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INTEREST ANALYSIS, “MULTISTATE POLICIES,”
AND CONSIDERATIONS OF FAIRNESS
IN CONFLICTS TORTS CASES

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I. INTRODUCTION

When we look at “American Conflicts of Law at the Dawn of the 21st Century,” we should begin by recognizing that the last third of the twentieth century has seen a dramatic and revolutionary change in our thinking about choice of law. Despite intense academic disagreement about preferred approaches to choice of law, about the need for rules versus case-by-case adjudication, about the meaning of “conflicts justice,” and about all the other matters that comprise the themes of conflicts symposia, one salient fact stands out: policy analysis has come to the forefront of choice of law. Policy analysis is an essential component of every modern approach to choice of law. The primary disagreement among academic commentators is over which policies should be emphasized in determining choice of law and how courts should resolve cases that present conflicting policies.

It is fair to say that Brainerd Currie’s interest analysis approach has been the catalyst for the emergence of policy analysis as the predominant feature of choice of law in the United States today. Under Currie’s interest analysis approach, the choice-of-

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1. Such as whether the focus should be on the policies reflected in the differing substantive laws of the involved states, or on “multistate policies” and policies promoting “conflicts justice.”

2. Such as whether the forum should apply its own law in order to implement the policy reflected in that law or whether the courts should develop “neutral principles” to accommodate the differing policies of the involved states.

3. As Professor John P. Dawson put it, when presenting Currie with the first Order of the Coif Triennial Award, “It is clear after Brainerd Currie, that the dark science called the conflict of laws can never be the same.” The Dark Science of Conflict, TIME, Jan. 8, 1965, at 42-43.
law decision is made exclusively with reference to the policies and interests of the involved states; and where the forum has a real interest in applying its own law in order to implement the policy reflected in that law, Currie maintains that it should do so. While most other modern approaches to choice of law reject the underlying premises of Currie's interest analysis, these approaches nonetheless recognize the relevance of a consideration of the policies and interests of the involved states in the choice-of-law determination, and give at least some weight to a state's interest in applying its law in order to implement the policies reflected in that law.

II. INTEREST ANALYSIS IN CONFLICTS TORTS CASES

More importantly, in the "real world" of conflicts tort litigation, interest analysis has assumed surpassing importance. Although only a small number of courts expressly follow the Currie version of interest analysis as their articulated approach to choice of law, the results the courts have reached in the conflicts torts cases coming before them are generally consistent with the results that would be reached under interest analysis. This includes the application of the forum's own law in the "true conflict" situation, where the forum and the other involved state both have a real interest in having their law applied in order to implement the policies reflected in those laws.


5. The two modern approaches most favored by the courts, the Restatement (Second) of Conflict of Laws "state of the most significant relationship" approach, and Leflar's choice-influencing considerations, expressly include a consideration of the policies and interests of the involved states as a relevant factor in the choice-of-law decision. For a listing of the approaches followed by the different states in conflicts torts cases, see Symeon C. Symeonides, Choice of Law in American Courts in 1997, 46 AM. J. COMP. L. 233, 266 (1998).

The reason the courts follow the interest analysis approach in practice if not in name, I submit, is because, as Currie has emphasized, it seems rational to a court to make choice-of-law decisions with reference to the policies and interests of the involved states. In the "false conflict" situation, where only one state has a real interest in applying its law in order to implement the policies reflected in that law, there is every reason for a court to apply the law of that state and no good reason not to apply it. In the "true conflict" situation, it seems fully reasonable for a court to apply its own law in order to advance its own policy and interest, as long as this does not produce any unfairness to the party against whom that law is being applied. Although academic commentators may search endlessly for a "neutral" solution to the "true conflict," the results in practice indicate that "neutral" solutions do not have much appeal to the courts deciding the cases that come before them. 7

It may also be noted that interest analysis is "neutral and non-judgmental." In conflicts torts cases, interest analysis does not favor plaintiffs or defendants or support one view of tort law over another. It does not classify a rule of substantive tort law as "progressive" or "regressive," "good or bad." It looks only to the policy reflected in a state's law and that state's interest in applying its law in order to implement that policy in the particular case. As a state's law changes, its policies and interests will change accordingly. The movement toward "tort reform," for example, has resulted in rules of tort law in a number of states that now favor defendants over plaintiffs.

The statement that "the results the courts have reached in the conflicts torts cases are generally consistent with the results that would be reached under interest analysis" obviously needs some qualification. With conflicts torts cases being decided by the highest and intermediate appellate courts of 50 states and the District of Columbia, as well as by federal courts of appeal and federal district courts applying the conflicts law of the state in which they sit, there certainly will be some variation in results. Cases will be found in which the results are not consistent with the results that would be reached under interest analysis. I submit, however, that in percentage terms, the percentage of such cases is much lower than the percentage of cases in which the results are consistent with the results that would be reached under interest analysis.

7. And even though interest analysis can only identify, but not resolve, the "unprovided-for" case—the situation where the policies reflected in the laws of neither state would be advanced by the application that state's law in the particular case—such identification helps lead the courts to a means of resolution of the choice-of-law issue in that situation. See Sedler, supra note 4, at 233-36 (discussing the "unprovided-for" case).
Suppose that state A has enacted a law limiting recovery for noneconomic loss in tort cases. Prior to the change, state A would have had a real interest in applying its law that allows unlimited recovery whenever a state A resident was injured, whether in state A or in another state, and whether by a state A defendant or an out-of-state defendant. As a result of the change in policy, state A's interest has now changed. State A now has a real interest in applying its law that limits recovery for noneconomic loss for the benefit of a state A defendant, again whether the harm caused by the actions of a state A defendant occurred in state A or in another state, and whether the victim is a resident of state A or a resident of another state. As state A's substantive law changed to benefit defendants rather than plaintiffs, state A's policies and interests have changed; but this change does not affect the application of the interest analysis approach by the state A courts at all.

III. A RESPONSE TO TWO CRITICISMS OF INTEREST ANALYSIS

From the time of its inception, the interest analysis approach has been subject to vehement academic attack in this country and abroad, and the attack continues apace as we enter the twenty-first century. While I and other strong supporters of interest analysis periodically mount “comprehensive” defenses against this criticism, in the context of this symposium, it is more appropriate that we respond to specific criticisms, as Dean Kay has done in regard to Professor Juenger's “time warp” criticism, and to Judge Weinstein's criticism of interest analysis as being an impractical “methodology in the world of global litigation that now characterizes product liability.” This Article responds to two specific and recurrent criticisms of interest analysis: (1) that interest analysis fails to take into account “multistate policies;” and (2) that interest analysis ignores considerations of fairness.

Because this Article focuses on the “real world” of conflicts torts litigation, it uses this “real world” as the basis of its response to these criticisms. It begins with the proposition that the “real world” of conflicts torts litigation is essentially local and

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8. See, e.g., Kay, supra note 4; Sedler, supra note 6; Weintraub, supra note 4.
therefore readily lends itself to the use of interest analysis to resolve torts conflicts issues. Tort law reflects strong policies relating to loss distribution, regulation of enterprise activity, and deterrence of socially undesirable conduct. Thus, a state’s interest in applying its law is easily identified on the basis of local factors, namely a state’s connection with the parties, the harm, and the conduct giving rise to the harm.

In the United States, tort law rather than social insurance is the primary method of providing compensation for accident victims and victims of socially undesirable conduct. Thus, where the tort law of the plaintiff’s home state is plaintiff-favoring, that state has a real interest in applying its plaintiff-favoring law for the benefit of a resident plaintiff who is injured in an accident, regardless of where the accident occurred or where the defendant resides. This is because the plaintiff will feel the consequences of the accident and of imposing or denying liability in the home state. The home state’s interest in applying its plaintiff-favoring law is unaffected by the fact that the accident may have occurred in another state or the fact that the defendant resides in another state. And it makes no difference, insofar as the interest of the plaintiff’s home state is concerned, whether the state where the accident occurred, or the conduct giving rise to the accident, or the defendant’s home state, is across the border, across the continent, or across the ocean.

Conversely, where the law of the defendant’s home state is defendant-favoring, that state has the same real interest in applying its defendant-favoring law for the benefit of a resident defendant or defendant engaged in substantial business activity there because the consequences of imposing or denying liability will be felt by the defendant in that state. Again, that interest is

10. Because most tort cases involve liability for accidents, the discussion will revolve around accident cases.

11. Where the defendant is a nonresident, the suit can be brought in the plaintiff’s home state, of course, only if jurisdiction can be obtained against the defendant there. It will usually be possible to obtain jurisdiction in tort cases against a nonresident manufacturer, including a foreign country manufacturer, that has shipped goods into the forum and so will be deemed to have “directed its activities toward residents of the forum.” See Asahi Metal Indus. Co., Ltd. v. Superior Court, 480 U.S. 102 (1987). National and multinational corporations will also be subject to general jurisdiction in most states on the basis of continuous and substantial business activity in that state, sufficient to justify jurisdiction over them on a nonforum-related claim. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).
the same regardless of where the harm resulting from the defendant's conduct occurred and regardless of who was injured by that conduct. Where a state's law reflects a regulatory or admonitory policy, the state has a real interest in applying its law to impose liability for conduct occurring in that state, regardless of the residence of the actor or the victim and regardless of where the harm resulting from that conduct occurred.\footnote{12}

This Article now applies interest analysis to a conflicts tort case presenting a "true conflict," and in so doing responds to the criticisms that (1) interest analysis fails to take into account "multistate policies," and (2) interest analysis ignores considerations of fairness. Because this Article uses the "real world" of conflicts tort litigation, it is necessary at the outset to identify the forum in which suit is being brought. In this "real world," the question of choice of law cannot be separated fully from the question of jurisdiction as it relates to the possible states in which suit can be brought. Litigating lawyers know that the choice-of-law result in a particular case and the possible outcome of the case often may depend on the state where suit can be brought. They quite realistically assume that a court is more likely to apply its own law in preference to the law of another state, and that where a state has a real interest in applying its law in order to implement the policy reflected in that law, the courts of that state likely will do so.\footnote{13} This being so, plaintiffs' lawyers will try to obtain jurisdiction in the state whose law is plaintiff-favoring.

In my illustrative case, there has been a three-vehicle crash in state $B$. One of the vehicles is an automobile driven by $P$, a resident of state $A$. Another vehicle is an automobile being

\footnotetext[12]{See, e.g., In re Disaster at Detroit Metro. Airport, 750 F. Supp. 793 (E.D. Mich. 1989) (applying Michigan law) (where manufacturer manufactured allegedly defective airplane in California, which crashed in Michigan, killing Michigan victims and victims from other states, California law imposing strict liability for design defect applied rather than Michigan law imposing liability only on the basis of negligence). Where the law of a manufacturer's home state reflects a regulatory policy, such as a law imposing strict liability or allowing the recovery of punitive damages, and the harm occurs in another state, whose law on these issues is defendant-favoring, to a victim resident in that state, a "false conflict" is presented. See id. at 801-04. The manufacturer's home state has a real interest in applying its law to implement the regulatory policy reflected in that law, while the victim's home state has no real interest in applying its defendant-protecting law for the benefit of a non-resident manufacturer.}

\footnotetext[13]{In other words, they assume that in the "true conflict situation," the forum is likely to apply its own law.
driven by D, a resident of state B. The third vehicle is a tractor-trailer owned by T Trucking Co., an interstate trucking company that does business in a number of states, including state A. At the time of the accident, the tractor-trailer was on its way to deliver goods in state C. We will assume that the evidence would support a finding that P was 50% at fault, the driver for T Trucking Co. was 25% at fault, and D was 25% at fault. State A law follows a regime of complete comparative negligence and imposes joint and several liability. This means that under state A law, P could recover 50% of his damages against T Trucking Co. and against D, jointly and severally. Under state B law, the plaintiff cannot recover anything unless the negligence of the defendant was greater than the negligence of the plaintiff, and joint and several liability has been abolished. This means that under state B law, P could not recover against either defendant because P was 50% negligent.

Under interest analysis, if P were to sue in state B, state B would apply its own law in order to implement the defendant-favoring policies reflected in its law because both defendants are residents of state B. P cannot sue D in state A, since state A could not constitutionally exercise jurisdiction over D. But state A can constitutionally exercise jurisdiction over T Trucking Co. on the ground that it is engaged in "continuous and systematic business activity in that state," sufficient to justify the exercise of jurisdiction over it on a nonforum-related claim.¹⁴ In our example, the state A courts are authorized to exercise jurisdiction within constitutional limits, so P can and does sue T Trucking Co. in a state A court. Under interest analysis, state A should apply its own law on the issues of comparative negligence and joint and several liability because, based on P's state A residence, state A has a real interest in applying its plaintiff-favoring law for the benefit of P in this case.

This is the situation most decried by critics of the interest analysis approach because the result is designed to differ depending on where the suit is brought.¹⁵ And in this situation,

¹⁴. See Helicopteros Nacionales de Colombia, 466 U.S. at 415-16.
¹⁵. Note, however, that in the "real world" of torts conflicts litigation, the suit against T Trucking Co. will be brought only in state A. Our concern, therefore, should not be with trying to come up with an "ideal solution" that will "satisfy" both state A and state B, but with whether the result reached by the state A court, which is where suit will be brought, is a result that is functionally sound and fair to the parties.
some critics would fault interest analysis for failing to take into account "multistate policies." I would respond to this criticism by first asking, "what are the 'multistate policies' that the court should take into account" in a conflicts tort case? I would also ask whether the same "multistate policies" would apply if (1) the accident occurred in state A instead of in state B or (2) if the accident occurred in state B while T Trucking Co. was on its way to deliver a shipment of goods to state A?

In the tort area, it is difficult to identify or obtain any kind of agreement on what are the relevant "multistate policies" that the courts should consider in the choice-of-law determination. Prior to tort reform, Professor Juenger argued, for example, that "substandard tort law" should not be applied in multistate cases.16 But Juenger's definition of "substandard tort law" was built around the now largely abandoned defendant-favoring tort rules, such as guest statutes, spousal immunity, or limitations on wrongful death damages. The current trend in tort law is toward limitation or even denial of tort recovery, designed to protect defendants and insurers from what legislatures consider excessive and improper liability for enterprise activity.17 In light of this current trend, how does a court, even if it were disposed to do so, decide which rules of substantive tort law are "substandard" and should not be applied in multistate cases?

In the final analysis, the question in any conflicts torts case is whether the court should apply the plaintiff-favoring law of one state or the defendant-favoring law of another state. It is difficult to see what "multistate policies" could provide a "neutral" and functionally sound solution to this question.18 I would submit, therefore, that the failure of interest analysis to take into account "multistate policies" cannot be a valid objection to the use of interest analysis as the preferred means of re-

17. See Sedler, supra note 6, at 896-98.
18. In our example, because the state A legislature has not adopted tort reform, it would not be expected that the state A courts would find some "multistate policy" in favor of limiting liability in torts cases and apply that policy to the detriment of the policies reflected in state A tort law. Similarly, because the state B legislature has adopted tort reform rules restricting recovery based on comparative negligence and abolishing joint and several liability, it would not be expected that the state B court, in the completely unlikely event that this suit had been brought there, would conclude that "multistate policies" justify application of state A's plaintiff-favoring rules.
We now turn to considerations of fairness. Contrary to the contentions of the critics, interest analysis does not ignore considerations of fairness. As I have pointed out many times, fairness to the parties is an independent choice-of-law consideration, built into any approach to choice of law. Because this is so, a court will not apply its own law, despite a real interest in doing so, where such application would be unfair to the party against whom it is being applied.

In the tort area, fairness relates to foreseeability and reliance. The application of a state's law may produce unfairness if the party against whom that state's law is being applied could not reasonably foresee the application of that law at the time the party acted, and, in the circumstances presented, the party was entitled to rely on the law of another state and conform its conduct to the requirements of that state's law. Although such cases will be fairly rare, when they do occur, the forum will displace its own law despite a real interest in having that law applied.\(^9\) To this extent, considerations of fairness are necessarily built into the interest analysis approach.

Let me give some examples of the situation where the displacement of the forum's law can be explained in terms of fairness considerations. In *Offshore Rental Co. v. Continental Oil Co.*,\(^{20}\) a "key employee" of a California corporation was injured while at the defendant's facilities in Louisiana.\(^{21}\) It was assumed for purposes of this case that California law allowed the corporation recovery of damages for injury to a "key employee" (the California court subsequently held that it did not), while Louisiana law did not.\(^{22}\) The California court, applying "comparative impairment" to the resolution of a purported "true conflict," held that Louisiana's interest would be "more impaired" if its law were not applied.\(^{23}\) In arriving at this conclusion, the court emphasized that the defendant had to deal with employees from many different states at its Louisiana facility, and that it would

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21. See id. at 722.
22. See id.
23. See id. at 726-28.
most reasonably have anticipated a need for protection of premises liability insurance, based on Louisiana law, under which it could not incur tort liability for economic injury to the victim's employer.24

In Barrett v. Foster Grant Co.,25 a New Hampshire employee of a New Hampshire contractor suffered serious injuries while working on an electrical transformer in Massachusetts and brought suit in a federal court in New Hampshire against the Massachusetts landowner.26 The landowner would not be liable under Massachusetts law, under which the only duty imposed on a landowner in these circumstances was to warn of hidden dangers.27 The plaintiff contended that New Hampshire law imposed a higher duty of care.28 The court held that Massachusetts law applied on the duty of care landowners owed to persons on the land, emphasizing that the Massachusetts landowner was entitled to rely on the Massachusetts standard of care when acting on the Massachusetts land.29

In Blakesly v. Wolford,30 a Pennsylvania resident was advised by her physician to have a complicated procedure performed by a Texas oral surgeon. The Texas oral surgeon met with the plaintiff when he was visiting in Pennsylvania, and arranged to perform the procedure at a hospital in Texas.31 The operation was unsuccessful, and in fact, caused additional injury to the plaintiff.32 In a malpractice action against the oral surgeon in Pennsylvania (the oral surgeon made no objection to Pennsylvania's exercise of jurisdiction, although such an objection might have been sustained), the court held that Texas law, which was more favorable to the defendant, applied on the issues of "informed consent" and limitations on malpractice damages.33 The court emphasized that the plaintiff voluntarily went to Texas to have the procedure performed and, accordingly, the de-

24. See id. at 728-29.
25. 450 F.2d 1146 (1st Cir. 1971) (applying New Hampshire law).
26. See id. at 1148.
27. See id. at 1149.
28. See id. at 1152.
29. Id. at 1154.
31. See id. at 236-38.
32. See id.
33. See id.
fendant was entitled to rely on the Texas law of informed consent” and limited liability for damages.34

In *Bader v. Purdom*, 35 New York parents were visiting friends in Ontario and left their small child unsupervised.36 The child was injured by the friends’ dog.37 The parents brought a negligence action on behalf of the child against their friends in New York.38 Realistically, of course, the suit was against their friends’ homeowners’ insurer, and the insurer sought to recover contribution and indemnity from the allegedly negligent parents, which was permitted under Ontario law but not under New York law.39 The New York court applied Ontario law, under the second *Neumeier* rule. 40 Here it can be contended that the application of New York law on the issue of contribution and indemnity would have been unfair to the dogowners, the nominal defendants in the case. Because they were acting in Ontario, they were entitled to conform their conduct to the requirements of Ontario law, under which the parents were responsible for the child’s protection. Thus, the dogowners would not have to be concerned about the child’s safety while the parents were present.

Fairness considerations are also a factor in what I have called the “ninth rule of choice of law.” Under this “rule of choice of law,” an employer’s tort liability to an employee who is covered by worker’s compensation and the liability of the employer for contribution to a third-party tortfeasor in a claim involving that employee is determined by the law of the state where the employer has taken out worker’s compensation to cover the particular employee. One of the reasons for this “rule of choice of law” is that the employer is considered to be entitled to rely on the law of the state where worker’s compensation, covering the particular employee, was taken out to immunize it

34. See id.
35. 841 F.2d 38 (2d Cir. 1988) (applying New York law).
36. See id. at 38.
37. See id. at 37.
38. See id.
40. Id. at 40. *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972), established rules for conflicts torts cases. Under the second *Neumeier* rule, where the plaintiff is from a recovery state and the defendant is from a nonrecovery state, and the accident occurs in the defendant’s home state, the law of that state applies. See id. at 457.
from tort liability to that employee. 41

Having looked at those cases where fairness considerations influenced the choice-of-law decision, we now return to the T

41. See Sedler, supra note 19, at 1334-44. As a matter of due process, a state's law may not constitutionally be applied when the application of that state's law would be "fundamentally unfair" to the party against whom that state's law is being applied. See Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981). No conflicts torts case will be found where a court has held that the application of a state's law would be "fundamentally unfair" for due process purposes. This is because, as the above cases indicate, a state will not apply its own law when the application of that law would produce some unfairness to the party against whom that state's law is being applied. This being so, it is never necessary for a court to consider whether the application of its law would be "fundamentally unfair" for due process purposes.

The only example of due process "fundamental unfairness" that I have seen occurred in a case on which I consulted sometime in the mid-1980s. (There was no reported decision, and the portion of my consulting report that I have retained does not contain many details). In that case, a Michigan couple was vacationing with Canadian friends in Ontario. They left their infant child in a tent, which caught fire when a lantern in the tent fell over. The father attempted to rescue the child, and both the father and the child perished in the fire. The mother brought suit against the lantern manufacturer in a federal court in Michigan, where the lantern manufacturer did extensive business. The lantern manufacturer sought to add the tent manufacturer as a third party defendant, alleging that the tent manufacturer was negligent in not making the tent flame retardant. The tent manufacturer was an Ontario company that marketed its tents throughout Canada. It did not market any tents in Michigan, but marketed other products there, and so was subject to general jurisdiction in Michigan on the basis of "systematic and continuous business activity." Under Ontario law and the laws of all the other Canadian provinces, there was no requirement that tents be flame retardant. Michigan law imposed such a requirement.

In order for the lantern manufacturer to sustain its claim that the Ontario tent manufacturer should be added as a third party defendant, it had to show that the Michigan plaintiff would be entitled to recover against that defendant for negligence. Had the Michigan plaintiff brought her suit against the Ontario manufacturer, in terms of "interest analysis," the "true conflict" would have been presented. Michigan would have a real interest in applying its plaintiff-favoring rule for the benefit of the Michigan plaintiff, while Ontario would have a real interest in applying its defendant-favoring rule for the benefit of the Ontario defendant.

The lawyer for the Ontario tent manufacturer retained this author as a consultant and he advised that, "The Michigan courts would hold that the tort liability of the Ontario manufacturer in the instant case should be determined by Ontario law rather than by Michigan law, because it would be fundamentally unfair to apply Michigan law rather than Ontario law on the point in issue." Because the Ontario manufacturer did not market any tents in Michigan, it could not foresee the application of Michigan law requiring that tents be flame retardant and was entitled to rely on Ontario law, which did not impose such a requirement, and conform its conduct to the requirements of Ontario law. Here, because the application of Michigan's conduct-regulating rule was completely unforeseeable to the Ontario tent manufacturer, the application of Michigan law on this point would be "fundamentally unfair" and thus violative of due process. The court did not need to reach the constitutional question because it held that, under Michigan conflicts law, Ontario law would apply on the negligence question.
Trucking Co. case. In this example, there is no unfairness to T Trucking Co. in the application of state A's law on the issues of comparative negligence and joint and several liability. Because T Trucking Co. was engaged in continuous and systematic business activity in state A, it could foresee one of its vehicles being involved in an accident there, and its liability insurance obviously covered its state A operations. Thus, it could foresee being held liable under the state A law of comparative negligence and joint and several liability. In regard to foreseeability, it is completely irrelevant whether the particular accident involving one of its vehicles occurred in that state. Moreover, the driver for T Trucking would not have relied on the state B's law of comparative negligence and joint and several liability at the time the driver was involved in an accident there. This was not a case where the defendant was entitled to rely on one state's law and conform its conduct to the requirements of that state's law.

Because state A has a real interest in applying its law on the issues of comparative negligence and joint and several liability, and because there is no unfairness in the application of state A law on these issues, state A should apply its own law in order to implement the policies reflected in that law.

42. In Allstate, because the insurance covered the vehicle while being driven in Minnesota, the application of Minnesota law on the issue of the “stacking” of the insurance policies was foreseeable to Allstate, and it was completely irrelevant that the particular accident involving the covered vehicle occurred in Wisconsin. See Allstate, 449 U.S. at 326-31 (Stevens, J., concurring).

43. The example case is based on Schwartz v. Consol. Freightways, 221 N.W.2d 665 (Minn. 1974). In that case a Minnesota resident was injured in an accident in Indiana with trucks owned by an Ohio corporation and traveling to states other than Minnesota. See id. at 666-67. The defendant did substantial business in Minnesota, and suit was brought there. See id. at 667. The court applied Minnesota law allowing recovery on the basis of comparative negligence, rather than the law of Indiana or Ohio, which would have barred recovery due the plaintiff's contributory negligence. See id. at 669; see also Kenna v. So-Fro Fabrics, Inc., 18 F.3d 623 (8th Cir. 1994) (applying North Dakota law) (where North Dakota resident was injured in Minnesota store owned by company that did business in both states, North Dakota's plaintiff-favoring rules relating to survival and wrongful death applied over Minnesota's defendant-favoring rule); Pollack v. Bridgestone/Firestone, Inc., 939 F. Supp. 151 (D. Conn. 1996) (applying Connecticut law) (where Connecticut victims were involved in accident resulting from the blowout of a tire manufactured by an Ohio company in Illinois, Connecticut victim-favoring products law applied).
IV. A CONCLUDING NOTE

In the "real world" of conflicts torts litigation, the application of the interest analysis approach produces results that are functionally sound and fair to the parties. Under the interest analysis approach, the choice-of-law decision is made exclusively with reference to the policies and interests of the involved states and, by design, does not take into account "multistate policies." Far from being a point of criticism, I submit that in conflicts torts cases this is a point of strength. Tort law reflects strong policies relating to loss distribution, regulation of enterprise activity, and deterrence of socially undesirable conduct. States have "real" interests in applying their plaintiff-favoring tort law for the benefit of resident plaintiffs and their defendant-favoring tort law for the benefit of resident defendants; this is because the consequences of the accident and of imposing or denying liability will be felt by the parties in their respective home states. States also have a "real" interest in applying their laws reflecting a regulatory or admonitory policy to conduct occurring within that state. It is difficult to come up with any "multistate policies" that would provide a "neutral" and functionally sound solution to the question of whether a court should apply plaintiff-favoring law or defendant-favoring law. Thus, it seems fully rational for a court when making a choice-of-law determination in a conflicts torts case to make that determination with reference to the policies and interests of the involved states, and in the "true conflict" situation for a court to apply its own law in order to implement its own policy and interest.

Moreover, considerations of fairness are built into the interest analysis approach, as they are in any approach to choice of law. A court will not apply its own law, despite a real interest in doing so, where the application of its own law may produce unfairness to the party against whom it is being applied. The application of a state's law in a conflicts torts case could produce unfairness only where the party against whom that state's law is being applied could not reasonably foresee the application of that law at the time the party acted, and, in the circumstances presented, was entitled to rely on the law of a state and conform its conduct to the requirements of that state's law. Such cases have always been fairly rare and, in the twenty-first century world of interstate operations and a global economy, will be
even more rare.

In the "real world" of conflicts torts cases, interest analysis is the preferred approach to choice of law because it works. It produces results that are functionally sound and fair to the parties. The courts understand this, which is why they apply interest analysis in practice to the cases coming before them for decision. Perhaps, as we move further into the twenty-first century, the academic commentators may catch up with the courts.