CONFLICT OF LAWS: AN ANALYSIS OF NEW *RESTATEMENT* RULE AS APPLIED BY FOURTH CIRCUIT

THE TRADITIONAL approach to conflict of laws problems has been strongly criticized in recent years.[1] In *Lowe's No. Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co.*,[2] the Court of Appeals for the Fourth Circuit, rejecting a traditional choice of law rule, chose to apply a rule of the proposed *Restatement* in reaching its decision. This rule states that the local law of the state having the most significant relationship with the occurrence and with the parties determines their rights and liabilities.[3] The result reached in *Lowe's* suggests a need for a different type of approach in analyzing conflicts problems.

Plaintiff, a North Carolina corporation, applied to defendant, a Pennsylvania corporation, for a 200,000 dollar insurance policy on the life of plaintiff's president. The application was submitted to defendant's home office in Pennsylvania but was not acted upon until five days after its receipt.[4] The defendant then rejected the application for a 200,000 dollar policy, and instead, issued a 50,000 dollar policy. The latter policy was delivered to plaintiff's agent in Washington, who requested that an attempt be made to procure an increase in the amount of coverage. Before any action was taken on this request, the proposed insured died. Plaintiff instituted suit alleging that defendant had been negligent in its failure to act within a reasonable time on the application for the 200,000 dollar policy.

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[1] See COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942); Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1; Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement*, 36 MINN. L. REV. 1 (1951); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215 (1963); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928).

[2] 319 F.2d 469 (4th Cir. 1963).

[3] RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 8, 1963).

[4] The vice-president in charge of underwriting was the only person in the home office who was authorized to approve applications for over $100,000; he left on an out-of-town trip the day before the final part of the multi-part application was received. Trying unsuccessfully for four days to reach him, the underwriting officer in the home office was powerless to act on the application during that period. 319 F.2d at 471.

The district court, bound to apply North Carolina law,[5] held that under state conflicts decisions the traditional rule of *lex loci delictus* would govern.[6] Determining that Pennsylvania was the place of wrong, the court dismissed the suit on the ground that no cause of action existed under Pennsylvania law.[7]

The Court of Appeals, however, held that there were no North Carolina conflicts decisions determining which state's law would govern the merits of the case.[8] Consequently, the court applied a choice of law rule which it considered to be a more flexible approach to the solution of conflicts problems[9]—the "significant relationship"

[5] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[6] 206 F. Supp. 427, 428 (M.D.N.C. 1962). The district court based its decision on Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931). There the court said: "The actionable quality of the defendants' conduct... must be determined by the law of the place where the injury was done...." *Id.* at 576, 158 S.E. at 102.

[7] The court cited Shipley v. Ohio Nat'l Life Ins. Co., 199 F. Supp. 782 (W.D. Pa. 1961); Zayc v. John Hancock Mut. Life Ins. Co., 338 Pa. 426, 13 A.2d 34 (1940). Under Pennsylvania law there is no cause of action for negligent delay unless it arises *ex contractu*.

[8] The court based its decision upon a rather narrow interpretation of North Carolina law. It held that the conflicts rule of *lex loci delictus* applied only to personal injury actions wherein the wrongful conduct and the injury occurred in the same state. Such was the situation in Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931). Thus the court was able to distinguish it from the instant case.

The rule of *lex loci delictus* has been applied in other North Carolina personal injury cases where the injury and conduct occurred in the same state but never where they occurred in different states. See, *e.g.*, Charnock v. Taylor, 223 N.C. 360, 26 S.E.2d 911 (1943); Wise v. Hollowell, 205 N.C. 286, 171 S.E. 82 (1933); Hipps v. Southern Ry., 177 N.C. 472, 99 S.E. 335 (1919); Harrison v. Atlantic Coast Line R.R., 168 N.C. 382, 84 S.E. 519 (1915).

More recently, in Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963), 1963 DUKE L.J. 537, the North Carolina court again applied the traditional choice of law rule of *lex loci delictus* instead of the suggested *lex domicilii* in an interspousal immunity case (where the conduct and injury occurred in the same state), saying: "We do not deem it wise to voyage into such an uncharted sea, leaving behind well established conflict of laws rules." *Id.* at 616, 129 S.E.2d at 293.

[9] 319 F.2d at 472-73. The court said that although there were no North Carolina cases in point, it was nevertheless required to determine and to apply the rule that the North Carolina court would choose were it hearing the case. However, the court said it could find little indication from North Carolina decisions how North Carolina might decide this case. Then it discredited the few guidelines it did find: "Thus, favored with few guides and observing that even the validity of these is obscured by substantial criticism, we find it most reasonable, in these circumstances, to avoid a rigid rule and to pursue instead a more flexible approach...." 319 F.2d at 473.

Erie R.R. v. Tompkins, 304 U.S. 64 (1938), sharply limited the discretion of a federal court to determine for itself what law should be applied in a diversity of citizenship case. "Federal courts have... used their discretion where questions have arisen in the ascertainment of the state's common law. If there are no decisions exactly in point, relevant data in the shape of *analogous decisions* which afford a *reasonably satisfactory* basis for a conclusion as to the state law *should be followed* .... The federal court must consider related decisions, analogies, and any reliable

rule.[10] Concluding that Pennsylvania had the most significant relationship with the case, the court affirmed the dismissal by the district court.

Under the significant relationship rule as set forth in the proposed *Restatement*, courts must apply the law of the place which has the most significant contacts with the matter in dispute. In tort cases, the *Restatement* lists a hierarchy of contacts which are considered important: (1) place of injury; (2) place of conduct; (3) domicile, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship between the parties centered.[11] As a general rule, if the injury occurs in a single, ascertainable state that contact will be given the greatest weight; if not, then the place where the wrongful conduct occurs will be considered most heavily. When the injury and conduct both occur in the same state, then almost invariably those contacts will be given greatest weight.[12] The importance of the other factors will vary according to the nature of the interests involved. The nature

data tending convincingly to show what the state law is." 1A MOORE, FEDERAL PRACTICE ¶ 0.309[2], at 3328 (2d ed. 1961). (Emphasis added.)

The cases cited note 8 *supra*, though distinguished from the present case by the Court of Appeals, are quite analogous. From these cases it would appear that the North Carolina court is steadfast in its retention of the traditional rule of *lex loci delictus* and would apply it in the present case, the factual distinction and the North Carolina statute cited note 24 *infra* notwithstanding.

[10] What is now the significant relationship rule was first applied as the "grouping of contacts" theory in Jones v. Metropolitan Life Ins. Co., 158 Misc. 466, 286 N.Y. Supp. 4 (App. T. 1936). The court defined the theory as the grouping of various elements, such as place of injury and place of wrong, which are related to the case and which are an indication of the law that was intended to govern. Where the various elements seemingly dictate an inconsistent conclusion, those which are deemed "controlling" govern. (One of the shortcomings of the case was that it failed to list criteria by which to determine which elements are "controlling.")

The court in *Jones* was strongly influenced by the British theory that the "proper law" shall govern. The "proper law" is that system of law by which the parties intend to bind themselves. See CHESHIRE, PRIVATE INTERNATIONAL LAW 214-15 (6th ed. 1961).

The rule was later applied in Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954), where the New York court in determining rights and obligations under a contract refused to apply automatically either the law of the place of its making or the law of the place of performance. The court said that although this rule afforded less certainty and predictability than the traditional rule, its advantage was that it gave the place having the most interest in the dispute paramount control over the issues and outcome of the case. 308 N.Y. at 161, 124 N.E.2d at 102.

The "grouping of contacts" theory has also been referred to as the "center of gravity" theory, and now in the *Restatement* as the significant relationship rule. Basically, the difference between them is in name only. EHRENZWEIG, CONFLICT OF LAWS § 174, at 463-64 (1962).

[11] RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 8, 1963).

[12] *Id.* comment *e*.

of the interests of two or more states and the weight to be accorded them will depend on: (1) the issues involved; (2) the nature of the tort involved; (3) the basic purpose of the tort rule involved; and (4) the possibility of recovery on some other theory.[13]

The Court of Appeals decided that *Lowe's* could best be adjudicated by application of the significant relationship rule. Yet the court failed to state where the injury occurred[14] and thereby avoided the contact afforded the greatest weight by the *Restatement*.[15] It also discounted the fact that plaintiff was a North Carolina corporation and the proposed insured was a North Carolina resident.[16] The court determined that the wrongful conduct occurred in Pennsylvania and stated flatly that the most important events upon which liability would rest occurred there.[17]

The result reached in this case illustrates a major weakness in the approach of the proposed *Restatement*. It has established a hierarchy of contacts which the courts are to follow but has provided no adequate means by which the courts can judge the relative significance of each of these contacts in a specific case. For example, the *Restatement* says that the place of injury is to be considered

[13] RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 and comments thereto (Tent. Draft No. 8, 1963). See also Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1253 (1963).

[14] "It is of course true that, in addition to the defendant's conduct complained of, an injury must be shown to have resulted before tort liability can arise. It does not follow, however, that because plaintiff was domiciled in North Carolina and Buchan [the proposed insured] lived and died there, the tort complained of happened in that state. It would seem to make no difference in this case if Buchan had died elsewhere." 319 F.2d at 474. Perhaps the court was implying that the injury (as well as the wrongful conduct) occurred in Pennsylvania.

The insurance applied for was to be used by plaintiff as collateral for a loan which it was negotiating. Thus the injury resulting from the defendant's alleged wrongful conduct seemingly was the financial loss to the plaintiff of $150,000 collateral. Since the loss of collateral affected a North Carolina corporation, it is suggested that the place of injury was North Carolina.

[15] See note 14 *supra*. The court avoided stating explicitly where the injury occurred. It seemingly could and should have done so.

[16] "Scarcely can the mere fact that the proposed insured lived in North Carolina be highly significant. This circumstance is reduced almost to the point of irrelevancy in comparison with the events which occurred in Pennsylvania. And while the domicile of the plaintiff corporation merits consideration, it cannot be accorded dominant importance in fixing the location of the tort." 319 F.2d at 474.

[17] 319 F.2d at 474. The court listed the following contacts as controlling: "It is to the home office of defendant in Pennsylvania that the application was sent; all information relative to the policy was obtained through or sent to the Pennsylvania office. Only there could an application for a policy of the size desired be acted upon; and in that place the application was rejected and an offer of a $50,000 policy made." *Id.*

most heavily;[18] yet the court in *Lowe's* determined other contacts to be more significant in this particular case. How did the court arrive at this conclusion? Because there is very little guidance in the *Restatement,* courts are left more or less on their own to decide as they see fit.[19] This discretion given to the courts may lead to less than satisfactory results in some cases; *Lowe's* is an example. It appears that a new set of arbitrary rules have merely been substituted for the old ones with the disadvantage of more difficult application.

Another approach to the solution of conflicts problems, governmental-interest analysis,[20] has been suggested. When applied to the *Lowe's* case, governmental-interest analysis offers an interesting contrast to the *Restatement* rule.

It should be noted that in allowing or prohibiting a cause of action for negligent delay, different states have expressed different reasons for their decisions.[21] North Carolina's policy is to protect

[18] See, *e.g.,* Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963); Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941). Though the facts of these cases were similar, the place of domicile was less important in the latter than in the former.

[19] Professor Reese, one of the draftsmen of the *Restatement,* in commenting on the new rule, said: "The relative interests of two or more states in having their law applied will inevitably depend upon the precise issue presented, the facts of the case, and the relationship of these facts and the parties to the states involved. The court is the body best equipped to deal with such variables on a case by case basis.... By requiring the courts, at least in the areas of torts and contracts, to tailor their rules to the precise issues involved, the opinion lays the proper basis for the eventual development of a considerable number of relatively narrow choice-of-law rules. Only rules of this type can prove successful in practice. Once they have been developed, the advantages of predictability of result can be enjoyed." Reese, *supra* note 13, at 1253-54.

[20] According to this theory, as developed by Professor Currie, a court faced with a choice of laws problem would examine the policies of the respective states and determine which of them has a legitimate interest in having its policy applied under the circumstances of the particular case. If only one state has such an interest, then its law should be applied. If more than one state has an interest, and the policies of those states conflict, then there would be a "real conflict." In that case, according to Professor Currie, the court should apply the law of the forum state rather than subordinate its own legitimate interest to that of a foreign state. See notes 28 and 30 *infra.*

See Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1212, 1233 (1963); Currie, *The Disinterested Third State,* 28 LAW & CONTEMP. PROB. 754 (1963); Currie, *Conflict, Crisis and Confusion in New York,* 1963 DUKE L.J. 1; Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws,* 10 STAN. L. REV. 205 (1958). For the most succinct statement of the theory see Currie, *Notes on Methods and Objectives in the Conflict of Laws,* 1959 DUKE L.J. 171, 178.

[21] See generally Comment, *Tort Liability of Insurance Company For Negligent Delay in Processing Applications,* 15 ALA. L. REV. 157 (1962); Annot., 32 A.L.R.2d 487 (1953).

its citizens from the negligence of an insurance company, either foreign or domestic, in failing to act upon an application within a reasonable time. The policy is expressed in two leading cases and is reinforced by statute. In *Fox v. Volunteer State Life Ins. Co.*,[22] the North Carolina court ruled against an insurance company for its alleged negligent delay in delivering a policy to the insured. The court talked in terms of a legal duty owed by the insurer to the plaintiff to conduct its affairs so as not to injure another. In *Elam v. Smithdeal Realty & Ins. Co.*,[23] the court held the defendant company liable for its alleged negligent failure to procure a policy for the plaintiff as promised. The basis for liability was the "trust and confidence" imposed in the defendant by the proposed insured. There is a North Carolina statute[24] which provides that all contracts of insurance made on lives, property, or interests in the state are deemed to be made within the state; and all contracts for insurance, the applications for which are taken within the state, are deemed to be made within the state and are subject to its laws. The North Carolina court has specifically recognized that the policy underlying this statute is the protection of the citizens of the state doing business with foreign corporations.[25] Furthermore, there are decisions which imply that foreign law probably would not be applied in derogation of this policy if considered prejudicial to the public interest.[26]

On the other hand, Pennsylvania clearly has the policy of protecting insurance companies from claims not arising *ex contractu*. The Pennsylvania court has stated[27] that unless a legal duty to act falls upon the company independently of statute or contract, the company cannot be held liable for its failure to act. The court pointed out that the law imposes on no person a general duty to act to save others from harm; rather an affirmative legal obligation to act exists only in certain specific situations. Thus no cause of action for negligent delay exists in Pennsylvania.

[22] 185 N.C. 121, 116 S.E. 266, *approved*, 186 N.C. 763, 119 S.E. 172 (1923).

[23] 182 N.C. 599, 109 S.E. 632 (1921).

[24] N.C. GEN. STAT. § 58-28 (1960).

[25] Williams v. Mutual Reserve Fund Life Ins. Co., 145 N.C. 128, 132, 58 S.E. 802, 803 (1907).

[26] See, *e.g.*, Wise v. Hollowell, 205 N.C. 286, 289, 171 S.E. 82, 83 (1933); Rodwell v. Camel City Coach Co., 205 N.C. 292, 171 S.E. 100 (1933); Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931).

[27] See Zayc v. John Hancock Mut. Life Ins. Co., 338 Pa. 426, 430-33, 13 A.2d 34,

If the Court of Appeals had used governmental-interest analysis, it would have discovered not only that the laws of North Carolina and Pennsylvania differ but also that the underlying policies of the two conflict. Realizing this, it would have applied North Carolina law.[28]

Governmental-interest analysis has been criticized for this arbitrary application of the forum state's law whenever a true conflict is found.[29] But whether or not one accepts this method as the final step in making the choice of law,[30] the analytical aspect of the theory provides two things lacking in the proposed *Restatement* rule. In the first place, it offers a definite approach to choice of law problems in contrast to the search for the "most significant relationship." Secondly, it exposes the false conflict so that a state need not unwittingly subordinate its own legitimate interests where no other state has a real interest in having its law applied to the controversy.[31] For these reasons[32] governmental-interest analysis seems to be the better candidate to replace the discredited traditional rules.

36-38 (1940). *Accord,* Shipley v. Ohio Nat'l Life Ins. Co., 199 F. Supp. 782 (W.D. Pa. 1961).

[28] Under governmental-interest analysis, when a court encounters a true conflict, it must apply the law of the forum. Professor Currie has stated: "A conflicts problem does not arise merely because a statement of the facts of the case requires mention of two states. [Nor does it arise merely because the laws of the two states are different.] A true problem arises only when the laws of two or more states are in conflict, in the sense that each state has an interest in the application of its distinctive legal policy." Currie, *Conflict, Crisis and Confusion in New York,* 1963 DUKE L.J. 1, 38. See articles cited, *supra* note 20.

Here North Carolina, the forum state, has an interest in the assertion of its policy, for North Carolina citizens, who are the beneficial objects of the policy, are involved.

[29] See, *e.g.,* Baxter, *Choice of Law and the Federal System,* 16 STAN. L. REV. 1 (1963).

[30] Another approach which might be used is to apply the law which reaches the better result or to give effect to that policy which, in the opinion of the court, is stronger. In many cases, however, where there is no true conflict, this problem will not arise.

[31] According to the *Restatement* hierarchy of contacts, as under the traditional system, if the place of injury and the place of the wrongful conduct are in the same state, the law of that state would be applied even though it had no real interest in applying its law under the circumstances. See note 11 *supra* and accompanying text.

[32] Moreover, it would seem that the result from a governmental-interest approach would be at least as predictable as the result from application of the significant relationship test. The former would involve construction of state policies and a subsequent arbitrary choice of law in the real conflict situation, while the latter is based on the court's subjective appraisal of the various "contacts" involved.