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Where the Place of Injury Is Unknown and Unascertainable, Texas Will Apply the Law of the Place of the Wrongful Act.

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CONFLICTS OF LAW—Products Liability—Where the Place of Injury Is Unknown and Unascertainable, Texas Will Apply the Law of the Place of the Wrongful Act

Continental Oil Co. v. General American Transportation Corp., 409 F. Supp. 288 (S.D. Tex. 1976).

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

1. The court noted that defendant had originally argued for the application of Ohio law asserting that it did not allow recovery on a strict liability theory for economic loss. Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 294 n.4 (S.D. Tex. 1976). The Ohio law was changed, however, by a 1975 case which allowed such recovery in Ohio. Iacono v. Anderson Concrete Corp., 326 N.E.2d 267, 271 (Ohio 1975).

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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5. *See* D. CAVERS, THE CHOICE OF LAW PROCESS 12 (1965).

6. R. LEFLAR, AMERICAN CONFLICTS LAW § 8, at 13, 14 (1968).

7. 3 J. BEALE, THE CONFLICT OF LAWS § 73, at 1967 (1935). Professor Beale was the principal proponent of the vested rights doctrine and as chief reporter had a significant effect on the *Restatement of Conflicts*. D. CAVERS, THE CHOICE OF LAW PROCESS 6 (1965).

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).

9. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS §§ 377-84 (1934). *But see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969) (supplants *lex loci delicti* with state's interest approach).

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).

11. *E.g.*, Griffith v. United Airlines, Inc., 203 A.2d 796, 801 (Pa. 1964); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 200 (1971); Note, *The Erosion of Lex Loci Delicti: Toward a More Rational Choice of Tort Law*, 5 U. RICH. L. REV. 331, 333-34 (1971).

Recognizing these often unjust results, many courts engaged in evasive techniques, which circumvented the rigid conflict rules.[12]

The New York Court of Appeals intitiated a widespread shift from the traditional approach with the landmark case of *Babcock v. Jackson.*[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.[14] The Ontario contacts were dismissed as insignificant.[15]

Early decisions breaking from the old rule applied a quantitative approach to determine the contacts necessary to sustain a choice of law decision.[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.[17] The *Restatement (Second)* officially sanctioned this "significant interest" approach, thereby displacing the old vested rights doctrine.[18] At least twenty-two states have abandoned the *lex loci delicti* rule in favor of the interest

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12. Richards v. United States, 369 U.S. 1, 11 (1962) (Federal Tort Claims Act refers to whole law of state, including choice of law rules); *see* Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295, 299 (9th Cir. 1954) (place of contract law avoided by declaring New York statute procedural and Alaska statute substantive); Guernsey v. Imperial Bank of Canada, 188 F. 300, 301 (8th Cir. 1911) (law of place where note payable governed rather than place of indorsement by interpreting Illinois law to refer to whole law, including its conflict rules). *See generally* R. LEFLAR, AMERICAN CONFLICTS LAW § 93, at 212 (1968); Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 S. CAL. L. REV. 221 (1941); Lorenzen, *The Renvoi Doctrine in the Conflicts of Laws—Meaning of "The Law of a Country,"* 27 YALE L.J. 509 (1918).

13. 240 N.Y.S.2d 743 (1963).

14. *Id.* at 749-50.

15. *Id.* at 750.

16. *See, e.g.*, Grant v. McAuliffe, 264 P.2d 944, 949 (Cal. 1953); Haag v. Barnes, 216 N.Y.S.2d 65, 69 (1961); Auten v. Auten, 308 N.Y. 155, 161, 124 N.E.2d 99, 102 (1954). *See generally* Leflar, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 637, 638 (1968).

17. Reich v. Purcell, 63 Cal. Rptr. 31, 34 (1967); First Nat'l Bank v. Rostek, 514 P.2d 314, 319-20 (Colo. 1973); Fox v. Morrison Motor Freight, Inc., 267 N.E.2d 405, 408 (Ohio 1971). Professor Leflar articulated the distinction by juxtaposing the reasoning in *Babcock* with that in *Reich*, one of the first cases in California to employ a functional or governmental interests approach to conflict problems. *See* Leflar, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 637 (1968).

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,[19] but many still cling to the mechanical rule.[20]

Texas has repeatedly rejected efforts to replace the *lex loci delicti* rule[21] and continues to adhere to the original *Restatement* standard.[22] 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.[23] The second is when the law of the foreign jurisdiction is completely obnoxious to a strong public policy of the forum state.[24] 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.[25]

In *Continental Oil Co. v. General American Transportation Corp.*[26] 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.[27] 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.[28] Since the railroad tank cars

19. Weintraub, *The Emerging Problems in Judicial Administration of a State-Interest Analysis of Tort Conflict of Law Problems*, 44 S. CAL. L. REV. 877, 878 n.4 (1971) (list of 20 states which have adopted significant interest approach). Recently Colorado and Louisiana have rejected the *lex loci delicti* doctrine and joined other states in applying the significant interest rule. First Nat'l Bank v. Rostek, 514 P.2d 314, 320 (Colo. 1973); Jagers v. Royal Indem. Co., 276 So. 2d 309, 311 (La. 1973).

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

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).

23. Federal law governs procedural issues in diversity actions. *E.g.*, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 488 (1941); Polk v. Ford Motor Co., 529 F.2d 259, 271 (8th Cir.), *cert. denied*, 96 S. Ct. 2229 (1976); Owens v. Int'l Paper Co., 528 F.2d 606, 611 (5th Cir. 1976).

24. Couch v. Mobil Oil Corp., 327 F. Supp. 897, 903 (S.D. Tex. 1971); *see* Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 504 (1939).

25. Vrooman v. Beech Aircraft Corp., 183 F.2d 479, 480 (10th Cir. 1950) (applying law of manufacturer's state); Hellriegel v. Sears Roebuck & Co., 157 F. Supp. 718, 721 (N.D. Ill. 1957) (place of manufacture governs); Gordon v. Bates-Crumley Chevrolet Co., 158 So. 223, 229 (La. Ct. App. 1935) (law of manufacturer's state); *see* 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 37.03[1], at 11-14 n.4 (1976); Annot., 76 A.L.R.2d 130, 147 (1961).

26. 409 F. Supp. 288 (S.D. Tex. 1976).

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

became gradually defective while in use in a number of states, no place of injury could be pinpointed.[29] This prevented the easy application of the *lex loci delicti*, the most likely choice of law rule to be adopted by a Texas court.[30] Precedential guidance was unavailable in Texas because the tort was the result of a gradual process rather than an immediate impact.[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 *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.[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.[33] This exception was given limited discussion and effect in *Continental Oil*, however, for the crux of the court's argument in favor of adopting the *lex loci delicti* rationale rested solely on the party's inability to determine exactly where the injury occurred.[34]

The court concluded that Texas would follow its traditional *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.[35] Therefore, since the defective cars were manufactured in Ohio, its law governed the strict liability claim.[36] The need and propriety of the manufacturer's exception would not have arisen had the place of injury been known.

598, 599 (Tex. Civ. App.—Eastland 1971, writ dism'd); Melody Home Mfg. Co. v. Morrison, 455 S.W.2d 825, 828 (Tex. Civ. App.—Houston [1st Dist.] 1970), *aff'd*, 468 S.W.2d 505 (Tex. 1971).

29. Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 294 (S.D. Tex. 1976).

30. Click v. Thuron Indus., Inc., 475 S.W.2d 715, 716 (Tex. 1972); Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 185 (Tex. 1968); Pratt v. Royder, 517 S.W.2d 922, 924 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).

31. Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 295 (S.D. Tex. 1976).

32. *E.g.*, Lee v. Howard, 483 S.W.2d 922, 923 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.); Brown v. Seltzer, 424 S.W.2d 671, 674 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.); Marmon v. Mustang Aviation, Inc., 416 S.W.2d 58, 63 (Tex. Civ. App.—Austin 1967), *aff'd*, 430 S.W.2d 182, 187 (Tex. 1968).

33. *See* Vrooman v. Beech Aircraft Corp., 183 F.2d 479, 480 (10th Cir. 1950); Minrose Hat Co. v. Gabriel, 149 F. Supp. 908, 910 (D.N.J. 1957). Some courts adopted the law of the seller's state rather than place of injury. *See* Gordon v. Bates-Crumley Chevrolet Co., 158 So. 223, 229 (La. Ct. App. 1935); Burkett v. Globe Indem. Co., 181 So. 316, 318 (Miss. 1938).

34. Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 294 (S.D. Tex. 1976).

35. *Id.* at 295.

36. *Id.* at 295.

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,[37] the court felt compelled to embark on an exhaustive discussion of the significant interests analysis.[38] 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.[39] 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.[40]

The interpretation has been strongly criticized,[41] and its effects are illustrated by *Marmon v. Mustang Aviation, Inc.*,[42] a wrongful death suit brought by survivors of Texas residents. The decendents 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.[43] 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.[44]

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37. Day & Zimmerman, Inc. v. Challoner, — U.S. —, —, 96 S. Ct. 167, 168, 46 L. Ed. 2d 3, 5 (1975). In a diversity action, a federal court must apply the substantive law, including the conflicts law, of the forum state. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

38. Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 295 (S.D. Tex. 1976).

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).

40. Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 186-87 (Tex. 1968).

41. *See, e.g.*, Weintraub, *The Emerging Problems in Judicial Administration of a State-Interest Analysis of Tort Conflict of Laws Problems*, 44 S. CAL. L. REV. 877, 881-82 (1971); 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, 1441 n.46 (1966).

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.[45] The distinction seems apposite to the instant case, for strict liability is a common law right, not governed by statute.[46] 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.[47] 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.[48] The relationships of Texas and Pennsylvania to the transaction were unimportant, for parital 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.[49] 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.[50]

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*.[51]

While the court undoubtedly reached the correct result on the strict liability issue, the real problem involved predicating 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*.[52] In that case the Fifth Circuit was reversed for refusing to apply the Texas *lex loci delicti* rule.[53]

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

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erned by the law of this State, and the court shall apply such rules of substantive law as are appropriate under the facts of the case.
(emphasis added to reflect 1975 amendments).

45. Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 186 (Tex. 1968).

46. Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 296 (S.D. Tex. 1976).

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.[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.[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.[56] This paradox, created by the *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 *Continental* result on the *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,[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 socioeconomic needs of modern society.[58] The advantages of the original *Restatement* were lost almost immediately after adoption through the evasive techniques of characterization and *renvoi* which attempted to give effect to the modern demands of justice.[59]

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54. Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 295 (S.D. Tex. 1976).

55. *Id.* at 295-96. Although the decision was well supported under the *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).

56. Article III, § 2 of the United States Constitution vests diversity jurisdiction in the federal courts. The only actions involving diversity of citizenship brought in the state courts concerned rights of actions given by statute rather than common law. *See* Recent Development, *Pierce v. Cook & Co.: Rule 60(b)(6) Relief from Judgment for Change of State Law in a Diversity Case*, 62 VA. L. REV. 414 (1976).

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).

58. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5, Comment b at 11, & § 6 (1969).

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 *Restatement (Second)* seeks to prevent this abuse by defining in advance what is meant by substantive law and choice of law rules. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1969).

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[60] and a growing recognition of the value of a more rational trend are encouraging signs,[61] Texas may, as have several other states, opt for another century of mechanical choice of law.[62]

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.[63] They charge that no objective criterion exists by which these decisions can be made.[64] 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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60. TEX. REV. CIV. STAT. ANN. art. 4678 (Supp. 1976).

61. Click v. Thuron Indus., Inc., 475 S.W.2d 715, 719-20 (Tex. 1972) (Daniel, Steakley, and Reavley, JJ., concurring); Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 189-92 (Tex. 1968) (Steakley, Smith, and Greenhill, JJ., dissenting).

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

63. *See* Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 187 (Tex. 1968); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function,* 26 U. CHI. L. REV. 9, 14, 75-84 (1958).

64. *See* A. EHRENZWEIG, CONFLICT OF LAWS § 123, at 351, § 174, at 464 (1962); R. LEFLAR, AMERICAN CONFLICTS LAW § 96, at 222 (1968); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function,* 26 U. CHI. L. REV. 9, 80 (1958).