Conflicts questions can arise as to two categories of damage suits related to workmen's compensation cases. The first category is that of suits against the injured worker's own employer. The second is that of suits against third parties whose negligence contributed to the causation of the compensable injury.

I. EXCLUSIVE-REMEDY DEFENSE OF FOREIGN STATUTE IN DAMAGE ACTION AGAINST EMPLOYER

All states now have workmen's compensation acts, practically without exception barring common-law suits against the employer when compensation is available. The question of the applicability of a foreign exclusive-remedy clause of this kind may arise when the injury occurs outside the United States, or when common-law actions are permitted under special conditions which differ from state to state. By far the most common example of this problem occurs because of varying rules as to the availability of the exclusive-remedy defense to the "statutory employer." Thus, the forum state may immunize the general contractor only when the subcontractor is uninsured, while the foreign state in which compensation is payable may immunize him absolutely.

It is generally held that, if a damage suit is brought in the forum state by the employee against the employer, the forum

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1. Spelar v. American Overseas Airlines, Inc., 80 F. Supp. 344 (S.D.N.Y. 1947). Where the compensation state bars a tort action and compensation has been paid, a suit cannot be maintained in that state, since it is against its public policy. Urda v. Pan Am. World Airways, Inc., 211 F.2d 713 (5th Cir. 1954). The deceased's widow had collected compensation in Florida and subsequently sued the employer in Florida, under the law of Brazil, which was the place of injury. Held: the public policy of Florida, evidenced by its compensation act, barred the action.

2. The term "statutory employer" is frequently used to identify a contractor who by statute is made liable for compensation to the employee of a subcontractor under him.

state will enforce the bar created by the exclusive remedy statute of a state that is liable for workmen's compensation as the state of employment relation, contract, or injury. Thus, although the local state might give the affirmative benefit of its own compensation act to this employee, thereby asserting its right to apply its own statute to the exclusion of the foreign


Mooney v. Stainless, Inc., 338 F.2d 127 (6th Cir. 1964). Decedent was hired by an Illinois firm to work in Tennessee. He was killed while working in Tennessee, and the claimant, his widow, received workmen's compensation benefits in Illinois. Later she attempted to bring a tort action against the general contractor in Tennessee. Held: Receipt of benefits in Illinois barred the Tennessee tort action.

Willingham v. Eastern Airlines, 199 F.2d 623 (2d Cir. 1952). Deceased's employment contract specifically stated that the Georgia compensation Act applied. He died in a flight over Maryland. Georgia compensation law was held to bar widow's damage suit in New York.


Missouri: Mitchell v. J. A. Tobin Constr. Co., 236 Mo. App. 910, 159 S.W.2d 709 (1942); Mangiaracino v. Laclede Steel Co., 347 Mo. 36, 145 S.W.2d 388 (1940), holding in accord with Yoshi Ogino case, infra this note under New York.

Nevada: Biner v. Dynalectron Corp., 85 Nev. 539, 458 P.2d 616 (1969). Claimant was hired in Nevada and injured there. The employer had not secured compensation coverage in Nevada, but had done so in Texas. Claimant compromised his Texas compensation claim, and then sought to sue the employer in Nevada for negligence, claiming that Texas law did not provide coverage in this situation, so that the settlement could be considered as void. Texas settlement held valid, unless set aside for mistake or some other such reason, and claimant held estopped to sue in Nevada.


New York: Barnhart v. American Concrete Steel Co., 227 N.Y. 531, 125 N.E. 675 (1920). New York has even gone so far as to enforce this rule after its own workmen's compensation board had decided that an injury occurring in North Carolina was noncompensable because it did not arise out of and in the course of employment. Yoshi Ogino v. Black, 278 App. Div. 146, 104 N.Y.S.2d 82 (1951). The theory was that North Carolina had an independent right to decide compensability under its own statute, as it has a right to do under Industrial Comm'n v. McCartin, 330 U.S. 622 (1947). The facts showed a prima facie situation indicating an employment injury, since they alleged that plaintiff was injured while travelling in an automobile at defendant's request, the automobile being driven by a co-employee. Since the kind of duty of care being alleged by the employee was the kind that only arises out of the employment relation and in the course of employment, the pleadings established a presumption that compensation was the exclusive remedy. This apparently could not be overcome by a showing that one jurisdiction had denied compensation, as long as there was another that might still grant it. This case went to the court of appeals on certified questions. The first question, whether the New York board's finding that the accident was not under the compensation act was binding on a court in a damage suit, was answered yes. But the question whether the North Carolina board would be bound by the same finding was left unanswered, and the appellate division's ruling on the defense was left undisturbed. Yoshi Ogino v. Black, 304 N.Y. 872, 109 N.E.2d 884 (1952).
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statute, it does not follow that the foreign statute will be disregarded when the employee is trying to get out of the compensation system altogether and back into the common-law damage system. In other words, the local state may reserve the right to apply its own statute in order to ensure that its benefits are conferred on the employee, for when it does this, no irremediable harm can possibly ensue to either of the parties. This refusal to limit the employee to the affirmative benefits of the foreign compensation act hurts no one, for if rights exist thereunder they are now no less enforceable in the foreign state after the first award than before.\(^6\) But if the defenses created by the foreign state are not enforced, irremediable harm to the employer is the result. Because of this distinction, then, a foreign exclusive-remedy defense to common-law suit against the employer will usually be honored although, on the same facts, the benefits of the foreign act would be required to give way to the benefits of the local act, if the employee chose to pursue his compensation rights locally.

Now, although states may enforce the bar of a foreign statute against a suit involving an employer, and indeed usually will, this is not to say that, because of constitutional compulsion, they must. It is now firmly established by the decision of the Supreme Court of the United States in *Carroll v. Lanza*\(^7\) that a state may decline to apply the exclusive remedy provision of a sister state when different from its own without violating the Full Faith and Credit Clause.\(^7\) In this case the place of contract and of the employee’s residence was Missouri, but the work was done and the injury occurred in Arkansas. Missouri’s compensation act covers out-of-state injuries when the contract was made in the state. The plaintiff had indeed received 34 weeks of compensation in Missouri. The rule in Missouri is that a general contractor has the same immunity from suit by the employee of a subcontractor that a direct employer would enjoy.\(^8\) But in Arkansas the general contractor can be sued in tort as if he were a third party. The plaintiff obtained a judgment in the federal district court,\(^9\) which was reversed by the circuit court of appeals on the ground that the Full Faith and Credit Clause barred recovery.\(^10\) The Supreme Court limited the issue sharply to this constitutional question, saying “we have the naked question whether the Full Faith and Credit Clause makes Missouri’s statute a bar to Arkansas’ common-law remedy.”\(^11\) *Bradford Electric Light Co. v. Clapper*,\(^12\) which had indeed held that the state of injury was constitutionally obliged to honor the exclusive-remedy clause of the state of contract,

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7. U.S. Const. art. IV, §1.
8. Bunner v. Patti, 343 Mo. 274, 121 S.W.2d 153 (1938).
10. Lanza v. Carroll, 216 F.2d 808 (8th Cir. 1954).
11. 349 U.S. at 411.
employee residence, and employer residence, was quickly passed by with the observation that *Pacific Employers Insurance Co. v. Industrial Accident Commission* had "departed" from it. *Pacific Employers* had allowed the state of injury to override the compensation act of the home state for the purpose of granting benefits under its own compensation statute. From this the Court concluded that it was a logical step to allow the state of injury an equal amount of independence in applying its own rules as to third-party suits and exclusiveness of remedy:

Here it is a common-law action that is asserted against the exclusiveness of the [Compensation Act] of the home State; and that is seized on as marking a difference. That is not in our judgment a material difference. Whatever deprives the remedy of the home State of its exclusive character qualifies or contravenes the policy of that State and denies it full faith and credit, if full faith and credit is due. But the *Pacific Employers Insurance Co.* case teaches that in these personal injury cases the State where the injury occurs need not be a vassal to the home State and allow only that remedy which the home State has marked as the exclusive one. The State of the forum also has interests to serve and protect. Here Arkansas has opened its courts to negligence suits against prime contractors, refusing to make relief by way of workmen's compensation the exclusive remedy. . . . Her interests are large and considerable . . . . The State where the tort occurs certainly has a concern in the problems following in the wake of the injury. The problems of medical care and of possible dependents are among these, as *Pacific Employers Insurance Co. v. Commission*, supra, emphasizes.14

The Supreme Court concludes by making it clear that its decision was strictly limited to a holding that the constitution did not require Arkansas to accept Missouri's exclusive-remedy rule:

Missouri can make her Compensation Act exclusive, if she chooses, and enforce it as she chooses within her borders. Once that policy is extended into other States, different considerations come into play. Arkansas can adopt Missouri's policy if she likes. Or, as the *Pacific Employers Insurance Co.* case teaches, she may supplement it or displace it with another, insofar as remedies for acts occurring within her boundaries are concerned.15

The principal post-*Carroll* case, *Wilson v. Faull*,16 decided by the Supreme Court of New Jersey in 1958, interpreted *Carroll* in exactly this restricted fashion. It concluded that, being free of any constitutional compulsion, New Jersey could approach the matter as a straight choice-of-law

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14. 349 U.S. at 412-413.
15. 349 U.S. 408 at 413. (emphasis added).
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question and could rest its decision on considerations of comity and of basic compensation policy as affecting choice of law. Following this approach, New Jersey chose to apply Pennsylvania's stricter exclusive-remedy clause with the effect of barring a suit in New Jersey for an injury occurring in Pennsylvania.

The problem was once more the result of a difference in the immunity accorded to a statutory employer. Pennsylvania makes the general contractor absolutely liable for compensation, and makes this remedy against him exclusive in all cases. New Jersey, however, makes the general contractor liable for compensation and immune to suit only if the subcontractor is uninsured. Thus, if the subcontractor is insured, the general contractor is suable as a third party. In this instance, the subcontractor was insured; indeed, the employee had already obtained an award of compensation in New Jersey against the subcontractor. He then instituted a suit for damages against the general contractor in New Jersey.

In this case, unlike Carroll, the state of the forum was not the state of injury. The state of injury was Pennsylvania, which was also the situs of the work. However, the contract of employment was made in New Jersey, thus making New Jersey's compensation statute apply, and the employee's residence was in New Jersey.

The Appellate Division had approached the question by saying that the issue was essentially not one of tort law but one of regulation of employment relations; therefore, it said, the law of New Jersey should apply, since its contacts bearing on employment relations were significantly greater than those of Pennsylvania — residence and place of business of contractor and subcontractor, residence of employee, place of contract with the employee, and place where the employment relation was originally created.20

The Supreme Court of New Jersey, however, came at the question from an entirely different angle. The problem, it said, was not one of merely classifying the substantive field as one, say, of tort or of employment relations, with a mechanical application of the law of a particular state according to the field thus chosen. Rather, the court started with the purpose of compensation acts, which was to substitute a limited but certain remedy for the former remedy in tort — a compromise benefiting both employer and employee. If only the affirmative payment of compensation is involved, any state having a substantial interest could provide compensation without violating this central principle of compensation law. But if the exclusive-remedy clause is not respected, this interferes with the fundamental quid pro quo, which is the heart of compensation philosophy. The court said: "Pennsylvania seeks to effectuate the same basic compensation policy as New Jersey — certainty of remedy and absolute but lim-

ited and determinate liability.”

The difference in detail between the law of the two states as to the exact person who is primarily liable did not change the basic consensus on the policy of exclusiveness. Hence the Pennsylvania rule was not obnoxious to New Jersey, and “on principles of comity” should be given effect in New Jersey. The choice of law, then, should not be based upon any concept of predominance of “contacts,” but upon broader considerations of fundamental compensation policy, with a view to fairness to both parties.

The court relied heavily on a strikingly similar case similarly decided by the Court of Appeals of the District of Columbia: Jonathan Woodner Co. v. Mather. The employee resided in the District of Columbia and was there employed by the subcontractor, who was insured both in the District and in Maryland. The job site, the general contractor, and the injury were in Maryland. In Maryland the general contractor has the immunity of a direct employer; in the District he has it only if the subcontractor is uninsured. Without applying for compensation in either place, the employee sued the general contractor in tort in the District. The court began by stating that compensation could be awarded in either jurisdiction. Bradford Electric Light Co. v. Clapper was then briefly noted; the court observed that it had been severely eroded, but that the erosion had been in the form of cases permitting affirmative compensation awards and thus enlarging the benefits of compensation acts. The court said it would not rest its decision entirely on the Full Faith and Credit ground under Bradford — which was fortunate, since five months later the Supreme Court in Carroll destroyed that ground altogether. Rather the court turned to “established principles of conflict of laws.” It invoked the doctrine that the law of the place of injury governed the character of the tort, and therefore the law of Maryland had barred this tort at birth. In addition, much was made of the argument, later picked up in Wilson v. Faull, that the balance of interests between employer and employee on which compensation theory rests would be upset if the claimant could sue the employer at common law while simultaneously having a compensation right against him elsewhere.

This argument appears to be the best all-purpose ground for enforcing the exclusive-remedy clause of a foreign state. The alternative argument, that since the state of injury controls the law of the tort there never was a tort liability, has the disadvantage that it would work only when the facts fall into the Wilson or Woodner configuration, with the state of injury

19. 141 A.2d at 778. See also Mooney v. Stainless, Inc., discussed supra in note 4 under Federal, in which the court stressed that the Carroll type of problem did not arise since both states agreed on the principle of exclusiveness of the employer’s liability for compensation.


22. Weintraub, J., concurring in Wilson v. Faull, N.15 supra, would have put the decision on this simple ground: No tort liability ever came into existence in Pennsylvania.
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being the foreign state. But if the state of injury were the forum state, as in Carroll, and had the more permissive third-party provision, the argument that the tort liability never arose would not apply. The argument addressed to compensation philosophy could apply in any combination, however, and on Carroll facts a local court could say that it should apply the bar to carry out the overall policy of compensation law of balancing the interests of employer and employee.

When the issue is whether the state can grant affirmative compensation benefits, the question is not a true choice-of-law question, since the only choice before the local tribunal is to grant relief under its own statute or deny relief altogether. But when the issue involves third party suits growing out of compensable injuries, true choice-of-law problems arise. The local court might choose whether to apply its own exclusive-remedy clause or that of a foreign state. Accordingly, this branch of law has unavoidably been caught up in the notoriously tangled and stormy story of choice-of-law theory generally. One thing, at any rate, is clear: Since Carroll these cases are not to be decided on Full-Faith-and-Credit grounds. But this still leaves several options. One is the conceptual lex loci approach, rejected in Wilson, but employed in Woodner and the concurring opinion in Wilson, that the law of the place of the tort controls its characteristics and indeed its existence. More fashionable lately are the theories of “significant contacts” and “legitimate interests.” But these, while they serve well enough when the question is one of supplying affirmative compensation benefits, seem less cogent when the question is one of permitting a common-law recovery to be superimposed on an admitted compensation remedy. Thus, the possibility that an injured worker may run up medical bills in the state of injury gives that state an interest in seeing that he gets an adequate workmen’s compensation award, as the Pacific Employers Insurance Co. decision stressed. But, assuming that the worker is assured of having his medical bills paid and of receiving income benefits under workmen’s compensation, the realistic question in a tort case is: Has this state an interest in adding something further to this assured medical and income benefit? Put in this way, the interest begins to look rather thin, if not fictitious.

The California Court of Appeals followed this line in a case in which the “interest” of the state was stretched about as thin as it could get: Howe v. Diversified Builders, Inc. The only “contact” of California with the case was that the defendants were California corporations. Everything else was in Nevada: the employee’s residence, the contract, and the place of work and injury. Nevada law makes subcontractors employees for compensation purposes, while California law does not. After receiving a Nevada

compensation award (which he attempted to "rescind"), the employee sued the defendants in California. The court began by agreeing that under California law the law of the place of wrong was not necessarily controlling, and that in complex situations involving multi-state contacts the significant interests of the particular states should be consulted. As the court framed the issue, it was whether California, merely as the home of the defendant corporation, has an "interest in extending to Nevada residents greater rights than are afforded by the state of their domicile." In answering this rather self-answering question, the court observed: "However, as previously indicated, no California 'interest' would be promoted by impairing the ability of California corporations to compete for business in other states by imposing upon them obligations to the residents of such states which those states do not impose upon foreign corporations or their own domestic corporations."25

Oregon has supplied an interesting case, Davis v. Morrison-Knudsen Co.,26 illustrating the transition from a lex loci approach to a "significant contacts" approach. It is also of unusual interest because it is one of the very few cases in this area not stemming from differences in the immunity of statutory employers. The plaintiff was an Oregon resident, who was hired in Oregon to work at a construction site in both Oregon and Idaho. Most of his work was in Oregon, although lately about 90% of it had been in Idaho. The plaintiff was injured on the job while driving in Idaho, which has a compulsory compensation act. Oregon has an elective act, and the employer had elected not to be covered. The plaintiff filed a compensation claim in Idaho and received some benefits. The compensation act of Oregon was also clearly applicable to the injury. The plaintiff then sought to sue his employer in Oregon, as a nonelecting employer. The defendant relied principally on two cases holding suits in Oregon barred when the injury arose in a sister state, Washington, that barred third-party suits against employers.27 But the court pointed out that the lex loci rule of those cases in Oregon had given way to the rule "that the law of the state which has the most significant contacts with the occurrences and the parties is determinative of all rights and liabilities."28 The court adds:

25. 69 Cal. Rptr. at 59.
27. Williamson v. Weyerhaeuser Timber Co., 221 F.2d 5 (9th Cir. 1955). Deceased, a regular employee in Oregon, was killed while in Washington. Compensation was awarded in Oregon, which did not bar the third-party suit. Suit was instituted in a federal court in Oregon. The Washington law prohibits third-party suits against all employers. Held: Washington law applied, since at the situs of the injury there was no action for the tort, the Oregon act was presumptively territorial, the Washington law set the limitations on its employer's liability, and the Full Faith and Credit Clause requires Oregon to give full faith and credit to the laws of Washington.
28. 289 F. Supp. at 837. See also Casey v. Manson Constr. & Eng'r Co., 247 Ore. 274, 428
The court has listed the following factors as important in determining the state of most significant relationships: (a) the place where the injury occurred; (b) the place where the conduct occurred; (c) the domicile, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.29

Since the only contract with Idaho was driving there and returning, the court had no difficulty in finding that Oregon was the jurisdiction where the parties had the most significant contacts. Accordingly, the tort suit was held to lie under Oregon law. The court then cited and distinguished *Wilson* and *Woodner*, observing the Oregon courts would not follow them on the facts of this case. This seems clear enough, since the central rationale of both *Wilson* and *Woodner* was that both jurisdictions in each case shared a common policy of according an employer immunity from common-law suit in exchange for his assuming the burdens of compensation liability. In the Oregon situation, the employer had *not* assumed any compensation burdens in Oregon. Indeed, it is a near-universal principle of compensation law that the non-electing employer should be subject to common-law suit. One reason is to impel him to elect coverage. If, in a case such as the present, the court relieved him of his liability, not because he had elected coverage in Oregon, but because some foreign state had subjected him to compulsory coverage, Oregon's own policy of providing an incentive to elect coverage would be to that extent undercut.

II. CONFLICT OF LAWS IN THIRD-PARTY ACTIONS

When compensation is awarded or payable in one state, and a third-party action lies in another state, the wide variance between third-party and subrogation statutes makes it important to ascertain which state's statute governs the incidents of the third-party suit. The range of possible third parties, for example, differs sharply from state to state,30 as do the extent and timing of the insurer's subrogation to the employee's rights on payment of compensation.31

It seems advisable to examine these two sources of conflicts separately. When the issue is whether the particular class of third-party defendants is completely immune to suit — as when one state immunizes co-employees, or subcontractors on the same project, or physicians, while the other does not — the result of the choice of law will ordinarily be an all-or-nothing holding that the defendant is or is not suable. But when the

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29. 289 F. Supp. at 837.
30. 2 LARSON §72.
31. 2 LARSON §74.
issue is whether the assignment or subrogation statutes of a sister state should be given effect, the result is often merely that a particular plaintiff is granted or denied standing to sue. The cause of action itself is probably not destroyed, and the proceeds of the suit may well be ultimately distributed in much the same way no matter who the plaintiff is. This type of case involves a mixture of procedural and substantive rights, while the cases on who are immune third parties involve purely substantive rights.

In one sense, the first category of cases, those turning on the immunity of particular third parties, might seem to be closely related to the cases just discussed, involving the question whether a statutory employer should be, in effect, treated as a “third party” not immune to suit. But there is an important difference. If the statutory employer is immune, it is because he is immune as employer. This being so, the rationale of Wilson and Woodner can be pressed into service, stressing that the defendant as employer is within the central policy of compensation law according immunity to employers as a quid pro quo for shouldering compensation liability. But no such rationale is available when the issue is whether the defendant should be immune as co-employee, or as unrelated subcontractor on the same job, or as physician. Some other choice-of-law theory must be found for these cases.

There is one carryover, however. The scope of Carroll v. Lanza is broad enough to suffuse all the third-party suit cases in this article. That is, the decision on whether to enforce a bar imposed by a sister state, against a statutory employer, a co-employee, or anyone else, is no longer to be made on constitutional considerations of full faith and credit, but on choice-of-law grounds free of constitutional compulsion.

III. CONFLICTS AS TO IMMUNITY OF PARTICULAR THIRD PARTIES

The closeness of the legal issue in this class of cases, and the contrast in possible approaches, is starkly exposed by a comparison of two decisions, one by the Supreme Court of New Jersey and one by the Court of Appeals of Maryland, reaching diametrically opposite results on substantially identical facts.

In Stacy v. Greenberg, the New Jersey case, the plaintiff was traveling

32. 2 Larson §74.30.
33. 349 U.S. 408 (1955), discussed in the text accompanying note 6, supra.
34. 9 N.J. 390, 88 A.2d 619 (1952). See Hunker v. Royal Indem. Co., 57 Wis.2d 588, 204 N.W.2d 897 (1973). Hunker and a co-employee, both Ohio employees of an Ohio corporation, traveled to Wisconsin in the course of their employment and were there injured in an automobile accident with a Wisconsin resident, Brown. Hunker brought an action for negligence under Wisconsin's direct action statute against Brown's automobile liability insurer and also against the insurer of the Hertz Rent-A-Car (Royal Indemnity) and alleged that the negligence of both his co-employee and the Wisconsin resident was the cause of his injuries. Hunker had received a workmen's compensation award under Ohio law. The insurance companies contended that Ohio law, which barred third-party suits against a co-employee, was
through New Jersey from a work site in Pennsylvania to his home and employment base in New York. The defendant employer was a New York corporation, and the contract of employment had been made in New York. The car was being driven by a co-employee, through whose alleged negligence the plaintiff was injured. New Jersey, where the tort suit against the co-employee was brought, permits tort suits against co-employees; New York does not. The court held that the bar imposed by the New York compensation statute should be respected, and the defense was upheld.

Seventeen years later the Maryland case of Hutzell v. Boyer was decided. Here the place of work and the place of contract were both in Virginia. However, the plaintiff and his co-employee, whose negligent driving allegedly caused the accident, lived in Maryland, and the employer furnished the transportation to and from the work site. The injury occurred in Maryland on the homeward trip. The compensation law of Virginia bars tort suits against co-employees; Maryland law does not. A tort suit against the co-employee was held maintainable in Maryland. Stacy v. Greenberg was discussed, but its holding was simply rejected. "We make no attempt to reconcile the Stacy case with our own decision in the instant case," said the court.

One of the most significant similarities between the two cases is that in each one it is clear that the compensation act of the state of injury and forum did not apply to the injury. In the Maryland case compensation in Maryland had actually been denied. In the New Jersey case, the court in its opinion says flatly that the New Jersey compensation act would not apply. By the same token, it is clear that the compensation act of the controlling—not Wisconsin law, which had no such bar. The court, holding that Ohio law applied in an action between Ohio citizens, applied certain "choice-influencing considerations." Ohio law was the more appropriate choice. Its application would induce predictability of results in that the parties involved in the insurance transaction in Ohio would expect that Ohio law would be applied to a claim arising under that policy and the Ohio employer would expect the employee to be limited to the workmen's compensation award that was predictable in Ohio. The minimal connection of Wisconsin with the accident does not override the interests of Ohio in the implementation of its own concepts of workmen's compensation. Application of Ohio law would not deprive plaintiff of compensation and was not the application of an outmoded law.

Wayne v. Olinkraft, Inc., 293 So.2d 896 (La. App. 1974). Decedent was a Louisiana resident employed by a Louisiana trucking firm. The trucking firm was under contract with a logging operation and was required to provide compensation insurance for decedent. Decedent, while unloading logs in Arkansas, was killed by the alleged negligence of the logger's employees. Decedent's survivors received compensation under the Louisiana Act. Under Arkansas law the logger was not required to provide insurance and was therefore not immunized from a tort suit. Decedent's survivors brought a tort suit in Louisiana court asserting Arkansas law. The court dismissed the suit, holding it barred by the Louisiana Compensation Act, and adopting §184 of the Restatement (Second) of Conflicts, which accords immunity from tort to the employer if he is given immunity by a compensation statute of any state under which he is required to provide insurance.

36. 249 A.2d at 454.
foreign state whose third-party clause was in question did apply in each instance. The only factual difference — and the Maryland court makes nothing of it — is that in the Maryland case the state of the forum was also the state of the employee's residence, which was not true in the New Jersey case.

In Stacy v. Greenberg, the court reasoned that, since New Jersey was not even sufficiently involved in the incident to apply its workmen's compensation act, this was not within the class of cases presenting the "complex problem of the application of conflicting workmen's compensation acts to an accident with which two or more states may have some legitimate concern. . . ." The court continued:

Nothing is presented in this situation which is obnoxious to the public policy of New Jersey. Recognition of the limitations upon plaintiff's rights of suit against fellow servants imposed by the New York statute can in no wise be prejudicial to the interests of our State. By making the New York statute the applicable law in the instant case we merely recognize that by their conduct plaintiffs have subjected themselves to certain restrictions upon their rights to pursue remedies against their fellow servants incorporated by the New York law into their contracts of employment. These are substantial provisions of such contracts and create in employers and fellow employees rights of immunity from suit, and should be enforced by us when not contrary to our public policy.38

Note that the court expressly avoids putting the decision on constitutional grounds.39 Indeed, in the Hutzell opinion, the Maryland court acknowledged this: “Although Stacy was decided prior to the opinion of the United States Supreme Court in Lanza, it is doubtful that knowledge of it would have influenced the result reached by the Supreme Court of New Jersey, as that Court did have the benefit of Pacific Employers Insurance Co. v. Industrial Accident Commission.”40 It is clear that the basis of Stacy was comity, not constitutional mandate.

In Hutzell, however, the defendant had evidently chosen to make his stand on the requirements of the Full Faith and Credit Clause. This seems a dubious strategy, what with Lanza having been on the books for over a decade. The court relied heavily on Lanza, as might have been anticipated. The “legitimate interest” of the forum state was the same in both instances, that is, the interest of the state of injury “in the welfare of a person injured within its borders, who may conceivably become a public charge due to a disabling injury.”41 The Maryland court added, “The social and

37. 88 A.2d at 622.
38. 88 A.2d at 623.
39. “Our conclusion makes unnecessary a determination whether, as urged by defendants, we are required by Article IV, Section I of the Federal Constitution to give effect to section 29 of the New York law.” Id.
40. 249 A.2d at 454.
41. Id. at 452.
economic problems following in the wake of a serious injury as they may affect the dependents of the person injured are properly matters of public concern."

As stressed earlier, Lanza did not compel the Maryland court to reject the immunity created by Virginia — it merely permitted it to do so if it chose. The choice itself, although ostensibly clothed in constitutional language of obnoxiousness, is essentially a choice-of-law decision based on legitimate state interest, buttressed by an old-fashioned invocation of the *lex loci* principle "uncomplicated by any consideration of the impact of divergent workmen's compensation statutes." For the latter point, the court could have cited *Ellis v. Garwood*, which was decided by the Supreme Court of Ohio on straight *lex loci* grounds without even bothering to mention *Lanza*. Note that in *Ellis* the compensation identification of the foreign state was, if anything, stronger than that in either *Stacy* or *Hutzell*, since the suit in Ohio was brought after compensation had been actually awarded in New York.

42. *Id.*
43. *Id.*
44. 80 Ohio Abs. 443, 143 N.E.2d 715 (1957), *aff'd*, 168 Ohio St. 241, 152 N.E.2d 100 (1958). New York residence, injury in Ohio, which unlike New York, does not prohibit suit against co-employee. Held: Ohio law controls, even though compensation had been awarded in New York.

Wilson v. Fraser, 353 F. Supp. 1 (D. Md. 1973). Decedents, Maryland residents, employed in a Maryland Sears store, were killed in Virginia while returning to Maryland from a company dinner in the District of Columbia. The court held that even though compensation benefits were collected under the Maryland law, Virginia would have applied its law, because the accident occurred within its borders. Therefore, the provision of the Virginia law that prohibits negligence actions against a fellow employee in compensable situations applied, and a wrongful death action by the estate of one employee against the estate of the other employee was barred. Virginia law was applied because of the Maryland Wrongful Death Statute, which called for the application of the law of the place of accident.

Sade v. Northern Natural Gas Co., 458 F.2d 210 (10th Cir. 1972). Plaintiff was injured in Nebraska. He was employed by an Oklahoma corporation, performing contract work with the defendant, a corporation with its main offices in Nebraska. After injury, plaintiff entered into a compromise and settlement agreement with defendant, releasing all claims that he had against defendant as a result of the accident. He then filed a compensation claim in Oklahoma, which in turn was settled by the payment of a lump sum. Plaintiff next sought to bring a negligence action in Kansas against defendant's employees. This suit was dismissed, on grounds that the release given to defendant also released the employees. Plaintiff then brought suit against defendant for fraud, contending that defendant had represented to him that execution of the release would not affect his rights against defendant's employees. Defendant contended that, among other things, plaintiff had not been induced to give up any rights, since under Oklahoma law he could not bring suit against defendant's employees. The court rejected this argument, holding that despite claimant's acceptance of benefits under the Oklahoma Workmen's Compensation Law, he was not precluded from pursuing additional remedies he had under the laws of Nebraska, where the accident occurred, and therefore was entitled to bring this action for fraud.

45. *Lanza* was mentioned in the opinion below, but not by the supreme court.
46. For other cases in which compensation had been actually paid, see:
In all three of these cases, one began with the actual or assumed fact that compensation would be payable in the foreign state and not in the local state. But if compensation has not yet been awarded or even sought, and might be payable in the forum state as well as in the foreign state, the question becomes much easier. In the leading case, Bagnel v. Springfield Sand & Tile Co.,\footnote{47} the place of contract, regular employment, and employer’s business were all in New York. The employee was injured on a temporary assignment in Massachusetts, due, as he alleged, to the negligence of a subcontractor of his employer. The law of New York permits a third-party suit against such a subcontractor; the law of Massachusetts does not. Suit was brought in Massachusetts. The court, in a lucid opinion, reduced the entire question to the issue whether the Massachusetts compensation act was applicable to this injury. On the strength of locus of the injury alone, the court concluded that it was applicable.\footnote{48} The act being applicable, its third-party provisions also came into play and barred the action against the subcontractor.

The application of the law of the state where compensation was awarded or is payable does not always have the effect of cutting down the employee-plaintiff’s rights. It may also at times serve to increase his rights, a fact not to be overlooked by a court that is tempted to spurn the principle of comity. For example, in an Illinois case, Miller v. Yellow Cab Co.,\footnote{49} the plaintiff was a Texas employee of a Texas employer and had been injured during a temporary business errand in Illinois. Texas, which had awarded compensation, permits suits against any third party, while Illinois had at the time the most restrictive kind of third-party statute, prohibiting suit by the employee against any third person who himself was under the Illi-

\footnote{47} Busby v. Perini Corp., 110 R.I. 49, 290 A.2d 210 (1972). Plaintiff, the employee of a subcontractor, was injured on a job site in Rhode Island. Plaintiff was a Massachusetts resident, the employer and the general contractor were Massachusetts corporations, and the employment contract was executed in Massachusetts, as was the contract between the general contractor and subcontractor. Compensation benefits were paid under Massachusetts law, and plaintiff then brought suit in Rhode Island against the general contractor. Rhode Island law permits such a suit, Massachusetts law does not. Adopting the Restatement (Second) of Conflict of Laws §184 (1971), the court held that the exclusive remedy provision of Massachusetts would be enforced, and affirmed a dismissal of the action.

\footnote{48} McKenney v. Capitol Crane Corp., 321 F. Supp. 880 (D.D.C. 1971). Plaintiff was injured in Maryland while working for a Maryland corporation which conducted almost all of its business in Maryland. All of plaintiff’s work was in Maryland. In addition, plaintiff had accepted benefits under a final compensation award pursuant to the Maryland Workmen’s Compensation Act. These facts were held to require that Maryland law, rather than that of the District of Columbia, govern third-party rights concerning the claim.

\footnote{49} Accord, Hynes v. Indian Trails, Inc., 181 F.2d 668 (7th Cir. 1950). See also Standard Oil Co. v. Lyons, 130 F.2d 965 (8th Cir. 1942). Compensation had been awarded under Iowa act for injury in Illinois; suit allowed under Iowa law, although both employers were “bound by” the Illinois act.
nois compensation act. Illinois allowed the suit, on the ground that third-party rights are fixed by the law of the state granting compensation. The court also apparently assumed that Illinois would not have awarded compensation if an award had been sought under the Illinois act; accordingly, its compensation provisions did not come into play at all.

IV. CONFLICTS AS TO ASSIGNMENT OR SUBROGATION IN FOREIGN STATE

The second major question involving conflicts as to third-party suits arises most frequently in this form: the law of the state of compensation assigns the recipient's common-law rights of action to the insurer. The employee then appears as plaintiff in the courts of the state of injury, whose laws contain no such assignment provision. It is usually held that the assignment will be enforced. The assignment worked by the acceptance of compensation is an accomplished fact between the parties. By respecting it, the court is not giving extraterritorial effect to foreign laws, but is merely recognizing the adjustment of rights which the parties have brought about between themselves by their conduct. There is, however,

Farnham v. Daar, Inc., 184 F. Supp. 809 (W.D. Mo. 1960). The employee had received Kansas compensation benefits. He brought suit in Missouri against the third-party tortfeasor. The court found that while the Missouri statute was predicated on subrogation as a matter of law, the Kansas statute provided for an assignment of the employee's claim to the employer one year after the accident. Under a principle of comity, Missouri would apply Kansas law and the final compensation award in Kansas must be given full faith and credit. Held, the assignment of a claim against the third party was effective, making the employer rather than the employee the real party in interest. The case was dismissed without prejudice to the rights of the plaintiff's employer to prosecute an action against the third party within the Missouri statute of limitations.
Florida: See United States Fid. & Guar. Co. v. Reed Constr. Corp., 132 So.2d 626 (Fla. App. 1961). The Florida Wrongful Death Act had been construed by the Florida courts to mean that the right of action could not be assigned. The Longshoremen's Act provides for an assignment of all rights of action against a third party upon the claimant's acceptance of compensation benefits. The court held that the Longshoremen's Act provisions controlled and would permit the assignee to bring suit under the Florida Wrongful Death statute.
Ohio: Griffin v. Gar Wood Indus., Inc., 97 Ohio App. 129, 123 N.E.2d 751 (1954). Ohio court applied the substantive law of Kansas, the situs of the tort, in holding that the one-year assignment provision of that state barred action by the plaintiff.
52. Sometimes the local court disavows any enforcement of the foreign third-party statute, but gets the same result by asserting its right to enforce the division of the proceeds of the suit equitably, according to the obligation existing between the parties because of the employee's acceptance of compensation. Hartford Acc. & Indem. Co. v. Chartrand, 239 N.Y. 36, 145 N.E. 274 (1924); General Acc. Fire & Life Assur. Corp. v. Zerbe Constr. Co., 269 N.Y. 227, 199 N.E. 89 (1935).
See also Hile v. Liberty Mut. Ins. Co., 281 Ala. 388, 203 So.2d 110 (1967). Claimant was employed by a Wisconsin company to work in Alabama, and was injured in Alabama. Pur-
The majority rule is practical as well as logical, for it prevents possible double liability of the third party. If he can be sued by the employee in spite of the statutory assignment of the cause of action to the insurer, he might also find himself sued again by the assignee-insurer.

In some cases, the local court has recognized the substantive rights created by the state of compensation, but at the same time has applied its own procedural rules. Thus, although the plaintiff-employee may have lost his rights in the state of compensation by assignment, the local state may, under its procedure, permit him the status of plaintiff, and may even

53. Federal: McAvoy v. Texas Eastern Transmission Corp., 187 F. Supp. 46 (W.D. Ark. 1960). The plaintiff brought a third-party suit in a federal court sitting in Arkansas against two Texas corporations and a California corporation, alleging negligence. The plaintiff was a resident of Arkansas, injured in Kentucky and hired in Louisiana, which established his right to receive Louisiana compensation benefits. His admitted receipt of such benefits would, under the Louisiana statute, bar the third-party tort action. The court held that, under Arkansas conflict of laws, the place of the injury (Kentucky) controlled the right to recover in tort, not the place of the employment contract (Louisiana). The court applied the Kentucky substantive law, which permitted the suit against the third-party tortfeasors. The court held that the plaintiff’s receipt of compensation benefits under the Louisiana act did not amount to an “election” to have his rights to maintain a third-party action determined under the Louisiana law, nor would the court of Arkansas or Kentucky be required to apply Louisiana law to determine the on whom tort liability could be imposed. Such a requirement would give extraterritorial effect to an exclusive-remedy provision of another state’s compensation act, contrary to the rule laid down in Carroll v. Lanza. Action in tort against third-party tortfeasors sustained.

New York: Middle Atlantic Transp. Co. v. State, 206 Misc. 535, 133 N.Y.S.2d 901 (1954). Employer, having paid compensation under the Michigan law, which assigned the cause of action to him, sued the third-party tortfeasor in New York. Held: Michigan assignment provision had no extraterritorial effect. The court noted that New York has a similar assignment provision, but stated that the plaintiffs did not and could not assert the right to maintain the action by virtue of the New York provision.

For a somewhat related problem, see Komlos v. Compagnie Nationale Air France, 111 F. Supp. 393 (S.D.N.Y. 1952), rev’d, 209 F.2d 436 (2d Cir. 1953). An employee, subject to the New York Workmen’s Compensation Act, was killed in an airplane accident in the Azores. Compensation was accepted by his dependents in New York. Then, after the expiration of the six-month period allowed the dependents to sue the third party in New York, the dependents sued the airline in the federal court sitting in New York claiming, among other damages, “moral damages” under the law of Portugal. The court held that, since the right to recover “moral damages” (unknown to New York law) could not pass to the carrier, and since any assignment to the carrier would therefore split the cause of action, the widow’s representatives retained the entire cause of action. See also Werkley v. Koninklijke Luchtvaart Maatschappij N.V., 110 F. Supp. 746 (S.D.N.Y. 1952), involving an accident in India.

rule that the assignee is not a necessary party, but always subject to the understanding that the recovery is for the benefit of the assignee-insurer.\(^4\)

Note that in many states the effect of subrogation is not to subtract the cause of the action from the employee but merely to add it to the insurer; in this view, the third party is not entitled to raise the subrogation as a defense at all.\(^5\)

V. SUMMARY

If a common-law action against the employer is available in the state of the forum but barred by the exclusive-remedy statute of a state granting a compensation remedy for the injury, the state of the forum will usually enforce the bar on grounds of comity or policy, although it is not bound to do so by the Full Faith and Credit Clause. As to third-party actions, if compensation has been paid in a foreign state and suit is brought against a third party of the state of injury, the substantive rights of the employee, the subrogated insurance company and the employer are ordinarily held governed by the law of the foreign state, although there is contra authority. If no compensation has as yet been paid, but could be awarded just as properly in the state in which the third-party suit is brought as in the foreign state, the local statute will control the incidents of the third-party action.

54. \textit{Federal:} Betts v. Southern Ry. Co., 71 F.2d 787 (4th Cir. 1934). \textit{See also} Magee v. McNany, 10 F.R.D. 5 (W.D. Pa. 1950). Suit was permitted by an employee in Pennsylvania, where the accident occurred, although the cause of action had been assigned by operation of the New York statute to the insurer, partly on the ground that the insurer had expressly waived the assignment and reassigned the action back to the employee; moreover, the insurer was also permitted to intervene, and there was no possibility of double recovery.

\textit{Delaware:} \textit{See} White v. Metzer, 52 Del. 449, 159 A.2d 788 (1960). The employee was killed in a seven-car accident in Delaware but was under the New Jersey Compensation Act in view of his employment relation. Under the New Jersey Compensation Act, the widow could sue a third party in tort, subject to the partial subrogation rights of the carrier. The Delaware Wrongful Death statute (\textsc{del. code ann.}, tit. 10 §3704(b) (1953)) permitted suit by “the personal representatives”; the Delaware Rules of Civil Procedure (Rule 17(a)) required every action be brought in the name of the real party in interest; and the Delaware Compensation Act (\textsc{del. code ann.}, tit. 19, § 2363 (1953)) provided that “any party in interest shall have a right to join in said suit” brought by the widow against a third-party tortfeasor. The court held that the different interests of the widow and the subrogee carrier did not constitute a splitting of the cause of action and the carrier was properly a co-plaintiff as a necessary but not indispensable party.


55. \textit{See} 2 \textsc{Larson} §75.40. \textit{Cf.} Black v. Panhandle & Santa Fe Ry., 222 F. Supp. 308 (E.D. Okla. 1963), \textit{aff'd}, 326 F.2d 603 (10th Cir. 1964). Texas compensation carrier's intervention rights under Texas act enforced in Oklahoma action between injured employee and third party, since Texas act did not absolutely assign the employee's right of action to the carrier.