did the decedent's death. If [plaintiff] and her children should ever become public charges, the burden will rest not on the District of Columbia but on the citizens of Maryland, where [plaintiff] resides.  

*Id.* at 473 (footnote omitted).
tiff was a Maryland domiciliary, she was precisely within the class intended to be protected. Clearly, Maryland had a significant interest in the application of its local law. Brazil's ceiling existed for the purpose of protecting Brazil's airlines. Obviously Varig was within the protected class and Brazil had a significant interest in the application of its local law. Consequently, the court confronted the task of deciding which state's interest was more significant. The court offered this view of the intensity of Brazil's interest:

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 Brazilian limitation in terms applies only to airplane accidents, unlike the Massachusetts provision rejected in Kilberg, which was an across-the-board ceiling on recovery for wrongful death in that state. The focus of Brazilian concern could hardly be clearer.82

In fashioning its local law, Brazil saw fit to focus upon one particular activity and to provide a protective ceiling on liability to those engaged in that activity. Moreover, as the language excerpted from the court's opinion indicates, that particular activity had a significant, perhaps unique, importance to Brazil. Were the ceiling on recovery not imposed, the defendant would be exposed to unlimited liability in each of the wrongful death actions arising out of the deaths of the Navy band members. As a result, Brazil's airline might face the alternative possibilities of severe financial difficulty, perhaps bankruptcy, or the need for the infusion of substantial additional government funds, which is an unhappy prospect for a government dealing with triple-digit inflation. None of these arguments, however, serves to denigrate Maryland's interest. If the Maryland domiciled widow were limited to a recovery of $170, Maryland's interest in her economic integrity would be acutely frustrated, perhaps even to the point of the widow's becoming an indigent ward of the state. It is apparent that Brazil and Maryland each had a significant interest in the application of its own local law.

Given this true conflict case, Professor Weintraub's rule 2 would apply. Under that rule, Maryland's no-ceiling law would apply, provided that law were not anachronistic or aberrational and provided that Maryland had "sufficient contact with the defendant or the defendant's

82. Id. at 471 (footnote omitted).
actual or intended course of conduct to make application of its law reasonable." The first condition is easily satisfied and a plausible argument exists for satisfying the second. Varig's conduct involved the operation of a commercial flight over Brazil with knowledge that other flights under other flags would be using that airspace. In all likelihood, Varig knew or should have known of the presence of the United States Navy plane and of the status of its occupants, domiciliaries of various states of the United States. Therefore, I am inclined to guess that Professor Weintraub would conclude that Maryland's plaintiff-favoring law should apply. The court concluded otherwise.

In resolving the difficult choice-of-law issue, the disinterested forum saw fit (apparently sua sponte) to look to Maryland's conflicts law for additional insight into the significance which Maryland itself would attach to its concern with the economic integrity of the Maryland domiciled widow. What the forum discovered was that a Maryland court confronted with the same case would impose the Brazilian ceiling although this would jeopardize the economic welfare of the Maryland domiciled widow. To the District of Columbia forum, Maryland's conflicts law implied a diminution of the intensity of Maryland's interest

83. See text accompanying note 3 supra. I am assuming that Professor Weintraub's rule 2 would apply, notwithstanding the fact that one of the interested states was Brazil. See note 64 supra.

84. The court undertook the consideration of Maryland law stating:

Although Maryland, the state of the decedent's and [plaintiff's] residence, might be thought to have a substantial interest in the amount recoverable for his death, no suggestion has been made that we should apply the law of Maryland to determine the issue before us. But this possibility inevitably suggests itself, and we therefore are inclined to say why we think that, even as between the law of Maryland and the law of Brazil, we are without warrant to look to the former. 305 F.2d at 473 (footnote omitted).

85. The court cited section 2 of Maryland's wrongful death statute which provides that, in suits based on acts committed outside the state:

[T]he courts of this State shall apply the law of such other state, District of Columbia or territory of the United States, to the facts of the particular case, as though such foreign law were the law of this State, provided, however, that the rules of pleading and procedure effective in the court of this State in which the action is pending govern and be so applied as to give effect to the rights and obligations created by and existing under the laws of the foreign jurisdiction in which the wrongful act, neglect or default occurred . . . . 350 F.2d at 474 (quoting MD. ANN. CODE art. 67, § 2 (1957)) (emphasis added by the court).

86. The Tramontana court concluded that: "It appears likely that a Maryland court would not have ignored the Brazilian limitation on recovery if this action had been brought there originally." 350 F.2d at 473-74. The court's conclusion was subsequently corroborated by White v. King, 244 Md. 348, 223 A.2d 763 (1966), in which the Maryland Court of Appeals applied lex loci delicti even to the economic detriment of its own domiciliary. See Note, 27 MD. L. REV. 85 (1966).
and a relative enhancement of Brazil's interest; consequently, the forum applied the Brazilian ceiling on recovery.

I think the technique utilized by the court was entirely rational. The forum's determination of which state's interest was more significant, in a case in which each state had a significant interest in the application of its own local law, was influenced and ultimately resolved by the forum's conclusion as to the intensity of interest which would be manifested by a court sitting in one of the interested states. That approach is, in my view, more appropriate and seemly than resolving the choice-of-law issue by the application of a wholly extrinsic rule, such as Professor Weintraub's rule 2, based on an isolated determination that plaintiff-favoring laws are the better rules of law. No matter how accurately stated its factual rationale may be, Professor Weintraub's rule does not have the effect of diminishing the significance of Brazil's interest in Varig Airlines or of enhancing the interest of Maryland in the economic integrity of Mrs. Tramontana. Those interests remain constant despite the rule. But the forum's acquired knowledge that a Maryland court would impose the Brazilian ceiling, despite the economic jeopardy in which this would place the Maryland domiciliary, does support diminishing Maryland's concern for the economic integrity of the surviving widow. Maryland has manifested a willingness to compromise this interest, as evidenced by the opinions of its courts and the broad language of its wrongful death statute. The Tramontana court wisely relied on statements made by one of the interested states in evaluating the interest of that state, rather than on an extrinsic conclusion as to the generally better rule of law.

In Tramontana, because the decedent was a member of the Navy band being transported on a Navy plane during a goodwill tour of South America, an inference readily arises that the United States had an interest in the choice-of-law issue presented. While it is speculation on my part, I find myself inclined toward the view that the court must have been cognizant of that national interest. Assuming such a subtle


88. See note 85 supra.

89. The Tramontana court noted that:

After this appeal was heard, the Court of Claims of the United States, pursuant to a reference by Congress, recommended an award of $25,000 to the families of each of these eighteen decedents. Armiger et al. Estates v. United States, 339 F.2d 625 (Ct.Cl.1964). This recommendation was founded on purely equitable grounds, and rested upon the circumstance that, prior to the fatal flight, there had been a failure to follow the usual practice of distributing application forms for private flight insurance. The possibility of suit against the United States under the Federal
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judicial sensitivity, one may infer the court's awareness of the possibility that Congress might enact special bills to provide compensation to the surviving dependents of the deceased Navy band members for the purpose of augmenting existing veterans benefits compensation and assuring that those dependent survivors did not become indigent wards of any state. Given the virtually unfettered freedom of Congress in determining the amounts to be so awarded to those dependents, and the considerably less acute inflation problem in the United States as compared with that in Brazil, the enactment of such special bills would be unlikely to impose an undue burden on this country. Consequently, the national interests in preserving the economic integrity of the dependent survivors without threatening the nation's economy could appropriately be fulfilled by congressional action. This also suggests the propriety of the conclusion achieved by the Tramontana court. The court inferred that leaving to Congress the decision of what economic relief, if any, to afford the dependents would impair the interest of the United States less than the nonapplication of the Brazilian ceiling would have impaired Brazil's interest.

To summarize, in Neumeier, the facts and local laws apparently did not present a "no interest" case because each state (Ontario and New York) had a minimal and competing interest in the litigation. Moreover, recognizing those competing minimal interests seems to be the first step in resolving the difficult choice-of-law issue presented by the case. Presenting the court with an enhanced degree of specificity (the existence of applicable liability insurance, for example) may enable the court to achieve a resolution which serves one state's interest without frustrating the other state's competing interest, thereby resolving the issue in the most satisfactory manner possible. Absent such enhanced specificity, the court would be compelled to decide which state's minimal interest is the more intense and then apply that local law which serves the more intense interest. In Tramontana, the additional insight available to the court from an examination of Maryland's conflicts law made it possible for the court to determine

Tort Claims Act is precluded by that statute's express exclusion of claims "arising in a foreign country." 28 U.S.C. § 2680(k).

350 F.2d at 470 n.3. In addition, "[u]nder the Federal Tort Claims Act . . . the United States is not liable for injuries sustained by servicemen, while on active duty . . . ." Armiger v. United States, 339 F.2d 625, 628 (Ct. Cl. 1964) (citing Feres v. United States, 340 U.S. 135 (1950)).

90. See note 89 supra. Congress followed the recommendation of the court of claims and by private law awarded $25,000 "to the estate of each of the former members of the United States Navy Band" who had died in the mid-air collision. Priv. L. No. 89-363, 80 Stat. 1670 (1966).

91. See text accompanying notes 67-68 supra.
which state’s interest in the application of its own local law was the more significant. And, if my speculation is correct, the Tramontana court may have been subtly influenced by its recognition of the interests of the United States. In neither case would it be necessary (nor, in my opinion, appropriate) for the court to utilize a predetermined conclusion of the better rule of law. In Neumeier, recognition of each state’s minimal interest in the litigation, and in Tramontana, examination of Maryland’s conflicts law, would lead to a rational resolution without recourse to a “no interest” characterization of the first case and an extrinsically identified better law in both cases.

Another case which affords an opportunity to compare Professor Weintraub’s rules with the approach I have suggested, additionally illustrates a somewhat surprising application of Judge Fuld’s rules. In Himes v. Stalker, the plaintiff, a Pennsylvania domiciliary, was injured in a two-car collision in New York. To recover for her injuries, the plaintiff sued the driver of the other car and the parents of the driver as the owners of the car; all the defendants were also Pennsylvania domiciliaries. The plaintiff’s theory of liability against the defendant driver was negligent operation, and it presented no choice-of-law problem. Her theory of liability against the defendant owners was New York’s owner liability law; that theory did present a choice-of-law issue since Pennsylvania’s local law did not provide for such owner liability. The plaintiff moved to dismiss the owners’ defense of no liability based on Pennsylvania law. The New York trial-level court found Judge Fuld’s rules determinative. Although the court recognized that those rules had been fashioned by Judge Fuld to resolveguest statute choice-of-law problems, the court felt that the rules implied a general reversion to lex loci delicti. Finding that application of Pennsylvania’s local law, which did not provide for owner liability, would not significantly advance Pennsylvania’s interests, the court

93. N.Y. VEH. & TRAF. LAW § 388(1) (McKinney 1959) states:
Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner . . . .
94. See text accompanying note 28 supra.
95. 99 Misc. 2d at 618-19, 416 N.Y.S.2d at 991.
96. Id.
97. The court determined that the substantive law of New York would be advanced by the application of lex loci delicti, whereas
The only discernible advancement to the substantive law of Pennsylvania that
applied New York's owner liability law under *lex loci delicti*. Consequently, the plaintiff's motion to dismiss the owners' defense was granted.

I have several reactions to the court's application of Judge Fuld's rules. First, I think it was inappropriate to fashion a result for a non-guest statute case out of a set of rules intended to apply to guest statute cases. Second, whenever one constructs a set of mechanical rules intended to facilitate interest analysis, one should be aware that a court may use those rules to avoid the mental discipline required for rational resolution through interest analysis. Third, since the court avoided that discipline, its opinion sheds little light on the basis for its conclusion that application of Pennsylvania's local law would not significantly advance that state's interests. The *Himes* court failed to analyze the reasons underlying Pennsylvania's local law simply because, it appears, the New York Court of Appeals had implied that the rule of *lex loci delicti* had been reestablished by the *Neumeier* decision.  

Professor Weintraub's rules, on the other hand, do not invite that kind of reaction from a court. His rules provide a quick resolution only after the court has completed the rigors of analyzing the reasons for each state's local law and the convertibility of each reason into a significant state interest in light of the particular facts of the case. Consequently, until that analysis is completed, one cannot know which of his three rules would apply.

Such an analysis of New York's owner liability law would reveal that it apparently has two purposes: to provide the injured plaintiff with a financially responsible defendant and to encourage the owner to be more circumspect in deciding to whom to lend or lease his vehicle. The accrue by rejecting the "*lex loci delicti*" rule and applying the agency doctrine of that state would be to protect Pennsylvania insurance companies and continue non-proven and speculatively lower liability insurance premiums for the automobile owners of that state.

99 Misc. 2d at 620-21, 416 N.Y.S.2d at 993.

98. For the proposition that *Neumeier* represents a general reversion to *lex loci delicti*, the *Himes* court cited a statement of the New York Court of Appeals: "It is true that *lex loci delicti* remains the general rule in tort cases to be displaced only in extraordinary circumstances (see Neumeier v. Kuehner. . .)." Cousins v. Instrument Flyers, Inc., 44 N.Y.2d 698, 699, 376 N.E.2d 914, 915, 405 N.Y.S.2d 441, 442 (1978) (per curiam) (citation in original), quoted at 99 Misc. 2d at 619, 416 N.Y.S.2d at 992.

second reason, on the other hand, concerns regulating the conduct of
the owner. In *Himes*, the owners' consent to lending their car to their
child occurred in Pennsylvania. However, their decision to permit their
offspring to drive their car in New York created reasonably foreseeable
consequences in that state. Under those circumstances, I submit
that New York's interest in conduct regulation converts into a signifi-
cant interest in the application of New York's local law. When one
reason for a state's law is conduct regulation, I believe that reason con-
verts into a significant interest on the part of that state in the applica-
tion of its law if: (1) the conduct occurred in that state; or (2) the im-
mediate consequences of that conduct occurred in that state; or (3) the
continuing consequences of that conduct will be felt in that state.
Presumably, a state's interest in regulating conduct rests on a desire
to avoid the immediate or continuing adverse consequences made pos-
sible by such conduct. Consequently, if the conduct occurs within the
state, thereby generating its reasonably foreseeable consequences
within the state, or the immediate consequences occur within the state,
or the continuing consequences will be felt within the state, the state's
interest in conduct regulation converts into a significant interest. I
would conclude, therefore, that the occurrence of the collision in New
York, with the Pennsylvania bailee driving one of the cars, gave New
York a significant interest in the application of its owner liability law.

With regard to Pennsylvania, its local law imposes no liability on
the owner for injuries inflicted by the negligent driving of the bailee.
Apparently, Pennsylvania's policy is that the nonculpable owner should
be immune from liability. Its interest is in protecting the economic in-
tegrity of the innocent Pennsylvania owner. Since the owners in the
case were Pennsylvania domiciliaries, they would seem to fall precisely
within the protected class and Pennsylvania would seem to have a
significant interest in the application of its local law protecting owners
from liability. The plaintiff in *Himes*, however, was a Pennsylvania
domiciliary. Does Pennsylvania have an interest in her economic in-
tegrity and, therefore, in her capacity to recover from the financially
responsible owners? Of course not. Pennsylvania's owner-protecting
law is intended to immunize Pennsylvania owners from liability to
Pennsylvania plaintiffs as well as from liability to non-Pennsylvania
plaintiffs. In fact, in the majority of cases applying Pennsylvania law,
it will be Pennsylvania domiciled plaintiffs who will be unable to
recover from Pennsylvania domiciled owners.

Pennsylvania, therefore, has no divided interest. Its express interest
is in protecting the economic integrity of Pennsylvania owners against
plaintiffs wherever domiciled. Note, however, that what is being
discussed is Pennsylvania's significant interest in the application of its
own local law. Once it is concluded that Pennsylvania has a significant
interest in the application of its local law, the question of whether Pennsylvania has a minimal interest in the litigation is irrelevant. Pursuing that inquiry generates a spurious internal conflict on the part of Pennsylvania. In a situation involving either a Pennsylvania domiciled plaintiff or a plaintiff domiciled elsewhere, and a Pennsylvania domiciled owner, Pennsylvania has fashioned a local law protecting the latter. Under the facts of *Himes*, Pennsylvania certainly had a significant interest in the application of its owner-protecting local law. Consequently, the conclusion of the foregoing analysis is that New York had a significant interest in the application of its local law of owner liability, which is based on conduct regulation, and Pennsylvania had a significant interest in the application of its contrary local law, which is based on protecting the economic integrity of Pennsylvania domiciled owners.

At this point in the analysis, Professor Weintraub's rules are applicable. Since each state had a significant interest in the application of its own local law, the case involved a true conflict. Under rule 2, New York's owner liability law would be applied, provided that it is not anachronistic or aberrational (I think it is neither) and provided that New York has sufficient contact with the Pennsylvania owners or their conduct (I think it does). Upon identifying the reasons underlying each state's law, and having determined the convertibility of each of those reasons into a significant interest, Professor Weintraub's rules for a quick resolution based on his view that plaintiff-favoring laws are the better laws may be employed.

Under my approach, however, because each state had a significant interest in the application of its own local law, I would attempt to determine which state's interest is more significant and apply the local law of that state. Assume that counsel for the plaintiff offers and the court receives information indicating that the owners had liability insurance applicable to the incident in an amount more than adequate to cover any judgment for the plaintiff. That information would demonstrate that applying New York's owner liability law would, in fact, do little to frustrate Pennsylvania's interest in protecting the economic integrity of the Pennsylvania owners. Given a judgment for the plaintiff and against all the defendants, the liability insurance carrier would pick up the entire tab. The owners would not be required to

100. *See* text accompanying note 3 *supra.*

101. In fact, the owners' liability insurance policy limit was $50,000. The plaintiff's cause of action had a potential dollar value far in excess of the policy limit. Following the decision by the Supreme Court of Cattaraugus County, the case was settled at the policy limit. I was advised of this during a telephone conversation with Joseph C. Dwyer, Esq., counsel for the plaintiff, on Sept. 10, 1980. I wish to express my gratitude to Attorney Dwyer for providing me with that information and for permitting me to include it herein.
pay anything out of pocket. The inconvenience of being defendants in a lawsuit would also tend to serve New York's interest in inhibiting car owners from carelessly lending their vehicles for use in New York. This more specific information would seem to motivate the court towards finding New York's interest more significant and applying its owner-liability law.

But a judgment for the plaintiff against all the defendants might render it more expensive or just more difficult for owners to secure future liability insurance coverage. The same result, however, would occur even were Pennsylvania's law avoiding owner liability to be applied. If the defendant driver was driving with the consent of the owners, their liability insurance would be applicable to the collision whether or not the owners were party-defendants. Any judgment enjoyed by the plaintiff against the defendant driver would be paid by the owners' carrier. It would then be likely that the owners would find it just as expensive or difficult to secure future liability insurance as they might have had they also been defendants. Consequently, given liability insurance coverage in an amount more than adequate to cover any judgment secured by the plaintiff, the court probably would conclude that application of New York's owner liability law would do little to frustrate Pennsylvania's interest in the economic integrity of the owners while serving New York's interest in regulating the conduct of owners.

Next, assume that counsel does not offer and the court does not request such insurance information. Absent that enhanced degree of specificity, how should the court go about determining which state's interest is more significant? If the court applies New York's owner liability law, Pennsylvania's interest in protecting the economic integrity of its domiciled owners will be frustrated. If the court applies Pennsylvania's owner-protecting law, New York's interest in regulating owners' conduct will be frustrated. Which state's interest should be considered more intense?

Although it is true that application of New York's owner liability law would directly frustrate Pennsylvania's interest in protecting the economic integrity of the Pennsylvania owners, I find that frustration less acute than the frustration of New York's interest in conduct regulation which the application of Pennsylvania's law would produce. The Pennsylvania owners, even if subjected to liability, would retain an undiminished physical and emotional capacity to survive. They were not the personal injury victims of the collision. Admittedly, subjecting them to a judgment for the plaintiff could diminish substantially or even deplete their existing assets. I do not intend to minimize the significance of such an economic impact. I do, however, wish to distinguish that purely economic impact from the more severe impact
resulting from serious personal injuries and mental anguish. The latter
impairments will also surely generate their own grave economic conse-
quences. The personal injury victim is unlikely to retain her original
capacity to be self-sustaining and, in addition, will be required to live
with the continuing pain and anguish caused by the personal injuries
suffered from the collision. New York's interest in conduct regulation
is aimed at preventing the collision and avoiding the plight of the im-
mediate victim of the collision.\textsuperscript{102} That interest, I believe, is even more
intense than Pennsylvania's contrary yet wholly legitimate interest in
protecting the economic integrity of the vehicle owners. Consequently,
I believe the court should apply New York's law.

Suppose, however, that the court is inclined to conclude otherwise. I
think a contrary conclusion could not be deemed irrational or patently
incorrect. Because it would derive from a reasoning process, a decision
to apply Pennsylvania local law would be intellectually acceptable if
not personally preferable. Professor Weintraub's rule 2 would not meet
the test of reason. The blanket imposition of the plaintiff-favoring rule
on the court cannot, in my opinion, be justified. Despite the factual ac-
curacy of the general assertion that "recovery, with loss-distribution
through the tortfeasor's liability insurance, represents the most per-
vasive aspect of tort development in this country over the past several
decades," its unexamined application lacks reasoned analysis. My point
is that the emphasis on "the tortfeasor's liability insurance" should be
dealt with directly and factually. The existence and amount of the
defendant's liability insurance should be considered relevant informa-
tion when offered by counsel or requested by the court. Moreover, I
submit that such information and all other information relevant to the
choice-of-law issue\textsuperscript{103} should regularly be submitted to the court for the

\textsuperscript{102} See note 99 and accompanying text supra.

\textsuperscript{103} In Rosenthal v. Warren, 475 F.2d 438 (2d Cir.), cert. denied, 414 U.S. 856 (1973),
the Second Circuit was required to determine the applicability of Massachusetts' then ex-
isting ceiling on wrongful death actions to an action arising out of the death of a New
York domiciliary in Massachusetts. The plaintiff, decedent's widow, was a New York
domiciliary and the defendants were a Massachusetts surgeon and hospital. In this diver-
sity case, the Second Circuit concluded that the New York Court of Appeals would not ap-
ply the Massachusetts ceiling. Counsel on both sides apparently provided the court with
an enhanced degree of specificity: "[D]ecedent was examined and diagnosed by [defendant]'

Dr. Warren, whom the plaintiff describes as a world-renowned physician and surgeon
treating patients from all over the world." Id. at 439. Presumably, this characterization of
the defendant physician was offered by the plaintiff's counsel in order to persuade the
court that the physician could not reasonably anticipate the application of the
Massachusetts ceiling with regard to all his patients.

The court further stated with regard to the non-local nature of the hospital that:

It is undisputed that although the [defendant] hospital is a Massachusetts cor-
poration, approximately one-third of its patients in 1969 came from outside
Massachusetts and approximately 8 per cent of its patients in the same year were
from New York. Indeed, the hospital claimed in its 1969 annual report that it was
interest analysis

purpose of affording the court an enhanced degree of specificity.¹⁰⁴

ultimately, therefore, i regard professor Weintraub's rules diversely. I would concur entirely in rule 1, applicable to false conflict cases.¹⁰⁵ Should only one of the states have a significant interest in the application of its local law, that local law is to be applied. The second state's minimal interest in the litigation has significance only to the extent that that minimal interest is best served by application of the first state's law, and then only for the purpose of confirming the court's decision to apply the first state's law.

its minimal interest in the litigation, best served by the first state's law, demonstrates the false conflict and the complete propriety of the court's application of the local law of the first state. A spurious conflict, on the other hand, would be created if the court weighed the second state's minimal interest in the litigation against the first state's significant interest in the application of its own local law. By definition, a minimal interest in the litigation is inferior to a state's significant interest in the application of its local law; had the reason underlying the second state's local law been convertible into a significant interest, the frustration of the minimal interest would have been an implicit and acceptable consequence.

I would dissent from Professor Weintraub's rules 2 and 3. In true conflict cases (rule 2),¹¹⁶ the court should arrive at a reasoned conclu-

"not a local or community hospital in the usual sense because its patients came from literally everywhere."

Id. at 440.

similiarly, this information about the defendant hospital was offered by the plaintiff's counsel in order to persuade the court that the hospital could not reasonably anticipate the application of the Massachusetts ceiling with regard to all its patients.

the court further noted the different premium limits for surgeons in New York and Massachusetts:

an affidavit of the head of the casualty underwriting department of the Boston office of St. Paul Fire & Marine, which issued the liability policy under which defendant Warren was covered, indicates that a general surgeon's liability policy in Massachusetts has a basic limit premium of $192, while a New York City surgeon pays a basic limit premium of $1,139, and that one factor contributing to the difference is the "dollar exposure" in New York, which has no wrongful death limitation.

Id.

This economic information presumably was offered by defense counsel in an effort to emphasize Massachusetts' interest in assuring the availability of medical care in that state and, perhaps, the liability carrier's reliance on the Massachusetts ceiling. The effort was not entirely successful, however, for the court replied, "Dr. Warren's policy, however, makes no reference to coverage limitation in wrongful death cases." Id.

104. Naturally, judicial consideration of such information must be constitutionally permissible as well as unlikely to generate an adverse policy effect; see notes 69-73 and accompanying text supra.

105. See text accompanying notes 3-15 supra.

106. See text accompanying notes 80-88 supra.
sion as to which state's interest in the application of its local law is more significant and apply the local law of that state. The court will be greatly assisted in its deliberations if it can receive from counsel additional information relevant to the choice-of-law issue presented, provided that consideration of such information is constitutionally permissible and not likely to generate adverse future consequences.\(^\text{107}\) In a number of true conflict cases, that additional information is likely to facilitate judicial resolution of even the difficult choice-of-law issues. Where necessary, the court should examine the conflicts laws of the competing states for the purpose of securing additional insight into the significance which each state's own courts would attach to its interest. With regard to rule 3,\(^\text{108}\) I take exception to the characterization of "no interest" cases; if neither state has a significant interest in the application of its own local law, the court should determine each state's minimal interest in the litigation. Where neither state has a significant interest in the application of its own local law, consideration of each state's minimal interest in the litigation will generate no spurious conflict, either internally or between the two states. If those minimal interests are in conflict, the court should arrive at a reasoned conclusion as to which state's minimal interest is more significant and apply the local law which serves that interest. In arriving at that conclusion, the court should utilize the techniques suggested for true conflict cases, since competing minimal interests in the litigation generate a true conflict.

In this manner, the courts are likely to produce results worthy of general approbation without the imposition of a rigid and extrinsic conclusion that plaintiff-favoring laws are better. Furthermore, these courts would avoid the inadvertent conversion of cases involving competing minimal interests in the litigation into "no interest" cases. In short, I cannot offer a magic rule which will make interest analysis easy no matter how difficult the choice-of-law issue may be. The quest for perfection, especially in the form of easily applied rules, although understandable and even commendable, is unlikely ever to be achieved. Man, after all, is fallible and his rules cannot anticipate all the varied factual combinations which are possible. Instead, I have confidence that interest analysis courts utilizing all of the appropriate and relevant information and recognizing the orders of interests which may exist in a particular case possess the capacity to produce excellent results without recourse to an extrinsic view as to the generally better rule of law.

\(^\text{107}\) See notes 69-73 and accompanying text supra.

\(^\text{108}\) See text accompanying notes 62-66 supra.