

# HOW “INTERNATIONAL” SHOULD A THIRD CONFLICTS RESTATEMENT BE IN TORT AND CONTRACT?

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## INTRODUCTION

The question on the floor, I take it, is whether in drafting the *Third Conflicts Restatement* special considerations (or perhaps even rules) should come into play in tort and contract conflicts cases in which the involved jurisdictions are not all states of the United States. This is a question that—in my view—admits of no easy answer. One might think that the question should be easier to answer in the seemingly benign fields of tort and contract, which are the subjects of this essay. Both tort and contract concepts under the common law have reasonably direct analogs in virtually every legal system.<sup>1</sup> They do not involve complex and distinctively American statutory regimes such as the Securities Exchange Act or the Racketeer Influenced and Corrupt Organizations Act, both of which the U.S. Supreme Court has construed in implausibly narrow fashions to limit their impact abroad.<sup>2</sup>

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1. Peter Schlechtriem, *The Borderland of Tort and Contract—Opening a New Frontier?*, 21 CORNELL INT’L L.J. 467, 467 (1988).

2. See generally *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016); *Morrison v. Nat’l Austl. Bank, Ltd.*, 561 U.S. 247 (2010).

But it is a mistake to assume that the questions get any easier just because the underlying concepts are familiar to most legal systems. American tort law, with generally larger awards for the injured party, has been described as the light to which the “moth” of foreign plaintiffs is drawn.<sup>3</sup> While essentially every legal system agrees that a legal mechanism is necessary to enforce freely negotiated contracts that do not require the performance of an illegal act, these same systems divide sharply as to the extent to which parties perceived to be weaker—insurance policyholders, consumers and employees being among the most prominent<sup>4</sup>—should be protected.<sup>5</sup> The United States effort at importing a mild consumer preference (borrowed from the European Union’s Rome I Regulation<sup>6</sup>) into the Uniform Commercial Code’s choice-of-law provisions was a flop; every U.S. jurisdiction except the Virgin Islands rejected it in favor of the pre-existing “substance blind” section.<sup>7</sup> As a result, the American Law Institute and the National Commission on Uniform State Laws were forced to withdraw it.<sup>8</sup>

It is easy to forget that the U.S. case igniting the flame of the American conflicts revolution, *Babcock v. Jackson*,<sup>9</sup> was an international one. The conflict, which arose in a case involving a one-car auto accident in Ontario between parties who were all New Yorkers, was between Ontario’s guest statute, which completely barred recovery, and New York’s rule of ordinary care.<sup>10</sup> Other well-known New York cases involved conflicts with Ontario law.<sup>11</sup> In *Neumeier v. Kuehner*,<sup>12</sup> New York’s high court attempted to draft soft rules for dealing with guest statute cases and in *Edwards v. Erie Coach Lines Company*,<sup>13</sup> the *Neumeier* framework was applied to a conflict with an Ontario damage cap.

However, these cases did not (expressly, anyway) view the international aspect as creating a novel problem, and the New York courts have since cited Ontario conflict cases interchangeably with domestic ones.<sup>14</sup> Of course, as

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3. *Smith, Kline & French Lab, Ltd. & SmithKline Corp. v. Bloch*, [1983] 1 WLR 730, 733 (C.A.) (Eng.) (“As a moth is drawn to the light, so is a litigant drawn to the United States.”).

4. *See* Council Regulation 593/2008, art. 6, 2008 O.J. (L 177/6) (EC).

5. *Id.*

6. *Id.*

7. *See* Patrick J. Borchers, *An Essay on Predictability in Choice-of-Law Doctrine and Implications for a Third Conflicts Restatement*, 49 CREIGHTON L. REV. 495, 502 (2015).

8. *Id.*

9. 191 N.E.2d 279 (N.Y. 1963).

10. *Id.* at 280.

11. *See, e.g.,* *Macey v. Rozbicki*, 221 N.E.2d 380 (N.Y. 1966).

12. *See generally* 286 N.E.2d 454 (N.Y. 1972).

13. 952 N.E.2d 1033, 1037–44 (N.Y. 2011).

14. *See, e.g.,* *Schultz v. Boy Scouts of Am.*, 480 N.E.2d 679, 685 (N.Y. 1985).

“international” goes, conflicts between New York law and the law of its English-speaking, common law neighbor to the north are about as tame as it gets. But as my Canadian-born wife reminds me, Canada is not part of the United States.

Before getting to the choice-of-law portions of the draft *Third Restatement*, we need to address the elephant in the room: forum choice in tort and conflict matters. Unfortunately, in my view, the situation is a disaster in both areas, albeit for different reasons. It is equally unfortunate that the *Third Restatement* is ill-suited to remedy these problems because they are determined either by the Supreme Court’s interpretation of the Constitution or a combination of the Constitution and a highly aggressive reading of the Federal Arbitration Act, which is unlikely to be amended and preempts state law.<sup>15</sup> The applicable law has become secondary to the question of whether there is a rational forum in which to apply it.

## I. FORUM CHOICE

### A. Torts

#### 1. Stream of Commerce Jurisdiction

Personal jurisdiction in the United States in tort cases is an unholy mess. The deterioration began with the U.S. Supreme Court’s dubious and arguably unnecessary opinion in *World-Wide Volkswagen Corp. v. Woodson*,<sup>16</sup> and devolved into near incomprehensibility in *J. McIntyre Co. v. Nicastro*<sup>17</sup> and *Walden v. Fiore*.<sup>18</sup> Compounding the problem has been the Supreme Court’s campaign to roll back corporate general jurisdiction—that is, jurisdiction based on a high volume of contacts unrelated to the dispute—to the corporation’s state of incorporation and its principal place of business.<sup>19</sup> While the constriction of general jurisdiction is more defensible on grounds that it prevents plaintiffs from “forum shopping” for favorable jurisdictions with little or no relation to the dispute, it has lost its role as a safety valve to provide a rational forum in cases in which it could not be justified otherwise.<sup>20</sup>

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15. See 9 U.S.C. § 1 *et seq.*; see also generally *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

16. 444 U.S. 286 (1980).

17. 564 U.S. 873 (2011).

18. 134 S. Ct. 1115 (2014).

19. See generally *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

20. *Daimler*, 134 S. Ct. at 758 n.9 (citing Patrick J. Borchers, *The Problem With General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 139 (“[G]eneral jurisdiction exists as an imperfect safety valve

The trouble, as I noted above, began with *World-Wide*. In that case, New Yorkers moving to Arizona were struck from behind by another driver while passing through Oklahoma, causing the New Yorkers' Audi vehicle to burst into flames.<sup>21</sup> The New Yorkers sued four defendants: the vehicle manufacturer (Audi), its importer (VWAG), the northeast distributor of the vehicle (World-Wide Volkswagen) and the New York dealer (Seaway).<sup>22</sup> The question presented to the U.S. Supreme Court was whether the latter two defendants should be subject to personal jurisdiction in Oklahoma state court.

Only Justice Blackmun in his dissent asked the relevant question, which was essentially "who cares?"<sup>23</sup> In a bygone era of joint and several liability and full indemnity among joint tortfeasors, having deep-pocketed defendants such as Audi should have made the question of whether defendants like World-Wide Volkswagen and Seaway were joined irrelevant to the plaintiffs.<sup>24</sup>

Had the U.S. Supreme Court countenanced the real issue it probably would have denied certiorari. The Robinsons (the plaintiffs) were still New York domiciliaries. Seaway and World-Wide were New York corporations.<sup>25</sup> At the time, the dismissal of the New York-based defendants arguably would have allowed the remaining defendants to remove the case from state to federal court, and the defendants succeeded in doing so.<sup>26</sup>

The successful removal to federal court changed the dynamics of the case. In state court, the venue would have been Creek County, Oklahoma, a forum highly favorable to plaintiffs.<sup>27</sup> Instead, the case wound up in an Oklahoma federal court, with a jury pool much less favorable to the plaintiffs.<sup>28</sup> In the end, the Robinsons recovered nothing.<sup>29</sup>

The consequential aspects of *World-Wide* revolve less around its facts and more its dictum regarding so-called "stream of commerce" jurisdiction

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that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it.").

21. *World-Wide Volkswagen*, 444 U.S. at 288.

22. *Id.*

23. *Id.* at 317–18 (Blackmun, J., dissenting).

24. See generally Charles W. Adams, *World-Wide Volkswagen — the Rest of the Story*, 72 NEB. L. REV. 1122 (1993).

25. *Id.* at 1139.

26. *Id.* at 1143. This would not be possible today as diversity-based removal from state to federal court cannot take place if the case has been filed in state court for more than a year. See 28 U.S.C. § 1446.

27. Adams, *supra* note 24, at 1128.

28. *Id.* at 1127.

29. *Id.* at 1146.

and its citation to *Gray v. American Radiator & Standard Sanitary Corp.*,<sup>30</sup> a famous Illinois state court decision allowing jurisdiction based upon the predictable sale of a product in the forum state.<sup>31</sup> The implication was that if a product were predictably sold in the forum state (as opposed to being merely used there) the seller was subject to jurisdiction.<sup>32</sup> But even so, the notion that the seller of a product, which is valuable specifically because of its mobility, should be able to avert its gaze to the possibility it might be used out of state is laughable.

If a further mess were possible, it came in *Asahi Metal Industry Co. v. Superior Court*.<sup>33</sup> *Asahi* resembled the Illinois Supreme Court’s opinion in *Gray*, to which the *World-Wide* Court seemed to offer a nod of approval.<sup>34</sup> *Asahi*, like *Gray*, involved an injured party suing at home, and a defendant component part manufacturer involved in the production of the product, ultimately sold to the plaintiff in the plaintiff’s home state where it injured the plaintiff.<sup>35</sup> In *Asahi* the component was a valve incorporated into a motorcycle tire,<sup>36</sup> while in *Gray* it was a valve incorporated into a hot water heater.<sup>37</sup>

There were additional differences between *Asahi* and *Gray*. In *Asahi* the manufacturer of both the component and the finished product were foreign,<sup>38</sup> while in *Gray*, both parties were domestic.<sup>39</sup> In *Asahi* the component manufacturer was only brought into the case as a third party on a contribution and indemnity claim by the manufacturer and was never sued by the injured party.<sup>40</sup> In *Gray*, both manufacturers were named as defendants.<sup>41</sup>

But on the question of whether the component had entered the state in the “stream of commerce,” the two cases were indistinguishable. In both cases, the product found its way into the hands of the consumer as the result of a predictable resale in the forum state and thus an effort by the

30. *World-Wide Volkswagen*, 444 U.S. at 298 (citing *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961)).

31. *Gray*, 176 N.E.2d at 766.

32. See, e.g., Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 126 n.151 (1983).

33. 480 U.S. 102 (1987).

34. *World-Wide Volkswagen*, 444 U.S. at 298 (citing *Gray*, 176 N.E. 2d at 761).

35. *Asahi*, 480 U.S. at 105–06.

36. *Id.* at 106.

37. *Gray*, 176 N.E.2d at 762.

38. *Asahi*, 480 U.S. at 106.

39. *Gray*, 176 N.E.2d at 764 (referring to the Ohio manufacture of the valve).

40. *Asahi*, 480 U.S. at 106.

41. *Gray*, 176 N.E. 2d at 761.

manufacturer to take advantage of the forum state's market. It is true that in *Asahi* California accounted for only about one percent of the market for its valves, but as Justice Stevens pointed out, that accounted for roughly 100,000 valves—hardly a trivial number.<sup>42</sup>

Despite the unanimous result, the *Asahi* Court split four to four on the appropriate definition of “stream of commerce.” Justice O'Connor's plurality opinion held that mere resale of the product in the forum was not enough to satisfy the stream-of-commerce test; the product's market contact must be accompanied by other indicia of an effort to serve the market, such as customer support or a special design of the product for that market.<sup>43</sup> Justice Brennan's concurrence took a competing view that predictable resale of products in the forum should suffice to satisfy the stream-of-commerce test, leaning heavily on *World-Wide*'s citation of *Gray*.<sup>44</sup> Justice Stevens would not commit to either test, but opined that Justice O'Connor had misapplied her own standard; in Stevens's view, 100,000 valves could not reach California without the sort of intentional efforts her opinion described.<sup>45</sup>

The big news from *Asahi* was that the Court found unanimously that California lacked jurisdiction. Eight of the justices concluded that jurisdiction was “unreasonable” on general grounds, regardless of minimum contacts.<sup>46</sup> Justice Scalia did not join this rationale and rested his “no jurisdiction” vote solely on Justice O'Connor's analysis as to the stream of commerce.<sup>47</sup> Picking up on a five-factor test, which first appeared in *World-Wide*, the Court evaluated considerations such as the burdens on the parties and the forum state's interest in hearing the dispute; both O'Connor and Brennan agreed that *Asahi* was an unusual case that the California courts ought not referee.<sup>48</sup> One of the factors mentioned by O'Connor was that *Asahi*, as a foreign defendant, was subject to a special burden as a litigant in U.S. court.<sup>49</sup> While some lower courts have since recognized this factor in denying jurisdiction, it remains debatable whether foreign defendants should be advantaged solely because they are foreign.<sup>50</sup>

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42. *Asahi*, 480 U.S. at 122 (Stevens, J., concurring in part and concurring in the judgment).

43. *Id.* at 112 (O'Connor, J., plurality opinion).

44. *See id.* at 120 (Brennan, J., concurring in part and concurring in the judgment).

45. *See id.* at 122 (Stevens, J., concurring in part and concurring in the judgment).

46. *Id.* at 114 (O'Connor, J., plurality opinion); *id.* at 121 (Brennan, J., concurring in part and concurring in the judgment).

47. *Id.* at 104 (Court syllabus).

48. *See supra* notes 44–45 and accompanying text.

49. *Asahi*, 480 U.S. at 114 (O'Connor, J., plurality opinion).

50. PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 420 (5th ed. 2010) (hereinafter HAY, BORCHERS & SYMEONIDES).

Probably the most important aspect of *Asahi* was its unusual posture by the time it reached the Supreme Court. The plaintiffs in the underlying tort case never sued Asahi, but sued only the Taiwanese manufacturer of the tube, and the parties had settled by the time the case reached the Supreme Court.<sup>51</sup> As a result, all that remained of the case was a battle between two foreign parties as to the fraction each owed of the settlement. As a result, California and the tort plaintiffs were disinterested in the matter,<sup>52</sup> all of which was enough to release the remaining parties to another forum, presumably in Japan or Taiwan.

After *Asahi*, predictable confusion reigned among lower courts as to which version of the stream-of-commerce test to apply—Justice O’Connor’s or Justice Brennan’s.<sup>53</sup> Courts divided as to which to follow, and others hedged their bets by concluding that the result would be the same under either test.<sup>54</sup> When the U.S. Supreme Court accepted review in *J. McIntyre Machinery, Ltd. v. Nicastro*,<sup>55</sup> it seemed likely to resolve the ongoing confusion over the stream-of-commerce test. The Court did no such thing.

The facts in *J. McIntyre* were straightforward. The defendant was an English manufacturer (hereinafter “J. McIntyre”) of scrap metal recycling machines.<sup>56</sup> One such machine was sold to a New Jersey company through J. McIntyre’s nominally independent—though similarly named—Ohio-based distributor.<sup>57</sup> Mr. Nicastro, a resident of New Jersey had four fingers cut off of one hand by a machine while on the job with J. McIntyre.<sup>58</sup> Claiming that the machine was unreasonably unsafe, Nicastro brought suit against the English manufacturer, and the New Jersey Supreme Court upheld jurisdiction, expressly following Brennan’s version of the stream-of-commerce test.<sup>59</sup>

The U.S. Supreme Court once again failed to generate a majority opinion. Justice Kennedy’s four-vote plurality opinion questioned the utility of the stream-of-commerce metaphor.<sup>60</sup> But to the extent that he had a preference as between the O’Connor and Brennan versions, it clearly was for O’Connor’s as the plurality concluded that the failure of the defendant to

51. *Asahi*, 480 U.S. at 114.

52. *Id.*

53. HAY, BORCHERS & SYMEONIDES, *supra* note 50, at 419.

54. *Id.*

55. 564 U.S. 873 (2011).

56. *Id.* at 878.

57. *Id.*

58. *Id.* at 894 (Ginsburg, J., dissenting).

59. *Nicastro v. McIntyre Mach. Am.*, 987 A.2d 575, 589 (N.J. 2008) (*rev’d J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873 (2011)).

60. *Nicastro*, 564 U.S. at 881.

specifically target the state of New Jersey was fatal to the plaintiff's attempt to exercise personal jurisdiction.<sup>61</sup> Making the plurality opinion even more opaque, it attempted to resurrect *World-Wide*'s sovereignty theme,<sup>62</sup> which the Court appeared to discard shortly after *World-Wide* was decided.<sup>63</sup>

Justice Ginsburg's dissent hit the plurality right between the eyes. She pointed out that the English defendant was trying to serve the entire U.S. market, so the notion that jurisdiction should depend on targeting any particular U.S. state was faintly absurd.<sup>64</sup> She pointed out that New Jersey led the nation in scrap metal recycling, so the sale of a machine in New Jersey hardly could come as a shock to the defendant.<sup>65</sup> As to the sovereignty rationale, Ginsburg noted that there was no competition between the states for jurisdiction as there arguably was in *World-Wide*.<sup>66</sup> Moreover, the English company could hardly be surprised by an assertion of jurisdiction, as the Brussels I Regulation—which governs jurisdiction in the European Union—allows for tort jurisdiction at the place of the plaintiff's injury.<sup>67</sup> The bitter irony for Mr. Nicastro is that if New Jersey were part of the European Union, as opposed to the United States, his case would likely have proceeded.

If the whole dreary mess that was the *J. McIntyre* case has a hero, it is Justice Breyer. Although this is purely speculation, I think it likely that he would have preferred to sign Justice Ginsburg's dissent. Instead, he wrote a concurrence in the judgment that he persuaded Justice Alito to sign.<sup>68</sup> Justice Breyer's concurrence deprived the lead opinion of a fifth vote and ultimately became the controlling opinion, as the narrowest opinion capable of sustaining the result.<sup>69</sup>

Narrow indeed was Justice Breyer's opinion. He emphasized that the record established that only one of the defendant's machines had ever been sold in New Jersey.<sup>70</sup> As such, Breyer reasoned that a claim for jurisdiction would fail under either of the tests proposed by Brennan and O'Connor.<sup>71</sup> In

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61. *Id.* at 877.

62. *Id.* at 874.

63. *See* *Ins. Co. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 702 n.10 (1982) (distinguishing *World-Wide Volkswagen*).

64. *Nicastro*, 564 U.S. at 893–94 (Ginsburg, J., dissenting).

65. *Id.* at 905.

66. *Id.* at 898 (citing *World-Wide Volkswagen Corp.* 444 U.S. at 297 (1980)).

67. *Id.* at 909 (referring to Brussels Convention and Brussels I Regulation).

68. *Id.* at 887 (Breyer, J., concurring in the judgment).

69. Patrick J. Borchers, *The Twilight of the Minimum Contacts Test*, 11 SETON HALL CIR. REV. 1, 5 (2014) (hereinafter Borchers, *Twilight*).

70. *Id.* at 5 (discussing Justice Breyer's opinion).

71. *Id.*



Breyer’s words, a single drop could not fill the streambed of commerce. He also reserved for another day the question of jurisdiction if the product were marketed through a large virtual reseller such as Amazon.com.<sup>72</sup>

It is difficult to think of the lack of a majority opinion—as so often happens in U.S. Supreme Court conflicts decisions<sup>73</sup>—as good news. However, as I and others have pointed out, had *J. McIntyre*’s plurality opinion been a majority opinion, it would have rolled back the jurisdictional clock many decades.<sup>74</sup> Still there was bad news aplenty. First, Mr. Nicastro was denied any rational forum, and future, similarly-situated plaintiffs will likely face the same result. Second, the split as to the appropriate stream-of-commerce test remains no closer to resolution. Third, the status of the reasonableness test deployed in *Asahi* remains a mystery; it was not mentioned in any of the *J. McIntyre* opinions. In a later general jurisdiction case,<sup>75</sup> Justice Sotomayor, in concurrence, indicated she would have used the *Asahi* test to deny jurisdiction,<sup>76</sup> but Justice Ginsburg’s majority opinion opined that it only applied in specific jurisdiction cases.<sup>77</sup> If this is so, it is hard to explain why the test made no appearance in *J. McIntyre*, particularly in Justice Ginsburg’s dissent.

## 2. Intentional Torts

Until recently, the U.S. Supreme Court’s jurisdictional jurisprudence in intentional torts seemed to make more sense than the stream-of-commerce cases. In companion multistate defamation cases, the Court ruled that plaintiffs could obtain jurisdiction in any place in which the offending publication had substantial circulation.

The less-remembered of the two cases is *Keeton v. Hustler Magazine, Inc.*<sup>78</sup> In that case, the plaintiff alleged that *Hustler* magazine libeled her<sup>79</sup> and she filed suit in a New Hampshire state court. The plaintiff’s choice of jurisdiction amounted to unabashed forum shopping. Although she had no connection to New Hampshire,<sup>80</sup> the state was apparently the only forum in which the statute of limitations had not run. Nevertheless, the Supreme Court

72. *Nicastro*, 564 U.S. at 890 (Breyer, J., concurring in the judgment).

73. *See generally, e.g.*, *Burnham v. Super. Ct.*, 495 U.S. 604 (1990); *Asahi*, 480 U.S. 102; *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

74. *See, e.g.*, Borchers, *Twilight*, *supra* note 69, at 4.

75. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

76. *Id.* at 765 (Sotomayor, J., concurring in the judgment).

77. *Id.* at 762 n.20.

78. 465 U.S. 770 (1984).

79. *Id.* at 772.

80. *Id.* at 779.

ruled that the circulation of approximately 15,000 of the defendant's magazines in New Hampshire established minimum contacts.<sup>81</sup>

The better-remembered case is *Calder v. Jones*.<sup>82</sup> In that case, the California-domiciled actress Shirley Jones alleged that a *National Enquirer* article libeled her.<sup>83</sup> Apparently, nobody disputed that the *National Enquirer*, with a massive California circulation, was subject to jurisdiction in Jones's suit in California.<sup>84</sup> The more challenging issue was whether the author and editor of the article in question—both with limited connections to the forum state of California—should be subject to jurisdiction there. The Supreme Court ruled in the affirmative and in so doing launched the *Calder* “effects” test.<sup>85</sup> Under the effects test, the majority reasoned that the predictable effect on Jones's reputation in her home state of California rendered the defendants amenable to jurisdiction there.<sup>86</sup>

In an age of digital communications, lower courts have struggled with the implications of *Calder* and *Keeton*—cases that pre-dated the emergence of “Internet” as a household word.<sup>87</sup> Nowhere has this been truer than in Internet libel.<sup>88</sup> The logic of *Keeton* would appear to require jurisdiction anywhere an allegedly libelous article can be read online; essentially any location with unfiltered Internet access.<sup>89</sup> Kathy Keeton had no connection to—and no reason to file suit in—New Hampshire other than its status as the one state in which the statutory limitation period had not expired.<sup>90</sup> Lower courts, however, have mostly ignored *Keeton* and concentrated on *Calder* and the federal district court case of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*<sup>91</sup> Now nearly two decades old, the *Zippo* test—which focuses on the interactivity of a website—is obsolete, because almost any webpage today falls on the high end of the interactivity scale.<sup>92</sup>

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81. *Id.* at 780.

82. 465 U.S. 783 (1984).

83. *Id.* at 784.

84. *Id.*

85. *Id.* at 789.

86. *Id.*

87. *See generally, e.g.,* United States v. Morris, 928 F.2d 504 (2d Cir. 1991) (in which a Cornell graduate student was charged criminally for launching the first Internet virus (technically a “worm”).

88. Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473 (2004) (hereinafter Borchers, *Internet Libel*).

89. *Id.* at 480.

90. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984).

91. 952 F. Supp. 1119 (W.D. Pa. 1997).

92. *See* Emily Ekland, *Scaling Back Zippo: The Downside to the Zippo Sliding Scale and Proposed Alternatives to its Uses*, 5 ALB. GOV'T L. REV. 380, 384 (2012).

The *Calder* “effects” test, by contrast, is gaining influence as more courts find it attractive in Internet cases.<sup>93</sup> Cases relying on the effects test ask whether the communication or other Internet activity specifically targeted the forum in question, either by discussing persons well-known in the state or mentioning activities taking place in the forum state.<sup>94</sup> While one can perhaps understand the desire to ignore *Keeton* and its implicit allowance of jurisdiction in virtually any state,<sup>95</sup> it has never been overruled. Better devices to avoid obvious forum shopping are venue transfer<sup>96</sup> and *forum non conveniens*.<sup>97</sup>

All of which brings us to the U.S. Supreme Court’s decision in *Walden v. Fiore*.<sup>98</sup> *Walden* is an odd case. The plaintiffs in the underlying suit were two Nevada professional gamblers. On their return from Puerto Rico, they had \$97,000 in cash seized in the Atlanta, Georgia airport by an agent of the federal government who suspected that it might be drug money.<sup>99</sup> The plaintiffs filed a *Bivens*<sup>100</sup> action in a Nevada federal court against the agent on the equivalent of a trespass to chattels theory; it had been several months before the plaintiffs’ seized belongings were returned.<sup>101</sup> The plaintiffs’ most significant allegation was that the federal agent, acting in Georgia, had helped draft a false “probable cause” affidavit to allow forfeiture of the money.<sup>102</sup>

The Ninth Circuit held that there was jurisdiction under *Calder*’s effects test.<sup>103</sup> However, on appeal the U.S. Supreme Court disagreed. In a sentence that will likely be quoted in thousands of briefs, the Court held that the defendant’s “actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections.”<sup>104</sup> The Court appeared to draw a distinction between contacts with state residents and contacts with the state.

93. See, e.g., *Riley v. MoneyMutual, LLC*, 884 N.W.2d 321 (Minn. 2016); *Guffey v. Ostonakulov*, 321 P.3d 971 (Okla. 2014); *Abdouch v. Lopez*, 829 N.W.2d 662 (Neb. 2013); *Snowney v. Harrah’s Entm’t, Inc.*, 112 P.3d 28 (Cal. 2005).

94. See, e.g., *Baldwin v. Fischer-Smith*, 315 S.W.3d 389 (Mo. App. 2010); *Dailey v. Popma*, 191 N.C. App. 64 (2008); *Wagner v. Miskin*, 660 N.W.2d 593 (N.D. 2003); *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002).

95. See Borchers, *Internet Libel*, *supra* note 88, at 465–66.

96. See 28 U.S.C. § 1404.

97. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

98. 134 S. Ct. 1115 (2013).

99. *Id.* at 1119.

100. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

101. *Walden*, 134 S. Ct. at 1120.

102. *Id.*

103. *Fiore v. Walden*, 688 F.3d 558 (9th Cir. 2011), *rev’d* 134 S. Ct. 1115 (2013).

104. *Walden*, 134 S. Ct. at 1125.

But, of course, human activity is more significant when it affects other humans, and residence is as powerful a connection as a person can have with a state.

Perhaps the case was best litigated in Georgia—where the allegedly tortious actions occurred.<sup>105</sup> But that is what *forum non conveniens* and the transfer statutes are for. If the bulk of the evidence is in another forum, dismissal on venue—not jurisdiction—grounds is called for.<sup>106</sup>

### 3. General Jurisdiction

Much has been written about the U.S. Supreme Court's two new general jurisdiction (that is, jurisdiction based upon unrelated contacts or, "all purpose jurisdiction," a term coined by Justice Ginsburg) cases: *Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>107</sup> and *Daimler AG v. Bauman*.<sup>108</sup> Both cases were simple in the sense that neither involved a connection to the forum that would sustain jurisdiction under any mainstream theory. But both cases, per opinions by Justice Ginsburg, made clear that the scope of general jurisdiction is considerably smaller than previously thought.<sup>109</sup>

*International Shoe* had stated previously that "continuous and systematic" contacts unrelated to a given cause of action may be sufficient to support jurisdiction.<sup>110</sup> Moreover, *International Shoe* implied that the facts in that case—in which the contacts were about \$30,000 worth of shoe sales in the forum—constituted "continuous and systematic" activity in the forum.<sup>111</sup>

Beyond that, the U.S. Supreme Court spoke only twice about general jurisdiction until *Goodyear* was decided in 2011. The Court regularly cites *Perkins v. Benguet Mining Co.*<sup>112</sup> for the proposition that a forum state has general jurisdiction over a corporation if its principal place of business is in the forum state;<sup>113</sup> though as I have argued elsewhere, the case is not really so neat and clean.<sup>114</sup> In the 1980's, the Court held in another case that four million dollars worth of unrelated purchases in the forum state did not sustain jurisdiction over a foreign corporation.<sup>115</sup> Thus, the high Court's "guidance"

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105. *Id.* at 1119.

106. *See generally, e.g.,* *Gilbert v. Gulf Oil*, 330 U.S. 501 (1947).

107. 564 U.S. 915 (2011).

108. 134 S. Ct. 746 (2014).

109. *See Goodyear*, 564 U.S. at 920; *see also Daimler*, 134 S. Ct. at 751.

110. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

111. *Id.* at 320.

112. 342 U.S. 437 (1952).

113. *See, e.g., Goodyear*, 564 U.S. at 928.

114. *Borchers, Twilight, supra* note 69, at 6 n.42.

115. *See Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408 (1984).

to lower courts was that maintaining corporate headquarters in the forum state suffices for general jurisdiction, but unrelated purchases do not; in between those poles, do your best.

With such faint path markers, it is hardly surprising that lower courts varied widely in setting a threshold for sufficient contacts to establish general jurisdiction.<sup>116</sup> The *Goodyear* case involved the failure of a tire manufactured by a subsidiary of the U.S. tire company, which allegedly caused an accident in Paris that took the lives of two North Carolina boys.<sup>117</sup> Their survivors brought suit in North Carolina state court. The North Carolina courts upheld jurisdiction in a muddled opinion by the North Carolina Court of Appeals, which confused the specific jurisdiction “stream of commerce” doctrine with general jurisdiction concepts.<sup>118</sup>

Unsurprisingly, a unanimous U.S. Supreme Court held that there was no jurisdiction. But what was a bit surprising is that the Court attempted to set forth a test for general jurisdiction over corporations. Analogizing to an individual’s domicile, the Court ruled that the corporation must be “at home,” and identified a corporation’s principal place of business and state of incorporation as being paradigmatic examples of “home.”<sup>119</sup> Elsewhere in the opinion, the Court added the qualifier “essentially” to the “at home” test.<sup>120</sup>

Considerable debate took place after *Goodyear* as to whether corporate general jurisdiction could ever be exercised outside of the states of a corporation’s principal place of business and incorporation.<sup>121</sup> But this debate seems settled beyond rational controversy by *Daimler*.<sup>122</sup> In that case, a unanimous Court (with Justice Sotomayor concurring only in the judgment) accepted as truth a set of remarkable propositions. The case was brought under the Alien Tort Statute<sup>123</sup> alleging that Daimler AG (the parent corporation for the makers of Chrysler and Mercedes-Benz car models) collaborated with the Argentinian government in the “Dirty War” of the late 1970’s and early 1980’s ultimately to harm the plaintiffs and their

116. HAY, BORCHERS & SYMEONIDES, *supra* note 50, at 411.

117. *Goodyear*, 564 U.S. at 918.

118. *Brown v. Meter*, 681 S.E.2d 382 (N.C. App. 2009), *rev’d* *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

119. *Goodyear*, 564 U.S. at 924.

120. *Id.* at 919.

121. *See generally, e.g.,* Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999 (2012).

122. *See Daimler* 134 S. Ct. at 762 n.19 (2014) (purporting not to “foreclose the possibility that in an exceptional case” general jurisdiction may exist beyond a corporation’s principal place of business and state of incorporation).

123. 28 U.S.C. § 1350.

families.<sup>124</sup> First, the Court bypassed the obvious fact that claims under the Alien Tort Statute had been held to apply only to torts committed in the United States; thus no claim had been stated.<sup>125</sup> Then the Court credited the plaintiffs' assertion that Daimler's indirect subsidiary, Mercedes Benz USA ("MBUSA"), should be treated as Daimler's agent for jurisdictional purposes; thus attributing its contacts with the forum state of California to Daimler.<sup>126</sup> With no whiff of a suggestion that Daimler had ignored corporate formalities or that its indirect subsidiary was under-capitalized, the Court was skeptical of the plaintiffs' position but accepted it *arguendo*.<sup>127</sup>

The Supreme Court wanted to make a point about general jurisdiction. MBUSA had considerable contacts with California because a substantial fraction of its sales took place there<sup>128</sup> and it had showrooms and offices aplenty in the forum state.<sup>129</sup> But the problem, said the Court per Justice Ginsburg, was that even attributing MBUSA's contacts to Daimler, the contacts were nowhere near sufficient to make California Daimler's "home."<sup>130</sup>

A perplexed Justice Sotomayor concurred only in the judgment.<sup>131</sup> She recounted MBUSA's extensive contacts with California and noted the majority's willingness to attribute them to Daimler.<sup>132</sup> But, as she noted, the majority held that Daimler's far-flung operations kept California from being its home, no matter how substantial its California operations might have been in an absolute sense.<sup>133</sup> As Justice Sotomayor stated: "The problem, the Court says, is not that Daimler's contacts with California are too few, but that its contacts with other forums are too many."<sup>134</sup>

It is hard to resist the force of Justice Sotomayor's critique. If one were drawing up a jurisdictional statute, it might make sense to limit jurisdiction based upon unrelated contacts to a corporation's home, as does the Brussels I Regulation. But if one returns to the basic fairness rationale of *International Shoe*, it's hard to fathom how the presence of contacts in other forums makes

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124. *Daimler*, 134 S. Ct. at 752.

125. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 U.S. 1659, 1669 (2013) (holding that the Alien Tort Claims Act presumptively lacks extraterritorial application).

126. *Daimler*, 134 S. Ct. at 751.

127. *Id.* at 752.

128. *Id.*

129. *Id.* at 764.

130. *Id.* at 760.

131. *Id.* at 763.

132. *Id.*

133. *Id.* at 764.

134. *Id.*

it any more or less difficult to defend in a forum with which the defendant has considerable contacts.<sup>135</sup>

So in one sense, tort conflicts have been internationalized, albeit not in a way I consider useful or just. Every time the Court has been asked to assert jurisdiction over a foreign defendant—in *Asahi*, *Helicopteros*, *Goodyear*, *J. McIntyre* and *Daimler*—it has refused. While this does not amount to a rule that international defendants are immune from long-arm jurisdiction, the Court’s trend is hard to ignore.

## B. Contracts

The minimum contacts test is of little practical relevance with regard to forum choice in contract matters. In the only two contract jurisdiction cases to reach the Supreme Court since *International Shoe—McGee v. International Life Insurance Co.*<sup>136</sup> and *Burger King Corp. v. Rudzewicz*<sup>137</sup>—the Court has held that a plaintiff who is a party to the contract at issue may sue in the plaintiff’s home state.<sup>138</sup> The only real news out of these cases is that the Supreme Court appeared uninterested in protecting the weaker party to the transaction, as do many E.U. regulations. Although the Court in *McGee* protected the weaker party, an insurance policyholder, the Court in *Burger King* sided with the giant franchisor over one of its franchisees.

All of this is of diminishing relevance. In *Carnival Cruise Lines v. Shute*<sup>139</sup> the Supreme Court enforced against a cruise passenger an exclusive choice-of-forum clause on the back of a ticket.<sup>140</sup> The only permissible forum was Florida (the cruise line’s base of operations), even though the plaintiffs were from Washington state and the cruise departed out of California.<sup>141</sup> Although *Carnival* was an admiralty case and thus not binding on state courts, the vast majority of state courts have followed it.<sup>142</sup>

Of more importance, however, is a series of pro-arbitration rulings from the Supreme Court starting with *AT&T v. Concepcion*.<sup>143</sup> In *Concepcion*, the Court kicked off a series of opinions ruling that arbitration clauses in consumer contracts are enforceable, making any practical relief in small claims matters practically unattainable because of the inability to stage a

135. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

136. 355 U.S. 220 (1957).

137. 471 U.S. 462 (1985).

138. *Burger King*, 471 U.S. at 478–80; *McGee*, 355 U.S. at 223.

139. 499 U.S. 585 (1991).

140. *Id.* at 588–89.

141. *Id.* at 594–95.

142. HAY, BORCHERS & SYMEONIDES, *supra* note 50, at 544.

143. 563 U.S. 333 (2011).

class action suit or class-wide arbitration.<sup>144</sup> A study by the Consumer Financial Protection Bureau found in 2015 that over half of all credit card debt is covered by arbitration agreements;<sup>145</sup> this figure will only increase as businesses recognize the advantage such agreements give them, and only legislative or regulatory action will stand capable of stemming the tide.

Of course, forum-selection clauses, arbitration clauses and choice-of-law clauses have their place, particularly in business-to-business transactions. In *The Bremen v. Zapata Offshore Co.*,<sup>146</sup> the Supreme Court upheld a choice-of-forum clause between a United States company and a German company that selected the English Courts in an admiralty dispute. Because of widespread acceptance of the New York Convention, arbitration awards in business disputes are considerably easier to enforce than are U.S. court judgments.<sup>147</sup>

The Second Preliminary Draft of the *Third Restatement* does not yet include any draft contract rules. The only black letter rule of relevance on choice of law is Section 1.04, which states that “it remains possible that factors in a particular international case will call for a result different from that which would be reached in an interstate case.”<sup>148</sup> The commentary notes correctly that, for the most part, courts and commentators have not distinguished between interstate and international cases, though it notes a few counter-examples.

The reality is that contract conflicts are about as internationalized in the United States as they are likely to get. The widespread enforcement of arbitration, choice-of-forum and choice-of-law clauses and the United States being a signatory to the major arbitration conventions has made the law of contracts conflicts relatively international by modest United States standards. Of course, there may be good policy reasons for adopting some international concepts such as protection of the weaker party, but as illustrated by the failed effort to import a mild consumer preference into the Uniform Commercial Code, the United States has gone as far as it’s likely to go in the near future. It seems unlikely that anything with a fair claim to being a Restatement can do more.

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144. Rachael Kent & Marik String, *Availability of Class Arbitration Under US Law*, 18 ICCA CONGRESS SERIES 853, 856 (2015).

145. CONSUMER FINANCIAL PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS 2015, at 9, <http://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015/>.

146. 407 U.S. 1 (1972).

147. W. Mark C. Weidemaier, *Disputing Boilerplate*, 82 TEMP. L. REV. 1, 11, n.60 (2009).

148. AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) CONFLICT OF LAWS § 1.04 (Prelim. Draft No. 2, 2016) [hereinafter SECOND PRELIM. DRAFT].



## II. CHOICE OF LAW

Here I confine myself mostly to tort choice-of-law concepts. As discussed above, the Second Preliminary Draft of the *Third Restatement* does not yet include contract choice-of-law provisions; in any event, contract choice of law has been taken over to a large extent by the expansion (perhaps over-expansion) of party autonomy.

Tort choice of law is a different ball of wax. Although the Second Preliminary Draft acknowledges in Section 6.08 the possibility of a post-tort agreement to the applicable law (which may happen occasionally but surely rarely except by default in cases where neither party raises the choice-of-law issue) and contract-related torts covered by expansive choice-of-law clauses,<sup>149</sup> party autonomy plays a much-reduced role in torts.

The Second Preliminary Draft of the *Third Restatement*, however, is appropriately international in several respects. First, it is a vast improvement from the *Second Restatement* in terms of predictability. One of the reasons that the American Conflicts Revolution never fully took hold outside the United States—including and especially in Europe—is that other nations were wary of its free-form analysis and inability to predict results because of the wildly varying nature of what counted as interest.<sup>150</sup> The Second Preliminary Draft seeks to remedy this by recognizing the difference between conduct-regulating and loss-allocating rules,<sup>151</sup> as well as laying down some reasonably concrete rules<sup>152</sup> without the endless qualification of the *Second Restatement* that Section 6 could override its presumptive rules.

The Second Preliminary Draft also moves toward international harmonization and predictability by choosing the law of the place of the injury in most cases involving a conflict of loss-allocating tort rules, unless the parties have a common geographical location such as a shared domicile or principal place of business.<sup>153</sup> This “common domicile” rule is one of the few unquestioned improvements generated by the American conflicts revolution and is widely shared around the world.<sup>154</sup>

149. SECOND PRELIM. DRAFT, *supra* note 148, § 6.08(2).

150. *See, e.g.*, Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TULANE L. REV. 1607, 1610–11 (2008).

151. SECOND PRELIM. DRAFT, *supra* note 148, §§ 6.01, 6.04.

152. *See* SECOND PRELIM. DRAFT, *supra* note 148, §§ 6.02–6.04.

153. *Id.* §§ 6.02, 6.03.

154. *See, e.g.*, Commission Regulation 864/2007, art. 4(2) O.J. (L 199) (EC) (common habitual residence); *Erie v. Edwards Coach Lines, Inc.*, 952 N.E.2d 1033, 1038 (N.Y. 2011) (common domicile); Patrick J. Borchers, *Nebraska Choice of Law: A Synthesis*, 39 CREIGHTON L. REV. 1, 6–7 (2005) [hereinafter Borchers, *Synthesis*] (common domicile or principal place of business).

From the standpoint of interactions between persons (including businesses) in the United States with those outside the United States, it is difficult to imagine a more valuable consideration than predictability of result. Litigation in the United States is expensive for many reasons. In general, fees are not shifted to the losing party.<sup>155</sup> Uncertainty of the result as to a choice-of-law issue is a perpetual “joker in the deck” that generates appeals and frustrates settlements in lawsuits.<sup>156</sup> Extensive pre-trial discovery and scads of other factors add to the list. Although from the outside the entire United States may appear a tort plaintiff’s nirvana, states vary considerably in their treatment of plaintiffs and defendants. For example, my home state of Nebraska does not allow punitive damages,<sup>157</sup> and jury verdicts are low by national standards.<sup>158</sup> There is a huge difference between trying a case tried in Omaha under Nebraska law and in Los Angeles under California law.<sup>159</sup>

The current draft (and its predictability) could be improved in several ways. I am not in favor of Section 6.03(2). In cases involving loss-allocating rules in which the conduct and subsequent injury take place in different states (as is common in products liability cases), the draft section defaults to the law of the state of the conduct.<sup>160</sup> This default choice can be rebutted only if the plaintiff is affiliated with the injury state, the injury in the state is “objectively foreseeable,” and the plaintiff requests application of the injury state’s law. I can see nothing in the interests of predictability or fairness served by such a rule. Moreover, I am unable to locate any substantial support for such a rule in the case law. So to the extent that this is to be a *restatement*, I am unclear as to what is being restated.

Several practical problems are also apparent. The most fundamental is that because the law of the state of the conduct will often apply in products cases, states may engage in a race to the bottom with regard to product liability law in an effort to attract manufacturing jobs. A state that completely abolished liability for defective products would surely become a prime

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155. See generally *Arcambel v. Wiseman*, 3 U.S. 306 (1796) (counsel fees are not allowed as damages).

156. See Friedrich K. Juenger, *The American Law of General Jurisdiction*, 1 U. CHI. LEGAL F. 141, 169 (2001).

157. See, e.g., *Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975) (“The defendants further alleged the judgments were repugnant to the laws of Nebraska because they included punitive damages in violation of Article I, section 3, of the Constitution of Nebraska.”).

158. U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, 2015 LAWSUIT CLIMATE SURVEY 1 (2015), [http://www.instituteforlegalreform.com/uploads/sites/1/ILR15077-HarrisReport\\_BF2.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/ILR15077-HarrisReport_BF2.pdf) (concluding Nebraska has third best liability regime for business defendants).

159. *Id.* (ranking California 47th).

160. SECOND PRELIM. DRAFT, *supra* note 148, § 6.03(2).

location for a company relocating its manufacturing plants and design headquarters. I am also leery of the phrase “objectively foreseeable,” though I know that it is used in the Oregon conflicts codification.<sup>161</sup> I am unsure what the word “objectively” does to modify foreseeability, itself an objective concept. If any modifier should be used, I would suggest “reasonably.” Moreover, I worry that courts will take their cue from the Supreme Court’s plurality opinion in *J. McIntyre*<sup>162</sup> and apply absurdly cramped notions of what constitutes foreseeability, leading courts to require “targeting” of a state to fulfill this provision.

Moreover, I do not see why it should make a difference whether a plaintiff is geographically affiliated with the injury state. Assuming the issue is one of loss allocation, one can imagine a car manufactured in a haven state with very restrictive laws on products liability. The plaintiff purchases the car in Wisconsin (which has reasonable laws on products liability) and drives into Illinois (another state with reasonable laws on products liability but with which the plaintiff has no other connection) and shortly after crossing into Illinois is involved in an accident in which the plaintiff is badly burned by a fuel pump with a manufacturing defect.<sup>163</sup> Had the plaintiff been involved in a collision in Wisconsin, she likely could have received the benefit of Wisconsin law. But by having crossed into Illinois, she is now relegated to the haven state’s product liability law. Why? This situation brings to mind the Supreme Court’s willful blindness in *World-Wide Volkswagen* to the fact that cars (and many other products) are intended to be mobile. To give the manufacturer a choice-of-law bonus for having its product used as intended seems random and unfair. I suggest that the law of the injury state, not the conduct state, become the default rule; this will avoid a state-by-state race-to-the-bottom problem.

Section 6.03 could also stand clarification regarding dépeçage. This issue arose in *Edwards v. Erie Coach Lines Co.*,<sup>164</sup> which involved many parties related to a horrific vehicle accident in New York. A majority on the New York Court of Appeals took, in my view, the appropriate route of lining up the various conflicts party-by-party and applying the appropriate law.<sup>165</sup> The dissent and the lower New York courts proposed taking an “overall” approach to the case and applying one law to the entire controversy.<sup>166</sup> Had the dissenting view prevailed, there would be few modern cases falling into

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161. See OR. REV. STAT. § 15.440(3)(c)(A).

162. *J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873 (2011).

163. See, e.g., *Baker v. Gen. Motors Corp.*, 522 U.S. 222 (1998).

164. 952 N.E.2d 1033 (N.Y. 2011).

165. *Id.* at 1042.

166. *Id.*

the “common affiliation” definition given the common complexity of modern tort litigation. Thus, I argue Section 6.03 should in its black letter (at a minimum its commentary) side with the *Edwards* majority.

To return to the conduct-regulation versus loss-allocating distinction, the divide has been recognized in U.S. codifications,<sup>167</sup> European regulations,<sup>168</sup> U.S. case law,<sup>169</sup> and by various commentators.<sup>170</sup> The Second Preliminary Draft of the *Third Restatement* puts more into the conduct-regulating basket than I think belongs there. For example, it places “strict liability” and “duty owed to the plaintiff” in the conduct-regulating basket,<sup>171</sup> but “guest statutes” in the loss-allocating basket<sup>172</sup> even though the few remaining enforceable guest statutes simply alter the duty of care owed to the guest-plaintiff.<sup>173</sup> So I am puzzled as to why rules imposing a duty toward plaintiffs should be treated as conduct-regulating in one setting but not another. Rules that are meant to (and likely do) have a direct impact on primary conduct (say speed limits) are obviously conduct-regulating.<sup>174</sup> So, too, in my view are detailed safety standards<sup>175</sup> and punitive damages.<sup>176</sup> Beyond that, I would not go far in categorizing specific rules as conduct-regulating. However, assuming that the rule is truly conduct-regulating, the Second Preliminary Draft makes the right choice in choosing the law of the place of the conduct.<sup>177</sup>

I am particularly concerned regarding strict liability’s inclusion in the conduct-regulating basket. To return to my fuel pump hypothetical, suppose a haven state imposes strict products liability but limits recovery to \$25,000 per incident all in an effort to draw manufacturing and product design jobs to its state. If the car were designed and manufactured in this haven state, liability would be confined to \$25,000 per incident, regardless of where the car were bought and used, because the Second Preliminary Draft chooses the state of manufacture and design as the site of the relevant conduct.

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167. See, e.g., LA. CIV. CODE art. 3543.

168. See Commission Regulation 864/2007, art. 17, O.J. (L 199) (EC) (referring to rules of conduct and safety in non-contractual obligations).

169. See, e.g., *Padula v. Lilarn Prop. Corp.*, 64 N.E.2d 1001 (N.Y. 1994).

170. See generally, e.g., Borchers, *Synthesis*, *supra* note 154, at 7; John T. Cross, *The Conduct-Regulating Exception in Modern United States Choice of Law*, 36 CREIGHTON L. REV. 425 (2003).

171. SECOND PRELIM. DRAFT, *supra* note 148, § 6.04.

172. *Id.* § 6.01.

173. See, e.g., ALA. CODE § 32-1-2 (requiring a showing of “willful or wanton misconduct” by host in order for guest to recover).

174. See, e.g., *Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963).

175. See, e.g., *Padula v. Lilarn Prop. Corp.*, 644 N.E.2d 1001 (N.Y. 1994).

176. Patrick J. Borchers, *Punitive Damages, Forum Shopping and the Conflict of Laws*, 70 LA. L. REV. 529, 545 (2010).

177. SECOND PRELIM. DRAFT, *supra* note 148, §§ 6.04, 6.05.

Conduct-regulating rules should include only those that have a direct impact on primary behavior, not secondary behavior such as buying insurance. Acts that require intentional (or at least reckless) disregard for legal rules belong in the conduct-regulating basket. But rules such as negligence and strict liability, which operate in the background, do not. I suspect most adults have an innate sense that they should behave carefully, but recognize that they do not always live up to this standard; this is why we buy insurance (and often are required to do so). In general, tort rules that do not require recklessly or intentionally tortious conduct belong in the loss-allocating basket.

In an effort to promote internationalization, the Second Tentative Draft, though not embracing “habitual residence” as a full substitute for domicile, bravely attempts to define this notoriously malleable concept.<sup>178</sup> From the standpoint of internationalization, this is an important development because it appears now in so many international conventions to which the United States is a party.<sup>179</sup>

I suppose no conflicts codification or restatement would be complete without a “safety valve.” One of my criticisms of the *Second Restatement* is that it leads with giant safety valves in Sections 6, 144 and 188, thus obscuring the view of its presumptive rules.<sup>180</sup> Recently, some courts have recognized my point and began looking to the *Second Restatement’s* presumptive rules rather than trying to work every case out anew from an unwieldy list of considerations often pointing in different directions.<sup>181</sup>

At least in the tort section, the safety valve is in the right place—at the end rather than the beginning.<sup>182</sup> But it needs some work. It states that it applies to tort “choice-of-law questions not explicitly provided for in this Restatement . . . .”<sup>183</sup> However, presumably the universe of tort issues is entirely occupied by loss-allocating and conduct-regulating rules. I fear that courts will read “explicitly” to mean any tort issue not mentioned in the non-exhaustive lists of loss-allocating and conduct-regulating rules. A better approach, and one that would more appropriately internationalizes the *Third Restatement*, would be to say that application of the tort provisions could be overridden if they would lead to “a manifestly unfair result that a party could

178. *Id.* § 2.04.

179. *See, e.g.,* *Lozano v. Montoya Alvarez*, 134 U.S. 1224, 1228 (2014) (applying “habitual residence” test under The Hague Convention on the Civil Aspects of International Child Abduction).

180. *See generally* Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232 (1997).

181. *See, e.g.,* *P.V. v. Camp Jaycee*, 962 A.2d 453, 459 (N.J. 2008); *Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893, 900 (Ill. 2007).

182. SECOND PRELIM. DRAFT, *supra* note 148, § 6.07.

183. *Id.*

not have foreseen;” thus giving courts latitude to depart from the principles set forth in the tort section, particularly in international cases. In the commentary and the illustrations, it could be made clear that this is more likely to occur in international cases in which a party has little reason to think that the law of a U.S. state will apply and it would work a manifest injustice on that party.

### CONCLUSION

My optimism is buoyed regarding the future of our discipline here in the United States. Distinguished judges<sup>184</sup> and Supreme Court Justices<sup>185</sup> have chastised American conflicts academics for having made the discipline incomprehensible. Fair enough. I am an accessory, as early in my career I focused heavily on the matter of individual justice to the parties and little on the systemic value of predictability, both in terms of judicial stability and the ability of parties to settle cases on reasonable terms. In mitigation, I plead that I defended the Louisiana codification largely on the ground that it had consolidated the gains of the American Conflicts Revolution (particularly the common domicile rule) while providing a common vocabulary that would allow trial courts to reach results that appellate courts would affirm. My empirical work showed that the Louisiana codification achieved this result by drastically reducing the reversal rate of trial courts.<sup>186</sup> I am now a convert—the *Restatement* needs reasonable predictability.

I do not believe, however, that predictability is or should be the only goal of conflicts law. Choosing forum law in every case would be perfectly predictable, but would reward forum shopping and could burden a party (likely the defendant) with the application of an unforeseeable rule. However, we have before us the chance of a generation to restate something. When comparativists such as Professor Reimann complain justifiably about the *Second Restatement*'s lack of internationalization, they appear to offer two major points; one express and the other half-buried. The express point was the undisputed unpredictability of the result generated by the *Second*

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184. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 430 (1990) (noting “the destruction of certainty in the field of conflict of laws as a result of the replacement of the mechanical common law rules by ‘interest analysis’”).

185. *See, e.g., BMW v. Gore*, 517 U.S. 559, 602 (1996) (Scalia, J., dissenting) (“one is faced with the prospect that federal punitive damages law (the new field created by today’s decision) will be beset by the sort of ‘interest analysis’ that has laid waste the formerly comprehensible field of conflict of laws.”).

186. *See generally* Patrick J. Borchers, *Louisiana’s Conflicts Codification: Some Empirical Observations Regarding Decisional Predictability*, 60 LA. L. REV. 1061 (2000)

*Restatement*, interest analysis and the "mishmash"<sup>187</sup> of modern American decisions. Point taken. A *Third Restatement* has the opportunity to, and likely will, address this matter.

The other, half-buried, point is tort judgments considered exorbitant by foreign parties. Here, the Supreme Court has come to the rescue of foreign parties by consistently refusing to exercise long-arm jurisdiction over them. Realistically, there is little the *Third Restatement* can do on this matter. While the Supreme Court continues in its possibly mistaken<sup>188</sup> view that the Due Process Clause of the Fourteenth Amendment sets physical boundaries on the exercise of U.S. state-court jurisdiction, there is little the drafters of the *Third Restatement* can do short of getting themselves appointed to the Supreme Court. While it is of little comfort to Mr. Nicastro, surely the English manufacturer of the allegedly defective machine can do little to complain. The most certain route to avoiding American courts is not to sell in the American market. With the reward so should come the risk. But in any event, the *Third Restatement* thus far holds promise for major progress.

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187. William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 *MERCER L. REV.* 645, 653 (1983).

188. See Patrick J. Borchers, *From Pennoyer to Burnham and Back Again*, 24 *U.C. DAVIS L. REV.* 19, 43–49 (1990).