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During 1965 and 1966 Continental Oil Company purchased forty-six railroad tank cars which were manufactured in Ohio by defendant, General American Transportation Corp. The contracts of sale were executed in Oklahoma and the cars delivered in Pennsylvania, Ohio, and Texas for use in several northeastern states. Defects gradually developed in the cars, and in December 1971 the Association of American Railroads prohibited their use. As a result, the purchasers were compelled to make repairs on the cars, and in 1973 they filed suit in federal district court against the manufacturer alleging five separate causes of action, including strict liability in tort.

Defendant moved for partial summary judgment asserting, inter alia, that a strict liability action afforded no basis of recovery for "loss of bargain." In ruling on this claim the district court applied Ohio law, which allows recovery for loss of bargain.1 Held—Summary Judgment granted in part, denied in part.2 In tort actions, where the place of injury is unknown and unascertainable, Texas will apply the law of the place of the wrongful act.3

Choice of law issues have been a source of litigation since the 13th century "statutists" sought to regulate disputes arising in Italian commerce.4 The need for a modern systematic formulation of conflict rules became apparent

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2. Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 290 (S.D. Tex. 1976). Summary judgment was granted as to the implied warranty but denied as to the express warranty and breach of contract theories, since material issues of fact and law remained. Judgment on the strict liability claim was also denied because Ohio law allowed recovery for the loss asserted and no statute of limitations had barred the action. The motion did not include the negligence theory originally asserted by plaintiffs.

3. Id. at 295.

4. The statutists first adopted a territorial approach to conflicts of law by classifying statutes as "real" or "personal." The "real" law was that of the place where the transaction occurred, while the "personal" law was the law of domicile, which was thought to follow an individual about. D. Cavers, The Choice of Law Process 2 (1965); 15 W. Holdsworth, A History of English Law 335 (1965).
as larger trading markets increased the number and magnitude of conflict problems.\(^5\)

In 1934 the Restatement of Conflicts adopted a set of rules designed to produce uniform and predictable results with a minimum of effort.\(^6\) Its conceptual basis was the vested rights doctrine, which prescribed adjudication of rights according to the law of the place where the rights arose.\(^7\) This choice of law process involved three steps: first, characterization of the nature of the right being asserted; second, selection of the proper choice of law rule to govern that type of action; and third, application of the substantive law that the choice of law rule directed.\(^8\)

The lex loci delicti, or law of the place of the wrong, governed choice of law in tort actions under the Restatement.\(^9\) Since the right of action was considered to have arisen in the place of injury, the substantive law of that state was applied regardless of the interests of other states.\(^10\) The rule drew severe criticism from many commentators who thought it too mechanical and unyielding to the interests of justice or ethical and social considerations.\(^11\)

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8. Under this traditional choice of law process, the characterization step was the most difficult to perform since many actions sounded both in tort and contract. See R. Leflar, American Conflicts Law § 91, at 207-08 (1968); Comment, Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?, 114 U. Pa. L. Rev. 539 (1966). The instant case is an example of this dilemma since the strict liability action for economic loss could have been grounded in tort or contract. Had the claim been characterized as a contract problem, the law of Oklahoma rather than Ohio would have governed and a completely different outcome would have resulted since Oklahoma does not recognize recovery for economic loss. Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 292 n.2, 293 n.3 (S.D. Tex. 1976); see, e.g., Forsyth v. Cessna Aircraft Co., 520 F.2d 608, 610 (9th Cir. 1975) (action for damages caused by defective airplane sounded in tort); Iacono v. Anderson Concrete Corp., 326 N.E.2d 267, 269 (Ohio 1975) (suit for damages resulting from defective mobile home sounded in tort, based on breach of implied warranty); Wights v. Staff Jennings, Inc., 405 P.2d 624, 629 (Ore. 1965) (action for injuries caused by defectively manufactured boat held a tort action).
10. E.g., Click v. Thuron Indus., Inc., 475 S.W.2d 715, 716 (Tex. 1972) (applying Missouri law where plane crashed); Francis v. Herrin Transp. Co., 432 S.W.2d 710, 713 (Tex. 1968) (Louisiana law governed wrongful death action); Willis v. Missouri Pac. Ry., 61 Tex. 432, 435-36 (1884) (Texas law inapplicable where injury and death occurred in Indian Territory).
Recognizing these often unjust results, many courts engaged in evasive techniques, which circumvented the rigid conflict rules.\(^\text{12}\)

The New York Court of Appeals initiated a widespread shift from the traditional approach with the landmark case of Babcock v. Jackson.\(^\text{13}\) In that suit for injuries sustained in an Ontario automobile accident, the court of appeals applied New York law, which requires compensation to guests for negligent injury, instead of the Ontario guest statute, which severely limited recovery. It was held that New York had the “dominant contacts” since the accident involved New York residents on a trip beginning and ending in New York, in a New York car, covered by New York insurance.\(^\text{14}\) The Ontario contacts were dismissed as insignificant.\(^\text{15}\)

Early decisions breaking from the old rule applied a quantitative approach to determine the contacts necessary to sustain a choice of law decision.\(^\text{16}\) This approach quickly shifted to a qualitative analysis of the particular fact issues in relation to the policy interests of the different states involved.\(^\text{17}\) The *Restatement (Second)* officially sanctioned this “significant interest” approach, thereby displacing the old vested rights doctrine.\(^\text{18}\) At least twenty-two states have abandoned the *lex loci delicti* rule in favor of the interest


\(^{13}\) 240 N.Y.S.2d 743 (1963).  

\(^{14}\) Id. at 749-50.  

\(^{15}\) Id. at 750.  


\(^{18}\) *Restatement (Second) of Conflict of Laws* § 6 (1969). As the analysis became more refined and oriented toward the competing policy interests, it assumed a number of descriptive labels which included “significant contacts,” “center of gravity,” “significant interests” and “governmental or functional interest.” The term “significant contacts” is employed in the instant case, although the analysis used might more properly be called “governmental interest.”
analysis, but many still cling to the mechanical rule. Texas has repeatedly rejected efforts to replace the *lex loci delicti* rule and continues to adhere to the original *Restatement* standard. There are, however, two situations in which it is generally agreed that the law of the place of wrong will not automatically apply. The first occurs when a question of procedure arises, as opposed to a substantive law conflict. The second is when the law of the foreign jurisdiction is completely obnoxious to a strong public policy of the forum state. Before the flood of states adopted the significant interest approach, a third exception was developed which applied the law of the state of manufacture or the place where the act or omission occurred.

In *Continental Oil Co. v. General American Transportation Corp.* the district court was faced with the problem of deciding which state's law Texas would adopt to govern the strict liability claim for economic loss. The decision was crucial because the court would have granted the defendant's motion for summary judgment on the strict liability claim if the law adopted did not recognize a claim for economic loss. Since the railroad tank cars

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21. *E.g.*, Click v. Thuron Indus., Inc., 475 S.W.2d 715, 716 (Tex. 1972); Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 187 (Tex. 1968); Pratt v. Royder, 517 S.W.2d 922, 924 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).

22. The law of "the state where the last event necessary to make an actor liable for an alleged tort takes place." *Restatement of the Law of Conflict of Laws* § 377 (1934).


27. *Id.* at 293.

28. Although the Supreme Court of Texas has not decided the issue, it does not seem likely that Texas would allow recovery in a strict liability action for commercial loss. *Id.* at 292 n.2; see Pioneer Hi-Bred Int'l, Inc. v. Talley, 493 S.W.2d 602, 606-08 (Tex. Civ. App.—Amarillo 1973, no writ); Eli Lilly & Co. v. Casey, 472 S.W.2d

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became gradually defective while in use in a number of states, no place of injury could be pinpointed.\textsuperscript{29} This prevented the easy application of the \textit{lex loci delicti}, the most likely choice of law rule to be adopted by a Texas court.\textsuperscript{30} Precedential guidance was unavailable in Texas because the tort was the result of a gradual process rather than an immediate impact.\textsuperscript{31} In order to produce a result consistent with Texas law, the court had to fit the unique facts within the constraints of the traditional rule.

Although Texas interprets the \textit{lex loci delicti} as the law of the place of injury, language in several reported cases indicates that it might be interpreted as the place where the wrongful act or omission which caused the injury occurred.\textsuperscript{32} These cases are inconclusive, however, since the place of injury and the act producing the injury were the same in all cases. No Texas court has ever expressed a preference for the place of the act over the place of the injury, though some jurisdictions have employed the manufacturer's exception in a product liability context.\textsuperscript{33} This exception was given limited discussion and effect in \textit{Continental Oil}, however, for the crux of the court's argument in favor of adopting the \textit{lex loci delicti} rationale rested solely on the party's inability to determine exactly where the injury occurred.\textsuperscript{34}

The court concluded that Texas would follow its traditional \textit{lex loci delicti} rationale in a case like the instant one, but would apply the law of the manufacturer's state in the absence of facts determining the place of injury.\textsuperscript{35} Therefore, since the defective cars were manufactured in Ohio, its law governed the strict liability claim.\textsuperscript{36} The need and propriety of the manufacturer's exception would not have arisen had the place of injury been known.

\begin{footnotesize}
\begin{enumerate}
\item 30. \textit{Click v. Thuron Indus., Inc.}, 475 S.W.2d 715, 716 (Tex. 1972); \textit{Marmon v. Mustang Aviation, Inc.}, 430 S.W.2d 182, 185 (Tex. 1968); \textit{Pratt v. Royder}, 517 S.W.2d 922, 924 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).
\item 35. \textit{Id. at 295}.
\item 36. \textit{Id. at 295}.
\end{enumerate}
\end{footnotesize}
Although mindful of the Supreme Court's recent affirmation of the Erie-Klaxon rule prohibiting federal courts from adopting their own "better" rule or federal common law, the court felt compelled to embark on an exhaustive discussion of the significant interests analysis. A major obstacle to this analysis has been the Texas courts' adherence to a ninety-year-old interpretation of the wrongful death statute, a major source and prototype of tort-conflict litigation. According to the Texas courts, the statute gives foreigners and Texas citizens the right to maintain suit in Texas for wrongful death occurring in another state or country only if the law of that place gives them such a right of action.

The interpretation has been strongly criticized, and its effects are illustrated by Marmon v. Mustang Aviation, Inc., a wrongful death suit brought by survivors of Texas residents. The decedents were killed in a Colorado plane crash while on a business trip for their Texas company. Although the case admittedly had little relationship with Colorado, the Supreme Court of Texas applied the Colorado statute, which severely limited recovery. In doing so, the court refused to give the Texas statute extraterritorial effect, claiming that its hands were bound by precedent until the legislature made a change in the statute.

39. E.g., Click v. Thuron Indus., Inc., 475 S.W.2d 715, 716 (Tex. 1972); Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 186 (Tex. 1968); Willis v. Missouri Pac. Ry., 61 Tex. 432, 435 (1884).
42. 430 S.W.2d 182 (Tex. 1968).
43. Id. at 193.
44. The Continental court seemed to be unaware of the fact that the legislature made the change in May 1975. The wrongful death statute now allows the courts to give the statute extraterritorial effect. TEX. REV. CIV. STAT. ANN. art. 4678 (Supp. 1976) provides:
Whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any foreign State or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign State or country or of this State, such right of action may be enforced in the courts of this State within the time prescribed for the commencement of such actions by the statutes of this State. All matters pertaining to procedure in the prosecution or maintenance of such action in the courts of this State shall be gov-
Reiterating the strength of stare decisis in such cases, Justice Norvell distinguished the "statutory" wrongful death action from "common law" tort actions. The distinction seems apposite to the instant case, for strict liability is a common law right, not governed by statute. The Continental court reasoned that the prohibition against the significant interest analysis extended only to statutory rights and did not apply to common law rights of action such as this one. Having made the distinction, the court examined the competing interests of the states involved in the principal action.

As the state of manufacture, Ohio had the only significant interest in the litigation, for it was the state most responsible for determining liability and future regulatory policy of in-state manufacturers. The relationships of Texas and Pennsylvania to the transaction were unimportant, for partial delivery on the contracts had little to do with the present controversy. The interests of Oklahoma, the state of contract, were also deemed inferior to those of Ohio in relation to the strict liability issue. After detailed analysis of the facts in terms of the significant interests, the court could only conclude that a Texas court "might" adopt the approach in a similar situation.

The final possibility considered was adoption of the "better reasoned majority rule." This suggestion was urged by defendant in the absence of any clear choice of law principle, but was quickly dismissed because of the express prohibition by Erie-Klaxon.

While the court undoubtedly reached the correct result on the strict liability issue, the real problem involved predating that result on analysis compatible with Texas law. The constraints of the Erie-Klaxon rule were certainly fresh in the court's mind with the recent Supreme Court decision in Day & Zimmerman, Inc. v. Challoner. In that case the Fifth Circuit was reversed for refusing to apply the Texas lex loci delicti rule.

In considering the impact of Continental, there is a temptation to criticize the court's failure to rest its decision firmly on the significant interest approach. Faced with the strong mandate in Day & Zimmerman, however, the

45. Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 186 (Tex. 1968).
47. Id. at 296.
48. Id. at 296.
49. Id. at 296.
50. Id. at 295.
51. Id. at 296.
52. — U.S. —, 96 S. Ct. 167, 46 L. Ed. 2d 4 (1975). In this suit by individuals injured by defectively manufactured weapons, the place of injury was Cambodia but the suit was brought in Texas, the place of manufacture.
53. Id. at —, 96 S. Ct. at 168, 46 L. Ed. 2d at 5.
traditional rule was the only one which the court could adopt.\textsuperscript{54} In light of this clear mandate, the court's discussion of the significant interest analysis can only be explained by the judge's desire for the decision to serve as a harbinger for choice of law revision in Texas.\textsuperscript{55}

The opportunity to adopt this new approach may involve a long wait, for most conflict questions arise in a context more likely to be litigated in a federal court.\textsuperscript{56} This paradox, created by the \textit{Erie-Klaxon} mandate, will continue to force courts to adopt a timid approach to deciding conflict cases which rarely, if ever, find their way into the state courthouse. The counterproductive effect of this uncertainty is not in the best interest of the state or the parties.

Placing the burden of the \textit{Continental} result on the \textit{lex loci delicti} rule has, however, strained it to the point of collapse. While it was originally intended to provide a certain and simple solution to conflicts of law,\textsuperscript{57} the addition of the manufacturer's exception has broken down the automatic mechanism and forced the courts to adopt a "thinking" approach that considers the socio-economic needs of modern society.\textsuperscript{58} The advantages of the original \textit{Restatement} were lost almost immediately after adoption through the evasive techniques of characterization and \textit{renvoi} which attempted to give effect to the modern demands of justice.\textsuperscript{59}

\begin{thebibliography}{99}
\item 55. Id. at 295-96. Although the decision was well supported under the \textit{lex loci delicti} rationale, the court examined the significant interest analysis in detail, concluding only that it "might" be adopted by a Texas court. Several Texas Supreme Court opinions reflect strong support for the new approach. See Click v. Thuron Indus., Inc., 475 S.W.2d 715, 719-20 (Tex. 1972) (Daniel, Steakley, and Reavley, JJ., concurring) (urges adoption of significant interest analysis in Texas); Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 189-92 (Tex. 1968) (Steakley, Smith, and Greenhill, JJ., dissenting) (urges adoption in spite of legislative obstacle perceived by majority).
\item 57. R. LEFLAR, AMERICAN CONFLICTS LAW § 90, at 206 (1968); Weintraub, Choice of Law for Products Liability: The Impact of the Uniform Commercial Code and Recent Developments in Conflicts Analysis, 44 Texas L. Rev. 1429, 1437 (1966).
\item 58. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5, Comment b at 11, & § 6 (1969).
\item 59. Technique employed by litigants or courts which sought to evade undesired effects of applying substantive law of the state where the forum's choice of law has directed it, by interpreting the forum state's choice of law to refer to the "whole law" of the other state, including its conflicts law. E.g., Richards v. United States, 369 U.S. 1, 11 (1962); Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295, 299 (9th Cir. 1954); see R. LEFLAR, AMERICAN CONFLICTS LAW § 96, at 219 (1968). The \textit{Restatement (Second)} seeks to prevent this abuse by defining in advance what is meant by substantive law and choice of law rules. \textit{Restatement (Second) of Conflict of Laws} § 8 (1969).
\end{thebibliography}
This inevitable infiltration of the functional approach to conflicts of law is evident in Continental. The lex loci delicti will certainly continue to be punctured by exceptions in the "interests of justice" or "on unique facts." Although recent legislation and a growing recognition of the value of a more rational trend are encouraging signs, Texas may, as have several other states, opt for another century of mechanical choice of law.

Critics of the interest analysis charge that its application forces courts to exceed proper judicial boundaries and assume the political-legislative function of determining whose interests are most significant. They charge that no objective criterion exists by which these decisions can be made. These same critics, however, are unwittingly disturbing the universal principles of justice and right reason by forcing too broad an application of a specific rule.

The lex loci delicti is an excellent example of an over-particularized principle of law. Taking several logical steps back to the more general significant interests approach will expand the choice of law view enough to provide the courts with an opportunity to rationally evaluate the complex issues which inevitably arise in a conflicts situation.

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62. E.g., Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743, 752 (Fla. 1967); McDaniels v. Sinn, 400 P.2d 1018, 1020 (Kan. 1965); White v. King, 223 A.2d 763, 767 (Md. 1966).