
OREGON LAW REVIEW

2009

VOLUME 88
NUMBER 4

Articles

SYMEON C. SYMEONIDES*

Oregon's New Choice-of-Law Codification for Tort Conflicts: An Exegesis

I.	Oregon's New Codification.....	965
	A. Background: The Traditional Choice-of-Law System and the Choice-of-Law Revolution.....	966
	B. Oregon Takes the Lead, Once Again	971
II.	The Structure of the New Act.....	974
III.	Preliminaries.....	976
	A. Applicability.....	976
	B. Definitions.....	977
	1. Noncontractual Claim.....	977
	2. Conduct and Injury.....	978

* Dean and Alex L. Parks Distinguished Professor of Law, Willamette University College of Law; LL.B. (Priv. L.), LL.B. (Publ. L.), University of Thessaloniki; LL.M., S.J.D., Harvard Law School. Chair and Reporter, Codification of Conflicts Law, Oregon Law Commission.

3.	Person and Domicile	979
4.	“State” and “Law”	980
C.	Characterization, Localization, and Other Factual Determinations	981
IV.	Claims Directly Governed by Forum Law	983
A.	The List of ORS 31.870	984
B.	Products Liability Claims.....	986
V.	Claims Governed by Either Forum or Foreign Law.....	993
A.	Choice-of-Law Agreements	993
B.	The General Rules of ORS 31.875.....	997
1.	Common-Domicile Cases.....	1000
a.	The Common-Domicile Rule.....	1001
b.	The Exception to the Common-Domicile Rule	1007
2.	Cases in Which the Parties Are Domiciled in States with Laws that Would Produce the Same Outcome	1012
3.	Cases in Which the Parties Are Domiciled in States with Laws that Would Produce a Different Outcome	1014
a.	Split-Domicile Cases in Which the Conduct and the Injury Occurred in One Party’s Home State	1015
b.	Split-Domicile Cases in Which the Conduct and the Injury Occurred in the Same Third State	1020
c.	Split-Domicile Cases Arising from Cross- Border Torts.....	1022
C.	The General Approach of ORS 31.878	1032
1.	The Goal and the Catchphrase.....	1032
2.	The Process.....	1034
a.	Identifying the Involved States	1034
b.	Identifying the Pertinent Policies of the Involved States.....	1035
c.	Evaluating the Conflicting Policies.....	1035
d.	Policies and “Interests”	1037
D.	Issue-by-Issue Analysis and Dépeçage	1038
VI.	Escape Clauses and the Balance Between Certainty and Flexibility	1040
	Conclusion.....	1044
	Appendix	1046

I

OREGON'S NEW CODIFICATION

On January 1, 2010, Oregon's new choice-of-law codification for tort conflicts went into effect.¹ This pioneering statute is one more example of Oregon's well-established propensity and capacity to innovate and to lead.² The new statute is the first attempt to codify this interesting but difficult subject in a common-law state in the United States.³ This Article provides a section-by-section exegesis⁴ of the new statute in an effort to assist courts and counsel in interpreting and applying it.⁵

¹ See OR. REV. STAT. §§ 31.850–890 (2009). This statute is reproduced in an Appendix, *infra*, and is hereinafter referred to as “the Act” or “the statute.” All citations to sections and subsections without further designation are citations to this statute. According to its terms, the Act applies to actions filed after its effective date of January 1, 2010, even if the underlying claim arose before that date. See 2009 Or. Laws 451 § 13 (S.B. 561).

² See, e.g., James A. Henderson, Jr. & Aaron D. Twerski, *Product Design Liability in Oregon and the New Restatement*, 78 OR. L. REV. 1, 2 (1999) (“Oregon courts have been leaders in product liability. . . . Oregon decisions have traditionally found their way into the leading torts and products liability casebooks as classic works that deserve the attention of scholars and students of the law. . . . More importantly, they are cited and relied upon with great frequency by courts throughout the country. . . . [A]s co-reporters for the Restatement (Third) of Torts: Products Liability[,] . . . the authors turned to the Oregon decisions for guidance in drafting both the black letter rules and the official comments.” (footnotes omitted)).

³ The only other state to enact a comprehensive choice-of-law codification is the civil law or “mixed jurisdiction” state of Louisiana, which has had a rich tradition of codification. The Louisiana conflicts codification, also drafted by this author, was enacted into law by Act 923 of 1991, became effective January 1, 1992, and now forms Book IV of the Louisiana Civil Code. It is discussed, *inter alia*, in Symeon C. Symeonides, *The Conflicts Book of the Louisiana Civil Code: Civilian, American, or Original?*, 83 TUL. L. REV. 1041 (2009). For a discussion of the tort provisions of that codification, see Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677 (1992) [hereinafter Symeonides, *Louisiana's New Law*]. Another similar codification drafted by this author for the Commonwealth of Puerto Rico is still pending before the Puerto Rico legislature as Book VII of the proposed new Puerto Rico Civil Code. See *Draft Code of Private International Law for the Commonwealth of Puerto Rico*, available at <http://www.codigocivilpr.net/>; Symeon C. Symeonides, *Revising Puerto Rico's Conflicts Law: A Preview*, 28 COLUM. J. TRANSNAT'L L. 413 (1990) [hereinafter Symeonides, *Revising Puerto Rico's Conflicts Law*]. The statute discussed in this Article draws heavily from both of the above codifications but also differs in important respects (besides its common law style of drafting).

⁴ The word is Greek and it means the exposition, objective explanation, or “drawing out” of the meaning of a given text.

⁵ The author has drafted the new law in his capacity as Reporter for the Oregon Law Commission and presented it to the Oregon Legislature. He was assisted by another Reporter, Professor James A.R. Nafziger of Willamette University, and a ten-member

A. *Background: The Traditional Choice-of-Law System and the Choice-of-Law Revolution*

For more than one hundred years, Oregon courts—along with all other American courts—followed a rigid territorialist-rule system for determining the law governing cases that had contacts with more than one state (conflicts cases). In tort and contract conflicts, this system mandated the application of the law of the state in which the injury occurred (*lex loci delicti*) and the law of the place in which the contract was made (*lex loci contractus*), respectively, regardless of any other contacts or factors.⁶

Over time, this system proved completely inadequate to rationally resolve the more frequent and complex conflicts brought about by increased cross-border activity and mobility of people. Courts gradually began searching for oblique ways to avoid the often arbitrary and artificial results the traditional system dictated. By the 1960s, judicial dissension against that system acquired the dimensions and intensity of an open “revolution” as many courts began abandoning the *lex loci delicti* and *lex loci contractus* rules in favor of flexible, open-ended “approaches.”⁷

Oregon was among the leaders of this new movement. In 1964, the Oregon Supreme Court became the second state supreme court in the United States to join the revolution.⁸ In *Lilienthal v. Kaufman*,⁹ the court abandoned the traditional choice-of-law rule of *lex loci contractus* and replaced it with an approach known as governmental interest analysis, which was first advocated by Professor Brainerd

Work Group, with the members listed *infra* at notes 44–49 and accompanying text. The opinions expressed in this Article are solely those of the author.

⁶ For a discussion of the traditional choice-of-law system, see EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 18–25 (4th ed. 2004); see also Symeon C. Symeonides, *The First Conflicts Restatement Through the Eyes of Old: As Bad as Its Reputation?*, 32 S. ILL. U. L.J. 39 (2007).

⁷ For documentation and discussion of this movement, see SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* (2006) [hereinafter SYMEONIDES, *REVOLUTION*].

⁸ The case that started the revolution is *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963), a case involving a tort conflict decided by the New York Court of Appeals on May 9, 1963.

⁹ 239 Or. 1, 395 P.2d 543 (1964). *Lilienthal* was decided on Sept. 30, 1964. Two weeks after *Lilienthal*, Pennsylvania became the third state to join the revolution in *Griffith v. United Air Lines, Inc.*, 203 A.2d 796 (Pa. 1964), a case involving a tort conflict decided on October 14, 1964.

Currie.¹⁰ Although two earlier cases in other states had also abandoned the *lex loci contractus* rule, their reasoning was hesitant and equivocal.¹¹ *Lilienthal* was the first truly revolutionary case in contract conflicts.¹² Three years later, in *Casey v. Manson Construction & Engineering Co.*, Oregon completed the abandonment of the traditional system by discarding the *lex loci delicti* rule for tort conflicts as well.¹³ The court relied instead on the Restatement (Second) of Conflict of Laws, which was then in draft form.¹⁴

In the rest of the United States, the choice-of-law revolution first caught fire in the 1970s, then spread in the 1980s, and finally declared victory in the 1990s, leading to the demolition of the centuries-old choice-of-law system (at least in tort and contract conflicts). By 2009, forty-two U.S. jurisdictions had abandoned the traditional system in tort conflicts and forty-one jurisdictions had done so in contract conflicts.¹⁵

Although the revolution changed American conflicts law in many beneficial ways, it did not produce a new choice-of-law *system* to replace the old one. Rather than offering a unified vision for the future, the revolution offered conflicting theories, which the courts have merged together, often adding their own variations.¹⁶ In its zeal

¹⁰ See generally BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963). For a discussion of this approach, as well as its judicial following today, see SYMEONIDES, *REVOLUTION*, *supra* note 7, at 13–24, 71–82.

¹¹ See *W.H. Barber Co. v. Hughes*, 63 N.E.2d 417 (Ind. 1945); *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954). These two cases, as well as a Puerto Rico case, *Md. Cas. Co. v. San Juan Racing Ass'n*, 83 P.R. 559 (1961), adopted the “center of gravity” approach, which is generally considered the transitional point between the traditional system and modern approaches.

¹² *Lilienthal* was *methodologically* revolutionary in the sense that it opened new ways of thinking about conflict of laws. This does not mean that *Lilienthal* was correctly decided. For this reason, *Lilienthal* was overruled by ORS 81.112 (effective in 2002). See Symeon C. Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205, 219–21 (2007) [hereinafter Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts*].

¹³ 247 Or. 274, 276–77, 428 P.2d 898, 899 (1967); see also *infra* text accompanying notes 200–01.

¹⁴ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

¹⁵ See Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 231–32 (2010); see also SYMEONIDES, *REVOLUTION*, *supra* note 7, at 38–50.

¹⁶ Cf. Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 403 (2000) (“[O]ne finds authors who are at doctrinal loggerheads peacefully united in a single footnote; . . . one encounters prose so turgid and stilted that one suspects the judge (or more likely the law clerk who actually drafted the opinion) never really grasped the idea behind the particular conflicts approach the court purports to follow.” (footnote omitted)).

to cleanse the system from all the vestiges of traditional thinking, the revolution careened to the other extreme of denouncing not only the particular rules of the first Restatement of Conflict of Laws,¹⁷ but also all choice-of-law rules in general.¹⁸ Rules were replaced with “approaches” namely flexible formulae that do not prescribe solutions in advance, but simply enumerate the factors to be considered in the judicial fashioning of an ad hoc solution for each conflict. Although these factors differ from one approach to the next, all such approaches are open-ended and call for an individualized, ad hoc handling of each case. The result was that, in relatively short time, American conflicts law began looking like “a tale of a thousand-and-one-cases.”¹⁹ “Each case [was] decided as if it were unique and of first impression.”²⁰ Just as the traditional system had gone too far toward certainty to the exclusion of flexibility, the revolution went too far in embracing flexibility to the exclusion of certainty.

Oregon did not avoid this loss of certainty. In reviewing Oregon choice-of-law cases after *Lilienthal* and *Casey*, an experienced, long-time observer of the Oregon conflicts scene characterized them as “puzzling,” “extraordinarily undisciplined,” and “bewildering.”²¹ He noted that one version of Oregon’s reliance on the Restatement (Second) engaged in weighing the “interests” of the involved states while minimizing other factors. Another version employed “an arithmetic of contacts—a gravity-of-contacts approach—that minimizes competing interests,” while a third version “sticks within the bark of territorialism to define the most significant contact or contacts without recourse to governmental interests, policies or other considerations.” Taken together, the three versions presented a “bewildering picture.”²²

Indeed, bewilderment is a common sentiment among lawyers contemplating—or seeking to avoid—litigation of choice-of-law

¹⁷ See generally RESTATEMENT OF CONFLICT OF LAWS (1934).

¹⁸ See CURRIE, *supra* note 10, at 180 (“The [traditional] rules . . . have not worked and cannot be made to work. . . . But the root of the trouble goes deeper. In attempting to use the rules we encounter difficulties that stem not from the fact that the particular rules are bad, . . . but rather from the fact that we have such rules at all.”); see also *id.* at 183 (“We would be better off without choice-of-law rules.”).

¹⁹ P. John Kozyris, *Interest Analysis Facing Its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability*, 46 OHIO ST. L.J. 569, 578 (1985).

²⁰ *Id.* at 580.

²¹ James A.R. Nafziger, *Oregon’s Project to Codify Conflicts Law Applicable to Torts*, 12 WILLAMETTE J. INT’L L. & DISP. RESOL. 287, 293, 295, 304 (2004).

²² *Id.* at 294–95.

issues in the United States today. The excessive fluidity of the various judicial choice-of-law approaches often makes it very difficult, if not impossible, to predict the outcome of a choice-of-law decision. While flexibility is preferable to uncritical rigidity, too much flexibility can be as problematic as no flexibility at all.²³ Besides increasing litigation costs²⁴ and wasting judicial resources,²⁵ too much flexibility often leads to judicial subjectivism and dissimilar handling of similar cases, which tests the citizens' faith in the legal system and tends to undermine its very legitimacy.²⁶

Gradually, the initial euphoria surrounding the revolution subsided and was replaced with disillusionment. Judges—particularly federal judges, who often adjudicate complex multidistrict cases—have routinely advocated the enactment of federal choice-of-law legislation for such cases.²⁷ At least one judge has described modern American conflicts law as “a veritable jungle, [in] which, if the law can be

²³ See Kozyris, *supra* note 19, at 580 (“[A]ny system calling for open-ended and endless soul-searching on a case-by-case basis carries a high burden of persuasion.”); Maurice Rosenberg, *Comments on Reich v. Purcell*, 15 UCLA L. REV. 641, 644 (1968) (“The idea that judges can be turned loose in the three-dimensional chess games we have made of [conflicts] cases, and can be told to do hand-tailored justice, case by case, free from the constraints or guidelines of rules, is a vain and dangerous illusion.”).

²⁴ See Patrick J. Borchers, *Empiricism and Theory in Conflicts Law*, 75 IND. L.J. 509, 509 (2000) (“[T]he extreme flexibility of the modern approaches probably brings increased litigation costs, in particular through the need to prosecute appeals. . . . [T]he ever-present wild card of choice of law may discourage settlement.”).

²⁵ See P. John Kozyris, *The Conflicts Provisions of the ALI's Complex Litigation Project: A Glass Half Full?*, 54 LA. L. REV. 953, 956 (1994) (“Conflicts theorists . . . have been notoriously indifferent to the issue of efficiency, treating every case as a unique specimen calling for custom-made handling on the tacit assumption that litigational resources are infinite.”); see also Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055, 1057 (7th Cir. 1987); Patrick J. Borchers, *Back to the Past: Anti-Pragmatism in American Conflicts Law*, 48 MERCER L. REV. 721, 724 (1997); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000); Shirley A. Wiegand, *Fifty Conflict of Laws “Restatements”: Merging Judicial Discretion and Legislative Endorsement*, 65 LA. L. REV. 1 (2004).

²⁶ See Phaedon John Kozyris, *Conflicts Theory for Dummies: Après le Deluge, Where Are We on Producers Liability?*, 60 LA. L. REV. 1161, 1162 (2000) (“[T]elling the courts in each conflicts case to make a choice and fashion the applicable law ‘ad hoc’ and ‘anew’ . . . as is often done under the prevailing conflicts theories, appears to me not only inconsistent with the basic principles of the separation of powers, not only burdensome and potentially arbitrary beyond reason, not only disorienting to the transacting persons, but essentially empty of meaning. . . . [U]npredictable law is not law to begin with.”).

²⁷ See, e.g., *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo.*, on Nov. 15, 1987, 720 F. Supp. 1445, 1454–55 (D. Colo. 1988); Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites*, 37 WILLAMETTE L. REV. 145, 153 (2001) (“A federal statute would help. An international treaty would be even better.”).

found out, leads not to a 'rule of action' but a reign of chaos dominated in each case by the judge's 'informed guess.'²⁸ The New York Court of Appeals, which led the revolution and is generally considered one of the most influential courts in the country, has confronted this "chaos" by enunciating, in a quasi-legislative fashion, a set of rules (the *Neumeier* rules) for resolving certain tort conflicts.²⁹ Even as the revolution reached its peak, some of the revolution's scholastic protagonists recognized the need for a new set of rules.³⁰ For example, as early as 1965, Professor David Cavers became disillusioned with the uncertainty unleashed by the revolution and recognized the need to "provide rules . . . under which the same cases will be decided the same way no matter where the suit is brought."³¹ He also showed the way by proposing his own "principles of preference" for tort and contract conflicts.³² Professor Willis Reese, the chief drafter of the second Restatement, also proclaimed that "the formulation of rules should be as much an objective in choice of law as it is in other areas of law."³³ Other scholars have also advocated the development of rules,³⁴ and some have proposed rules of their own.³⁵ In 1994, the American Law

²⁸ *In re Paris Air Crash of Mar. 3, 1974*, 399 F. Supp. 732, 739 (C.D. Cal. 1975).

²⁹ See *Neumeier v. Kuehner*, 286 N.E.2d 454, 457–58 (N.Y. 1972).

³⁰ See Courtland H. Peterson, *New Openness to Statutory Choice of Law Solutions*, 38 AM. J. COMP. L. 423, 442 (1990).

³¹ DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 23 (1965) ("We will not . . . fulfill the objectives of the conflict of laws, unless we can provide rules . . . under which the same cases will be decided the same way no matter where the suit is brought . . .").

³² See *id.* at 139–203.

³³ See Willis Reese, *General Course on Private International Law*, 150 RECUEIL DES COURS 1, 61 *passim* (1976). As early as 1976, Reese argued that the conflicts experience since the revolution had "reached the stage where most areas of choice of law can be covered by general principles which are subject to imprecise exceptions. We should press on, however, beyond these principles to the development, as soon as our knowledge permits, of precise rules." *Id.* at 62.

³⁴ See, e.g., SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 105–10; Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991); Alfred Hill, *For a Third Conflicts Restatement—But Stop Trying to Reinvent the Wheel*, 75 IND. L.J. 535 (2000); Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134 (1991); Maurice Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459 (1967); Ralph U. Whitten, *Curing the Deficiencies of the Conflicts Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 WILLAMETTE L. REV. 259 (2001); Wiegand, *supra* note 25.

³⁵ See, e.g., SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 937–39 (discussing products liability rules proposed by Cavers, Weintraub, Juenger, and Kozyris); SYMEONIDES, *REVOLUTION*, *supra* note 7, at 207–10, 233–36, 259–63, 346; Robert A.

Institute proposed a comprehensive set of choice-of-law rules for mass torts and mass contracts cases for enactment by the U.S. Congress,³⁶ and in 1999, American conflicts professors devoted their annual meeting to discussing the need for a third Conflicts Restatement,³⁷ thus commencing a debate that continues today.³⁸ Although the debates regarding a new Restatement and the need for rules remain inconclusive, the nationwide consensus—even among academics—is to no longer take Currie's aphorism that "[we] [are] better off without choice-of-law rules"³⁹ at face value.⁴⁰ The pendulum has begun swinging back. Nonetheless, these pleas for a new set of rules have been followed by legislative action in only two states: Louisiana⁴¹ and (recently) Oregon.

B. Oregon Takes the Lead, Once Again

Once again, Oregon took the lead in recognizing the need for a new way, an exit strategy from the anarchy of the conflicts revolution. This strategy called for a new breed of smart, evolutionary choice-of-law rules that would preserve the methodological accomplishments of the revolution while restoring a proper equilibrium between certainty and flexibility. To implement this strategy, the Oregon Law

Sedler, *Choice of Law in Conflicts Torts Cases: A Third Restatement or Rules of Choice of Law?*, 75 IND. L.J. 615, 619–22 (2000); Wiegand, *supra* note 25.

³⁶ See AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994).

³⁷ See Symposium, *Preparing for the Next Century—A New Restatement of Conflicts?*, 75 IND. L.J. 399 (2000) (containing an introduction by Shreve; articles by Juenger, Richman and Reynolds, Symeonides, and Weinberg; and commentaries by Borchers, Dane, Gottesman, Hill, Maier, Peterson, Posnak, Reimann, Reppy, Jr., Sedler, Silberman and Lowenfeld, Simson, Singer, Twerski, and Weintraub). This debate was initiated by this author in a previous annual meeting, which celebrated the silver anniversary of the Restatement (Second). See Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248 (1997).

³⁸ See Symposium, *American Conflicts Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1 (2001) (containing articles by Symeonides, Juenger, Kay, von Mehren, Weinstein, and Weintraub and commentaries by Cox, Nafziger, Sedler, Shreve, and Whitten); Symeon C. Symeonides, *A New Conflicts Restatement: Why Not?*, 5 J. PRIVATE INT'L L. 383 (2009).

³⁹ CURRIE, *supra* note 10, at 183.

⁴⁰ See Peterson, *supra* note 30, at 423 (“[W]e may be seeing a sea change in the attitudes of American conflicts scholars with respect to the use of statutes in solving conflicts problems.”).

⁴¹ See discussion *supra* note 3.

Commission⁴² undertook the ambitious project of drafting choice-of-law rules for enactment by the Oregon State Legislature.

The first phase of this project produced a new comprehensive statute for contract conflicts. This statute, codified as Oregon Revised Statutes (ORS) 81.100 to 81.135, was first drafted by the Commission in 2000, and was then unanimously adopted by both houses of the Oregon Legislature in 2001, and becoming effective on January 1, 2002.⁴³

The Act discussed in this Article represents the second phase of this project. The Act restores predictability in Oregon's conflicts law by providing specific rules for determining which state's law will govern most tort and other noncontractual claims arising from situations involving contacts with more than one state. However, as explained below, the Act also provides a certain degree of flexibility, thus avoiding the shortcomings of the traditional system and the rigidity that caused the revolution. This new equilibrium between the need for legal certainty and the need for a certain degree of flexibility should serve Oregon well for several generations and could well be a model for other states to follow.

The Act has been drafted under the auspices of the Oregon Law Commission by the author as Reporter, assisted by another Reporter, Professor James A.R. Nafziger.⁴⁴ Twelve successive drafts were submitted to and debated by a Work Group chaired by this author and consisting of one retired supreme court justice,⁴⁵ one court of appeals judge,⁴⁶ one trial court judge,⁴⁷ five practicing attorneys,⁴⁸ and two

⁴² Established by statute, the Oregon Law Commission is Oregon's official law reform agency. It is headquartered at Willamette University College of Law under an agreement with the State of Oregon and is directed by a member of the Willamette faculty, Professor Jeff Dobbins. For the history of the Commission and its work in the last ten years, see David R. Kenagy, *The Oregon Law Commission at Ten: Finding Vision for the Future in the Functions of the Past*, 44 WILLAMETTE L. REV. 169 (2007). Kenagy was the Commission's first executive director.

⁴³ For a discussion of this statute, see James A.R. Nafziger, *Oregon's Conflicts Law Applicable to Contracts*, 38 WILLAMETTE L. REV. 397 (2002); Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts*, *supra* note 12. Professor Nafziger served as Reporter for that project.

⁴⁴ Thomas B. Stoel Professor of Law, Willamette University College of Law.

⁴⁵ The Honorable Hans Linde, retired justice of the Oregon Supreme Court and Distinguished Jurist in Residence at Willamette University College of Law.

⁴⁶ The Honorable Jack L. Landau of the Oregon Court of Appeals.

⁴⁷ The Honorable Janice Wilson of the Oregon Circuit Court, 4th Judicial District, Multnomah County.

law professors.⁴⁹ The drafts drew on the vast experience of American courts in deciding tort conflicts in the four decades since the choice-of-law revolution began, as well as the experience of other jurisdictions in drafting rules for tort conflicts.⁵⁰ After approval by the Work Group and then the Oregon Law Commission, the final draft was submitted to the Legislature and introduced as Senate Bill 561. The Bill was unanimously approved by the Senate on March 26, 2009, unanimously approved by the House on May 29, 2009, and signed into law by Governor Ted Kulongoski on June 23, 2009.

Each section of the Act is accompanied by extensive explanatory comments, which have been written by the author and approved by the Oregon Law Commission.⁵¹ These official comments accompanied the bill when introduced to the Legislature and they thus remain de facto an important part of legislative history.⁵²

⁴⁸ The five attorneys are: Kathryn H. Clarke; Jonathan M. Hoffman (Martin, Bischoff, Templeton, Langslet & Hoffman LLP); Linda C. Love (Williams, Love, O'Leary & Powers, PC); James N. Westwood (Stoel Rives LLP); and Leonard Williamson (Oregon Department of Justice, Trial Division).

⁴⁹ The two professors are Maurice Holland and Dominick Vetri, both of the University of Oregon School of Law. The Work Group was also assisted by Wendy Johnson, Deputy Executive Director and General Counsel of the Oregon Law Commission, and by Kristy Nelson, staff attorney at the Oregon Law Commission.

⁵⁰ A Sourcebook containing rules from other jurisdictions was compiled by this author and made available to the Work Group. See Oregon Law Commission Work Group on Choice-of-Law for Torts, Choice-of-Law Rules for Torts from Other Jurisdictions: A Source-Book (July 28, 2008) (on file with author). The Sourcebook contains rules from: the codifications of Louisiana, Puerto Rico, and eighteen foreign countries; five international conventions; the Restatement (Second); the ALI's Complex Litigation Project; the *Neumeier* rules; and rules proposed by eight academic authors.

⁵¹ Because the author of these comments and this Article is the same, the Article draws heavily from the comments without using quotation marks.

⁵² See generally *State v. Serrano*, 346 Or. 311, 210 P.3d 892 (2009); *State v. White*, 346 Or. 275, 211 P.3d 248 (2009); *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009); *Filipetti v. Dep't of Fish & Wildlife*, 224 Or. App. 122, 197 P.3d 535 (2008); *State v. Spears*, 223 Or. App. 675, 196 P.3d 1037 (2008); *State v. Merida-Medina*, 221 Or. App. 614, 191 P.3d 708 (2008), *rev. denied*, 345 Or. 690 (2009). ORS 31.890 provides that the Oregon Law Commission "shall make available on the website maintained by the commission a copy of the commentary approved by the commission for the provisions of ORS 31.850 to 31.890." OR. REV. STAT. § 21.890 (2009). The commentary is posted at <http://www.willamette.edu/wucl/olc/groups/2007-2009/pdf/conflicts.sb561.report.2009.pdf>.

II

THE STRUCTURE OF THE NEW ACT

The Act consists of fourteen sections, which may be grouped into three parts. The first part, consisting of ORS 31.850 through 31.865, deals with preliminary issues, including definitions of terms used in the Act, a delineation of the Act's substantive and geographical scope, and special rules for characterization, localization, and determining domicile.

The second part of the Act, consisting of ORS 31.870 and 31.872, provides for certain noncontractual claims that will be governed by Oregon law without further inquiry. ORS 31.870 lists seven categories of such claims, beginning with actions in which (a) the parties agree to the application of the law of Oregon, (b) none of the parties raises the issue of applicability of foreign law, or (c) the party relying on foreign law fails to assist the court in establishing that law's content after being requested by the court to do so. ORS 31.872 deals with products liability actions and provides that Oregon law governs actions in which Oregon has certain specified contacts with the parties or the dispute.

The third part of the Act consists of ORS 31.875 through 31.885. ORS 31.885 provides that if, after the parties had knowledge of the events giving rise to the dispute, the parties agree to the application of the law of a state other than Oregon, then the agreement is enforceable—so long as it meets certain specified requirements. In the absence of such an agreement, the applicable law is determined under ORS 31.875, 31.878, or 31.880. ORS 31.875 applies when determining the applicable law in claims between the injured person and the person whose conduct caused the injury. ORS 31.880 applies to claims between or among third parties. ORS 31.878 is the Act's general and residual approach, which applies when not displaced by another section of the Act.

Through this structure, the Act provides an easy-to-follow road map that will significantly simplify the courts' task in resolving conflicts of law in torts and other cases involving noncontractual claims. A court or other decision maker encountering such a case may use the following checklist:

- (1) If, after the events giving rise to the dispute, the parties agreed to the application of Oregon law, or if none of the parties raises the issue of applicability of foreign law, or the party who relies on foreign law fails to assist the court in establishing that law's

content after being requested by the court to do so, Oregon law applies without a choice-of-law analysis.⁵³

(2) If the action is one of those listed in ORS 31.870(4)-(7), Oregon law applies without any further inquiry and without any exceptions.

(3) If the action is a products liability action that fits the requirements of ORS 31.872, then Oregon law applies, unless the opposing party successfully invokes one of two exceptions stated in that provision,⁵⁴ in which case the applicable law will be selected under the general approach of ORS 31.878.

(4) If the action is not one of those that must be governed by Oregon law under ORS 31.870 or 31.872 and the parties agreed to the application of non-Oregon law after they had knowledge of the events giving rise to the dispute, the agreed-upon law applies—so long as the agreement meets the requirements of ORS 31.885.

(5) In the absence of such an agreement, a distinction is made between, on the one hand, claims between the injured person and the person whose conduct caused the injury, and on the other hand, claims between or among third parties. ORS 31.875 provides for the former category of claims. The law designated by ORS 31.875 applies unless the opposing party successfully invokes at least one of the two exceptions contained in that provision,⁵⁵ in which case the applicable law will be selected under the general approach of ORS 31.878.

(6) For claims between or among third parties, such as joint tortfeasors, the applicable law is selected under the flexible approach of ORS 31.878.⁵⁶

(7) ORS 31.878 applies when none of the other sections of this Act are applicable or when the other sections expressly refer to ORS 31.878.

⁵³ See OR. REV. STAT. § 31.870(1)-(3) (2009).

⁵⁴ See § 31.872(2)-(3). For further discussion, see *infra* notes 110-14 and accompanying text.

⁵⁵ See § 31.875(3)(b), (4). For further discussion, see *infra* Part V.B.3 and Part VI.

⁵⁶ See § 31.880.

III

PRELIMINARIES

A. *Applicability*

ORS 31.855 delineates the “applicability” of the new Act—that is, its substantive and geographical scope. The substantive scope is composed of torts and other “noncontractual” claims. The quoted term, which is explained below, is juxtaposed with “contractual” claims, which are covered by the 2002 choice-of-law statute previously mentioned.⁵⁷ Pursuant to ORS 31.855, the geographical scope of the Act encompasses all noncontractual claims for which “a choice between or among the laws of more than one state is at issue.” A choice of law is “at issue” when: (1) the claim arises from events or circumstances that have pertinent contacts with more than one state, and (2) the laws of the contact states on the disputed issues are in material conflict such that each law would produce a different outcome.

ORS 31.855 also establishes the Act’s residual character vis-à-vis other Oregon statutes that expressly designate the law applicable to a particular noncontractual claim.⁵⁸ One example of such a statute is ORS 12.410 through 12.480, which contains the Uniform Conflict of Laws-Limitations Act. This statute determines which state’s statute of limitations applies to conflicts cases litigated in Oregon, regardless of whether the case involves a claim based in tort, contract, or another area of the law.

Other substantive Oregon statutes also contain isolated provisions delineating the intended reach of those statutes to include or exclude certain cases that have non-Oregon contacts. For example, ORS 656.126(1) provides that Oregon’s workers’ compensation statutes apply to workers employed in Oregon and injured in the course of their employment while on temporary assignment in another state.⁵⁹

⁵⁷ See *supra* note 43 and accompanying text.

⁵⁸ See § 31.855 (stating that the provisions of this Act “do not supersede the provisions of other Oregon statutes that expressly designate the law governing a particular noncontractual claim”).

⁵⁹ OR. REV. STAT. § 656.126(1) (2009). This section provides in part:

If a worker employed in this state and subject to this chapter temporarily leaves the state incidental to that employment and receives an accidental injury arising out of and in the course of employment, the worker . . . is entitled to the benefits of this chapter as though the worker were injured within this state.

Id.

Conversely, ORS 656.126(2) excludes from the coverage of Oregon's workers' compensation statutes certain workers employed in another state and injured in Oregon while on temporary assignment in Oregon.

Finally, another example is Oregon's products liability statute as amended in 2009. One of the amended provisions provides that in certain products liability actions involving products manufactured outside Oregon, the applicable statute of repose will be the statute of the state of manufacture in some cases and Oregon's statute in other cases, depending on certain contingencies.⁶⁰ All of the foregoing provisions are veritable choice-of-law rules, even though the provisions do not use such explicit terms. This Act is not intended to displace—and indeed, gives priority to—these and other similar rules found in other Oregon statutes.⁶¹

B. Definitions

1. Noncontractual Claim

ORS 31.850 defines certain terms used in the Act, including the term “noncontractual claim,” which delineates the Act's substantive scope. ORS 31.850(5) provides that the term noncontractual claim means “a claim, other than a claim for failure to perform a contractual or other consensual obligation, that arises from a tort as defined in ORS 30.260[(8)], or any conduct that caused or may cause injury compensable by damages, without regard to whether damages are sought.”⁶² ORS 30.260(8), the Oregon Torts Claim Act, defines a tort as:

[T]he breach of a legal duty that is imposed by law, other than a duty arising from contract or quasi-contract, the breach of which results in injury to a specific person or persons for which the law

⁶⁰ See § 30.905(2), (4) (as amended by 2009 Or. Laws 485 (S.B. 284)). In products liability actions for personal injury or property damage, the applicable statute of repose will be the statute that provides a longer length of time. In such actions arising from death, the applicable statute of repose will be the one that provides for the shorter length of time. In all actions, if the product was manufactured in a foreign country, the U.S. state in which the product was first imported replaces the state of manufacture. *See id.*

⁶¹ *See* discussion *supra* note 58.

⁶² § 31.850(5). Under ORS 31.860(1), Oregon law determines whether a particular claim qualifies as a noncontractual claim so as to fall within the scope of this statute, even if the claim is ultimately governed by the law of another state. § 31.860(1).

provides a civil right of action for damages or for a protective remedy.⁶³

Statistically, most noncontractual claims arise from torts.⁶⁴ However, the definition of ORS 31.850(5) encompasses not only tort claims but also claims (other than claims for failure to perform a contractual or other consensual obligation) that arise from “any conduct that caused or may cause an injury compensable by damages.”⁶⁵ Examples of such other claims are claims arising from racial discrimination, employment discrimination (beyond claims covered by employment law), unfair trade practices, breach of fiduciary duty, and restitution.

2. *Conduct and Injury*

“Conduct” and “injury” are two of the constituent elements of a noncontractual claim that are defined in ORS 31.850.

ORS 31.850(1) defines “conduct” as an act that has occurred or that “may” occur so as to include future conduct that may cause future injury, such as when one is preparing to undertake activities on property that may cause injury to, or on, nearby property.⁶⁶ The conduct may also be an omission, such as when one’s failure to exercise due care in the use of property causes injury to another. Of course, in order to qualify as a constituent element of a noncontractual claim for the purposes of this Act, the conduct must have caused—or have the potential to cause—a compensable injury. ORS 31.850(5) speaks of conduct that caused, or *may* cause, injury in order to cover situations in which a party seeks injunctive or declaratory relief for ongoing injurious conduct or to prevent future injurious conduct.

ORS 31.850(3) defines injury as a physical or nonphysical (e.g., economic or emotional) harm to person or property.⁶⁷ The injury may be present or future injury, but in order to qualify as a constituent element of a noncontractual claim for the purposes of this Act, the injury must be potentially compensable—even if the claimant does not seek damages in the particular case.

⁶³ § 30.260(8).

⁶⁴ For this reason, much of the discussion in this Article refers to “torts,” “tortfeasors,” and “victims” of a tort.

⁶⁵ § 31.850(5).

⁶⁶ *See* § 31.850(1).

⁶⁷ § 31.850(3).

3. *Person and Domicile*

The Act uses the term “person” to include both a natural and a legal person. ORS 31.850(6) defines person through reference to ORS 174.100, which provides that “[p]erson” includes individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies.”⁶⁸

The Act uses “domicile” as a pertinent contact or connecting factor for both natural and legal persons. Under ORS 31.860(1), the question of where a natural person is domiciled is answered under standards established by Oregon law (including ORS 31.865 of this Act), even if it is ultimately determined that the person is domiciled in another state.⁶⁹

ORS 31.865(1)(a) defines the domicile of a natural person as the simultaneous occurrence of the following two elements: (1) the physical element of a person’s actual residence in a given state, and (2) the mental element of that person’s intent to make that state his or her home state for the time being and for an indefinite period thereafter.⁷⁰ ORS 31.865(1)(b) begins by restating the general principle that domicile, once established, continues until it is superseded by a new domicile—that is, until both the physical element of residing in another state and the mental element of intending to make that state the person’s home coincide again.⁷¹ The second sentence of subsection (1)(b) deals with persons whose intent to change their domicile is legally ineffective, for example, because they are under legal compulsion (e.g., prisoners or soldiers), or because they lack the mental capacity to form the requisite intent

⁶⁸ OR. REV. STAT. § 174.100(5) (2009).

⁶⁹ ORS 31.865(3) provides that, for purposes of this Act, the domicile of a natural or legal “person is determined as of the date of the injury for which the noncontractual claim is made,” rather than at a later time, such as the time of the filing of the action or the time of litigation. *See* § 31.865(3). However, when a person changes domicile to another state after the time of the injury, the new domicile may be a “relevant contact” under ORS 31.878. *See infra* Part V.C.2.

⁷⁰ § 31.865(1)(a). For a similar definition, see OR. REV. STAT. § 111.005(14) (2009) (defining domicile as “the place of abode of a person, where the person intends to remain and to which, if absent, the person intends to return”). For a general discussion of domicile in American conflicts law, see LUTHER L. MCDUGAL, III ET AL., *AMERICAN CONFLICTS LAW* 17–40 (5th ed. 2001); SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 233–83; SYMEON C. SYMEONIDES, *AMERICAN PRIVATE INTERNATIONAL LAW* 88–89 (2008) [hereinafter SYMEONIDES, *PRIVATE INTERNATIONAL LAW*]; RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 13–51 (5th ed. 2006).

⁷¹ *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19 (1971); SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 251–52.

regarding domicile (e.g., minors or mentally ill persons).⁷² Subsection (1)(b) provides that, in such cases, the person's previously acquired domicile will continue to be the relevant domicile for the purposes of this Act.

ORS 31.865(1)(c) deals with persons who are legally capable of forming the intent to have a domicile in a given state but whose actual intent cannot be determined. Subsection (1)(c) provides that, in such cases: (1) a person's residence shall be treated as his or her domicile, and (2) if that person resides in more than one state, the state that has the most pertinent connection to the disputed issue is deemed to be the person's domicile with regard to that issue.

Subsection (2) of ORS 31.865 defines the domicile of a person "other than a natural person"—commonly referred to as legal person (e.g., corporations, associations, firms, partnerships, and other similar entities)—as the state in which that person has its principal place of business. The question of where a legal person has its principal place of business is answered on a case-by-case basis through review of the person's total activity and connections under the standards established by Oregon law.

The second sentence of ORS 31.865(2) applies to situations in which a legal person has its principal place of business in one state, State A, and also has "a place of business" in another state, State B. That sentence provides that if the dispute arises from that person's activities directed from State B (e.g., from its branch office located in State B), then either State A or State B may be treated as the legal person's domicile at the choice of the other party.

4. "State" and "Law"

ORS 31.850(8) provides a definition of "state" for the purposes of this Act. The definition includes a foreign country and, in some instances, a territorial subdivision of a foreign country, such as a Canadian province or a Swiss canton—*provided that* the subdivision has its own system of law on the disputed issues. The same qualification applies to recognized Indian tribes and other Native American, Hawaiian, or Alaskan groups. To qualify as a state for the purposes of this Act, the subdivision or group must have its own system of laws on the disputed issues. Conversely, a federation or a multinational entity, such as the European Union, may qualify as a

⁷² See SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 271–83.

single country—and thus qualify as a “state” under this Act—if the federation or union has a single law on the disputed issues.

The definition of state also includes the United States “unless the context requires otherwise.” The context does not require otherwise when the United States stands on equal footing with another country (as in a maritime tort case that involves contacts with the United States and a foreign country), so that a choice between federal law and foreign law is necessary. In contrast, the context does require otherwise when the United States stands in a hierarchically superior position *vis-à-vis* a state of the United States. In such a context, the demarcation of the line between federal law and state law is not a matter of choosing between the two laws but rather is a question of determining the reach of federal law, a question answered by federal law principles. If under those principles, the case falls within the reach of federal law, then federal law preempts any contrary state law. This Act does not purport to apply to such “vertical conflicts” between federal and state law.⁷³

ORS 31.850(4) defines “law” in a way that is intended to exclude the phenomenon known as *renvoi*. This French word is generally used in the conflicts literature as shorthand for the practice by which the forum state applies the choice-of-law rules of another state, which may refer back to the law of the forum state (a “remission”) or to the law of a third state (a “transmission”).⁷⁴ For practical purposes and other reasons, ORS 31.850(4) is intended to avoid this practice by confining any reference to foreign law to the internal or substantive law of the foreign state, excluding its choice-of-law rules.

C. Characterization, Localization, and Other Factual Determinations

ORS 31.860(1) provides that the scope and meaning of terms and concepts employed in this Act are to be determined under Oregon law. This is consistent with the generally accepted principle that “characterization”—namely, the classification of a given factual situation under the terms and categories employed by the forum’s choice-of-law rules—is conducted under the law of the forum.⁷⁵

⁷³ For the distinction between “vertical” and “horizontal” conflicts, see SYMEONIDES, PRIVATE INTERNATIONAL LAW, *supra* note 70, at 17–19.

⁷⁴ For a general discussion of the *renvoi* phenomenon, see SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 138–42; SYMEONIDES, PRIVATE INTERNATIONAL LAW, *supra* note 70, at 81–83.

⁷⁵ See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7(2) (providing that “[t]he classification and interpretation of Conflict of Laws concepts and terms are

ORS 31.860(2) provides that the scope and meaning of terms employed by the law that is determined to be applicable under this Act, which may be the law of Oregon or that of another state, are determined under that law.⁷⁶ For example, if the law of State X is applicable under the provisions of this Act and that law conditions the plaintiff's recovery on proof of "gross negligence," the meaning of "gross negligence" will be determined under the law of State X. Likewise, if State X prohibits recovery against "charitable entities," the law of State X determines whether the entity involved qualifies as a "charitable entity."

According to ORS 31.855, the applicability of this Act depends on whether the claim is "noncontractual." ORS 31.862(1) provides that Oregon law (including this Act) determines whether a claim is "noncontractual." If the claim is "noncontractual" under Oregon law, this Act applies—even if, under this Act, the claim is governed by the law of another state that considers the claim contractual. Conversely, if the claim is contractual under Oregon law, this Act is inapplicable and ORS 81.100 to 81.130 is applicable instead—even if, under ORS 81.100 to 81.130, the claim is governed by the law of a state that characterizes the claim as noncontractual.

"Localization" is the process of determining either the location of a contact or event upon which the choice of law depends, such as the location of the injurious conduct or the resulting injury, or the injured person's domicile.⁷⁷ Although in most instances this determination is a factual inquiry, it is guided by (and in some instances depends on) legal standards. Primarily for practical reasons and in the interest of judicial economy, ORS 31.862 provides that this determination is to be made under Oregon law, even if the location of the particular contact is ultimately determined to be in another state.

ORS 31.862 also provides specific rules to assist in the localization process in some cases, such as cases in which either the injurious conduct or the resulting injury occurred in more than one state. Thus, if the conduct occurred in more than one state, the state in which the conduct that is "primarily responsible" for the injury occurred is to be considered the state of the "injurious conduct" for the purposes of the

determined in accordance with the law of the forum"). For characterization generally, see SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 122–37; SYMEONIDES, PRIVATE INTERNATIONAL LAW, *supra* note 70, at 75–76.

⁷⁶ Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7(3).

⁷⁷ See SYMEONIDES, PRIVATE INTERNATIONAL LAW, *supra* note 70, at 77.

Act.⁷⁸ “If the same conduct cause[d] injury in more than one state, the place of injury is in the state in which most of the injurious effects occurred or may occur.”⁷⁹

ORS 31.862 also provides for cases involving more than one injured person or more than one person whose conduct allegedly caused the injury.⁸⁰ Thus, under ORS 31.862(2), in a *respondeat superior* action filed against an employer for injury caused by an employee, both the employer and the employee are considered to be persons whose conduct caused the injury for the purposes of this Act. Likewise under subsection (4), in a claim for wrongful death or for loss of consortium, both the claimant and the physically injured or deceased person are considered to be “injured persons” for the purposes of this Act.⁸¹

In some cases, questions such as (a) whether a person was actually injured, (b) whether the particular conduct actually caused the injury, and (c) whether a particular person was responsible for that conduct can only be answered after establishing the relevant facts. Until then, strictly speaking, there is only an “allegedly” injured person, an “allegedly” injurious conduct, and a person whose conduct “allegedly” caused the injury. In these cases, the quoted word is implied, even if it cannot be used in the text of the Act.⁸²

IV

CLAIMS DIRECTLY GOVERNED BY FORUM LAW

In the interest of judicial economy, as well as protecting Oregon’s policies or the parties’ justifiable reliance on Oregon law, ORS 31.870 and 31.872 list certain noncontractual claims that are directly

⁷⁸ OR. REV. STAT. § 31.862(1) (2009).

⁷⁹ § 31.862(3). This subsection also provides that, “[i]f different persons suffer injury in different states by reason of the same conduct, the place of injury is determined separately for each person.” *Id.*

⁸⁰ *See* § 31.862(2)–(4).

⁸¹ § 31.862(4). The terms “injured person” and “plaintiff” are not necessarily synonymous. For example, the plaintiff may simply be the assignee or subrogee of the injured person. By consistently using the term “injured person” rather than the term “plaintiff,” this Act signifies that in cases where these two terms do not coincide in the same person, only the former and not the latter term is relevant for purposes of the Act.

⁸² A more accurate phrase might be the person “claimed” to have caused the injury, “claimed to be liable” (which is used in the European Union’s Rome II Regulation), or perhaps some other even longer and more awkward phrase. *See* Regulation (EC) No. 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II), art. 4(2), 2007 O.J. (L 199) 40.

or automatically governed by Oregon law, notwithstanding other provisions of this Act. If a claim falls within the list, the court or other decision maker should apply Oregon law without conducting a choice-of-law inquiry. In doctrinal terms, ORS 31.870 and 31.872 consist of “unilateral” choice-of-law rules, namely, rules that mandate the application of the law of the forum state to cases that have certain contacts with that state without addressing the question of which law governs analogous cases that lack those contacts. In this case, however, the unilateral rules of ORS 31.870 and 31.872 are supplemented by the “multilateral” rules of ORS 31.875 through 31.885, which designate the applicable law (be it of the forum state or of another state) for all remaining cases.⁸³

A. *The List of ORS 31.870*

The list of ORS 31.870 can be divided into two parts. The first part, consisting of subsections (1) through (3), provides for cases in which the parties have agreed or acquiesced to the application of Oregon law. ORS 31.870(1) provides that if, “after the events giving rise to the dispute, the parties agree to the application of Oregon law,” then the agreement, if otherwise valid, will be enforceable and Oregon law will govern the dispute.⁸⁴ ORS 31.870 subsections (2) and (3) provide that Oregon law also governs if none of the litigants “raises the issue of applicability of foreign law,” or if the litigant or litigants “who rely on foreign law fail to assist the court in establishing the relevant provisions of foreign law after being requested by the court to do so.”⁸⁵ Both of these provisions are consistent with current judicial practice in Oregon and other states of the United States.⁸⁶

The second part of ORS 31.870, consisting of subsections (4) through (7), lists four categories of cases in which Oregon’s contacts are of the kind that would probably lead to the choice of Oregon law

⁸³ For the difference between “unilateralism” and “multilateralism” (or “bilateralism”), see Symeon C. Symeonides, *Accommodative Unilateralism as a Starting Premise in Choice of Law*, in PETER HAY, *BALANCING OF INTERESTS: LIBER AMICORUM* 417–34 (Hans-Eric Rasmussen-Bonne et al. eds., 2005).

⁸⁴ § 31.870(1). For cases in which the parties agree to the application of the law of a state other than Oregon, see *infra* Part V.A.

⁸⁵ § 31.870(2), (3).

⁸⁶ See MCDUGAL ET AL., *supra* note 70, at 440–45; SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 543–46; SYMEONIDES, *PRIVATE INTERNATIONAL LAW*, *supra* note 70, at 89–91; WEINTRAUB, *supra* note 70, at 112–16.

regardless of which modern choice-of-law methodology one might follow. For this reason, and in the interest of judicial economy, ORS 31.870 exempts these cases from a judicial choice-of-law analysis and directly subjects them to Oregon law.

Thus, ORS 31.870(4) provides that Oregon law applies in actions for noncontractual claims filed against the State of Oregon or any of its agencies or subdivisions or other public bodies as defined in ORS 31.850(7)—“unless the application of Oregon law is waived by a person authorized by Oregon law to make the waiver.”⁸⁷ Under ORS 31.860(1), Oregon law (including this Act) determines whether an entity is an agency or subdivision of the State of Oregon or a “public body.” ORS 31.850(7) defines a “public body” of the State of Oregon through a reference to ORS 174.109, which states that “‘public body’ means state government bodies, local government bodies and special government bodies.”⁸⁸ Subsequent provisions define state governmental bodies,⁸⁹ local governmental bodies,⁹⁰ and special governmental bodies.⁹¹ ORS 31.850(7) adds the Oregon Health and Science University and the Oregon State Bar to this list of public bodies so as to ensure that these two entities, which ORS 174.108(3) excludes from the definition of public body, will be covered by this Act.

ORS 31.870(5) provides that Oregon law governs actions filed against the owner, possessor, or lessor of land, buildings, or other real property situated in Oregon, seeking to recover for injury occurring on such property, if the injurious conduct also occurred in Oregon. Oregon law also governs actions seeking to prevent injury on such property if the impending or threatened conduct is expected to occur in Oregon.

ORS 31.870(6) provides that Oregon law governs actions for noncontractual claims between an employer and an employee “primarily” employed in Oregon, if the claim arises from injury in Oregon. Whether the employment meets this condition is a question of fact to be decided under Oregon law. By way of comparison, ORS 656.126 (Oregon’s workers’ compensation statute) applies to workers

⁸⁷ § 31.870(4). For a similar provision regarding certain contractual claims by or against the State of Oregon and other Oregon public bodies, see § 81.105(1).

⁸⁸ OR. REV. STAT. § 174.109 (2009).

⁸⁹ See §§ 174.111–114.

⁹⁰ See § 174.116.

⁹¹ See § 174.117.

“employed in this state,” even if the workers are injured elsewhere.⁹² Conversely, the same statute exempts certain workers “from another state” and injured in Oregon from its scope.⁹³

Finally, ORS 31.870(7) provides that Oregon law applies to noncontractual claims in actions for professional malpractice arising from professional services rendered entirely in Oregon if the provider of these services was licensed under Oregon law. In such cases, professionals rendering services in Oregon must comply with (and will be held accountable pursuant to) standards established by Oregon law, even if the recipient of the services is domiciled in another state.

It should be noted that, for claims that fall within the scope of ORS 31.870, Oregon law applies without any exceptions because, unlike other sections of the Act, ORS 31.870 does not contain any escape. Also, under ORS 31.870, Oregon law applies “[n]otwithstanding ORS 31.875, 31.878 and 31.885” of the Act.⁹⁴ In other words, ORS 31.870 prevails over the excluded sections, albeit for different reasons. It prevails over ORS 31.875 and 31.878 because it is more specific, and prevails over ORS 31.885, which permits the contractual choice of non-Oregon law, because a contrary rule would defeat the reason for mandating the application of Oregon law under ORS 31.870. Purposefully, the above-quoted phrase does not list ORS 31.880—which provides for claims by and against third parties—among the excluded sections. ORS 31.870 therefore coexists with ORS 31.880. This coexistence means that ORS 31.870 applies only between the plaintiff (and those parties asserting claims through the plaintiff) and the defendant (and those responsible for defendant’s conduct), while ORS 31.880 applies to claims by and against third parties.

B. Products Liability Claims

ORS 31.872 provides that certain products liability actions in which Oregon has the specified contacts are to be governed by Oregon law “[n]otwithstanding ORS 31.875 and 31.878”⁹⁵ of the Act

⁹² See OR. REV. STAT. § 656.126(1) (2009). For a discussion of this provision, see *supra* note 59 and accompanying text.

⁹³ See § 656.126(2) (“Any worker from another state and the employer of the worker in that other state are exempted from the provisions of this chapter while that worker is temporarily within this state doing work for the employer . . .”).

⁹⁴ OR. REV. STAT. § 31.870 (2009).

⁹⁵ § 31.872(1).

and without any judicial choice-of-law inquiry.⁹⁶ The quoted phrase underscores that, for claims falling within its scope, ORS 31.872 is more specific than ORS 31.875 and 31.878 and thus prevails over them. In this sense, ORS 31.872 is similar to ORS 31.870, which also prevails over ORS 31.875 and 31.878, but not to ORS 31.880, which applies to claims involving third parties. However, ORS 31.872 differs from ORS 31.870 in the following two important respects: (1) Unlike ORS 31.870, which does not allow exceptions to the application of Oregon law, ORS 31.872 provides two such exceptions, discussed below;⁹⁷ and (2) Unlike ORS 31.870, which does not allow a contractual choice of non-Oregon law, ORS 31.872 permits such a choice—provided it is made after the parties had knowledge of the events giving rise to the dispute and meets the other requirements of ORS 31.885.⁹⁸

ORS 31.872 applies to “product liability civil actions, as defined in ORS 30.900.”⁹⁹ The latter provision defines a “product liability civil action” as

a civil action brought against a manufacturer, distributor, seller or lessor of a product for damages for personal injury, death or property damage arising out of:

- (1) Any design, inspection, testing, manufacturing or other defect in a product;
- (2) Any failure to warn regarding a product; or
- (3) Any failure to properly instruct in the use of a product.¹⁰⁰

Like the Act as a whole, ORS 31.872 applies only to *noncontractual* claims. For *contractual* claims, such as certain claims for breach of warranty, the applicable choice-of-law statutes are ORS 81.100 to 81.135. One practical difference between the two statutes is that while the contracts statute allows predispute choice-of-law agreements within the limits specified in ORS 81.120 and 81.125, the new Act allows such agreements only if they are entered into after the parties had knowledge of the events giving rise to the dispute.¹⁰¹

⁹⁶ For a similar provision, see LA. CIV. CODE ANN. art. 3545 (2009); Symeonides, *Louisiana's New Law*, *supra* note 3, at 749–59.

⁹⁷ See *infra* note 287 and accompanying text.

⁹⁸ See *infra* notes 129–31 and accompanying text.

⁹⁹ § 31.872(1).

¹⁰⁰ § 30.900.

¹⁰¹ See § 31.885. For further discussion, see *infra* notes 128–35 and accompanying text.

ORS 31.872 applies only to the noncontractual claims and counter-claims between, on the one hand, the injured person as defined under ORS 31.862 (and those who assert claims through that person) and, on the other hand, a person who may be a defendant in a products liability action as defined in ORS 30.900, such as a manufacturer, distributor, seller, or lessor of a product. Claims by or against third parties or between joint tortfeasors are covered by ORS 31.880, which in turn refers them to ORS 31.878.

Finally, ORS 31.872 applies only to cases in which Oregon has the contacts enumerated in that provision.¹⁰² As stated in ORS 31.872(4), cases in which Oregon lacks these contacts are governed by the law selected under ORS 31.878, the residual section of this Act.¹⁰³ Depending on the circumstances, that law may be the law of Oregon or that of another state.

Under ORS 31.872(1), the application of Oregon law depends on specified combinations of four Oregon contacts: (1) the domicile of the injured person, (2) the place of injury, (3) the manufacture or production of the product, and (4) the delivery of the product when new in Oregon for use or consumption in Oregon. The following table shows the various possible combinations.

¹⁰² § 31.872. The presence of these contacts will usually—but not always—mean that Oregon courts will have jurisdiction to adjudicate these cases. However, the jurisdictional inquiry is different from the choice-of-law inquiry.

¹⁰³ In some of these cases, Oregon courts will not have jurisdiction. In those instances, the applicability of this Act would be a moot question, except to the extent that courts in other states may choose to consider ORS 31.872 and 31.878 under the doctrine of *renvoi* or similar reasoning.

TABLE 1
Products Liability Cases Governed by Oregon Law Under
ORS 31.872¹⁰⁴

	Case #	Victim's domicile	Injury	Delivery "as new"	Mnfg.	Applicable provision	Applicable law
4 contacts	1	OR	OR	OR	OR	§ 31.872(1)	OR
	2	---	OR	OR	OR	§ 31.872 (1)	OR
3 contacts	3	OR	---	OR	OR	§ 31.872 (1)	OR
	4	OR	OR	---	OR	§ 31.872 (1)	OR
	5	OR	OR	OR	---	§ 31.872 (1)	OR
2 contacts	6	OR	OR	---	---	§ 31.872 (1)(a)	OR
	7	OR	---	OR	---	§ 31.872 (1)(b)(B)	OR
	8	OR	---	---	OR	§ 31.872 (1)(b)(A)	OR
	9	---	OR	OR	---	§ 31.872 (1)(b)(B)	OR
	10	---	OR		OR	§ 31.872 (1)(b)(A)	OR
	11	---	---		OR	OR	§ 31.872 (4) and § 31.878
1 contact	12	OR	---	---	---	§ 31.872 (4) and § 31.878	?
	13	---	OR	---	---	§ 31.872 (4) and § 31.878	?
	14	---	---	OR	---	§ 31.872 (4) and § 31.878	?
	15	---	---	---	OR	§ 31.872 (4) and § 31.878	?
	16	---	---	---	---	§ 31.872 (4) and § 31.878	?

ORS 31.872(1) provides that, with only one exception,¹⁰⁵ Oregon law governs all cases in which any two or more of the aforementioned four contacts are situated in Oregon. These cases are indicated by shading in the last column of the above Table (Cases 1–10). Thus, Oregon law applies under subsection (1):

¹⁰⁴ For exceptions to the application of Oregon law, see the escapes of § 31.872(2)–(3). See also discussion *infra* note 287 and accompanying text.

¹⁰⁵ The exception covers cases in which Oregon's only two contacts are the manufacture or production of the product in the state and the delivery of the product in the state. See Case 11 in TABLE 1, *supra* p. 989.

(1) if, at the time of the injury, the injured person was domiciled in Oregon,¹⁰⁶ and Oregon was also: (a) the place of injury, (b) the place of the product's manufacture, or (c) the place of the product's delivery as new;¹⁰⁷ or

(2) if the injury occurred in Oregon, and Oregon was also: (a) the place of the product's manufacture, or (b) the place of the product's delivery as new.¹⁰⁸

The phrase "delivered when new" for use or consumption in Oregon under subsection (1)(b) is intended to exclude second-hand products that first entered Oregon in used condition. This exclusion will make a difference only when the application of Oregon law *depends on this contact* because Oregon lacks other contact combinations for applying Oregon law under subsection (1). This will be the case if the product first entered Oregon in used condition and Oregon had only one of the other three contacts listed in subsection (1).¹⁰⁹ In such a case, the claim will fall outside the scope of ORS 31.872 and will be governed by the law selected under ORS 31.878.

Subsections (2) and (3) of ORS 31.872 provide two exceptions to the application of Oregon law under subsection (1). The first exception operates for the entire claim; whereas the second exception operates on an issue-by-issue basis.¹¹⁰

Subsection (2) provides the first exception to the defendant, who must carry the burden of persuasion for the exception's deployment. The defendant can avoid the application of Oregon law by demonstrating to the court's satisfaction: (1) that the use in Oregon of the particular product that caused the injury could not have been foreseen (this is an objective test), *and* (2) that none of the defendant's products of the same type were available in Oregon in the ordinary course of trade.¹¹¹ If the defendant satisfies both of these

¹⁰⁶ As provided by ORS 31.865(3), a person's domicile is determined as of the date of the injury upon which the noncontractual claim is based. This is why ORS 31.872(1) uses the past tense when referring to the domicile of the injured person. However, a postinjury change of domicile may be a relevant factor in determining whether to employ the escape clause of ORS 31.872(2)(b). *See infra* note 287 and accompanying text.

¹⁰⁷ *See* Cases 1 and 3–8 in TABLE 1, *supra* p. 989.

¹⁰⁸ *See* Cases 2 and 9–10 in TABLE 1, *supra* p. 989.

¹⁰⁹ *See* Cases 7 and 9 in TABLE 1, *supra* p. 989.

¹¹⁰ Issue-by-issue analysis is discussed *infra* at Part V.D.

¹¹¹ Other codifications provide similar exceptions that nonetheless differ in some important respects. *See, e.g.*, LA. CIV. CODE ANN. art. 3545 (2009) (stating forum law

requirements, the entire claim will be governed by the law selected under ORS 31.878 of this Act.¹¹²

Subsection (3) of ORS 31.872 makes the second exception available to both defendants and plaintiffs. Either party can avoid the application of Oregon law under ORS 31.872 by demonstrating that, under the principles of ORS 31.878, the application to a disputed issue of the law of a state other than Oregon would be “substantially more appropriate” for that issue.¹¹³ In such a case, that issue will be governed by the law of the other state, while the remaining issues (if any) will be governed by Oregon law. The rationale for this exception is the same as that of a similar clause in ORS 31.875(4), which is discussed later.¹¹⁴

Subsection (4) of ORS 31.872 provides that noncontractual claims or issues in products liability actions falling outside the scope of ORS 31.872(1) are governed by the law selected under ORS 31.878. As noted earlier, these are cases in which Oregon lacks the combination of contacts required by ORS 31.872(1). The reference to ORS 31.878 does not preclude the application of Oregon law under that provision.

ORS 31.872(4) also refers to ORS 31.878 all claims falling within the scope of subsection (1) but “not disposed of” under subsections (1) through (3). These are cases in which a party carries the burden of satisfying the requirements of one of the exceptions provided in subsections (2) or (3) of ORS 31.872.

In summary, ORS 31.872 adopts a very pragmatic solution for products liability conflicts, which are an inherently difficult category of conflicts. Indeed, American courts have struggled with these

does not apply “if neither the product that caused the injury nor any of the defendant’s products of the same type were made available in [the forum] state through ordinary commercial channels”); Rome II, *supra* note 82, art. 5 (stating the otherwise applicable law does not apply if the defendant “could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable”); Hague Convention on the Law Applicable to Products Liability, art. 7, Oct. 2, 1973, 1056 U.N.T.S. 187 (stating the otherwise applicable law does not apply “if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels”).

¹¹² The claim will then become an “undisposed” claim, which ORS 31.872(4) refers to ORS 31.878. For a discussion of ORS 31.878, see *infra* Part V.C.

¹¹³ OR. REV. STAT. § 31.872(3) (2009).

¹¹⁴ See *infra* notes 290–91 and accompanying text.

conflicts,¹¹⁵ as have foreign or domestic rule makers.¹¹⁶ ORS 31.872 ensures that those cases that have sufficient contacts with Oregon to justify the application of Oregon law will be governed by that law, except when either of the two exceptions is found applicable. Most of the cases that lack these contacts will probably not be litigated in Oregon, either due to lack of jurisdiction or for other reasons. The few cases that will be litigated in Oregon will probably be too variable to be susceptible to a hard and fast rule. That is why ORS 31.872(4) refers these cases to the flexible approach of ORS 31.878.

As noted earlier, this Act does “not supersede” (and, in fact, gives priority to) choice-of-law provisions found in other Oregon statutes.¹¹⁷ One such statute is ORS 30.905, which establishes time limitations within which a claimant must assert a products liability action. In 2009, the Oregon Legislature amended this statute to provide for the applicable statute of repose in certain products liability actions involving products manufactured outside Oregon. The statute differentiates between actions for personal injury or property, on the one hand, and actions arising from death, on the other hand. In personal injury or property damage cases, the action must be brought within ten years of the product’s first purchase or within the period provided by the statute of repose of the state of manufacture, whichever period is *longer*.¹¹⁸ In claims arising from death, the action must be brought within three years from the death, ten years from the product’s first purchase, or the period provided by the statute of repose of the state of manufacture, whichever period is *shorter*.¹¹⁹ Under the scheme of ORS 31.855, the aforementioned provisions of ORS 30.905 take precedence over the provisions of this Act, if only because they are more specific on the issue of the timeliness of a products liability action. This precedence means that these provisions will apply not only to cases governed by Oregon law under ORS

¹¹⁵ For a discussion of how American courts have handled products-liability conflicts in the last two decades, see Symeon C. Symeonides, *Choice of Law for Products Liability: The 1990s and Beyond*, 78 TUL. L. REV. 1247 (2004).

¹¹⁶ For a survey of enacted or proposed choice-of-law rules for products liability, see SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 934–41.

¹¹⁷ See § 31.855. For a discussion, see *supra* Part III.A.

¹¹⁸ § 30.905(2) (as amended by 2009 Or. Laws 485 (S.B. 284)). If the product was manufactured in another country, the U.S. state “into which the product was imported” replaces the state of manufacture. *Id.*

¹¹⁹ § 30.905(4) (as amended by 2009 Or. Laws 485 (S.B. 284)). If the product was manufactured in another country, the U.S. state “into which the product was imported” replaces the state of manufacture. *Id.*

31.872(1) (e.g., Cases 1-10 of TABLE 1, above), but also to cases that ORS 31.872(4) refers to ORS 31.878 and on other issues may be governed by the law of a state other than Oregon.¹²⁰ This further means that, depending on the pertinent contingencies: (1) the timeliness of an action that is otherwise governed by Oregon law under ORS 31.872(1) may be determined under the statute of repose of another state in which the product was manufactured; and conversely, (2) the timeliness of an action that is otherwise governed by the law of another state under ORS 31.878 may be determined under Oregon's statute of repose.

V

CLAIMS GOVERNED BY EITHER FORUM OR FOREIGN LAW

When a case lacks the contacts that lead to the automatic application of Oregon law under ORS 31.870 or 31.872, the choice of law is to be made under ORS 31.875 through 31.885. ORS 31.885 addresses the enforceability of choice-of-law agreements, while ORS 31.875 through 31.880 apply in the absence of such an agreement. ORS 31.875 applies to claims between the injured person and the person whose conduct caused the injury, ORS 31.880 applies to claims between or among third parties, and ORS 31.878 is the default rule that applies when not displaced by other provisions of the Act.

A. Choice-of-Law Agreements

As noted earlier, this Act applies to noncontractual claims, whereas ORS 81.100 to 81.135 ("the contracts statute") applies to contractual claims.¹²¹ With regard to *contractual* claims, the principle of party autonomy is old, broad, and uncontested.¹²² This principle recognizes the freedom of contracting parties to agree in advance (as well as after the fact) on the law under which to resolve their contractual claims—as long as the agreement does not violate the

¹²⁰ The remaining question is whether the provisions described above of ORS 30.905 also prevail over the provisions of ORS 12.410 to 12.480 (the Uniform Conflict of Laws-Limitations Act). This question is beyond the scope of this Article. For what it is worth, this author's opinion is that ORS 30.905 should prevail.

¹²¹ For a discussion of this statute, see the sources cited *supra* note 43.

¹²² By now, this principle is "perhaps the most widely accepted private international law rule of our time." Russell J. Weintraub, *Functional Developments in Choice of Law for Contracts*, 187 RECUEIL DES COURS 239, 271 (1984). For a discussion of party autonomy and its limitations in contracts, see SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 947-87; SYMEONIDES, PRIVATE INTERNATIONAL LAW, *supra* note 70, at 197-223.

public policy or certain nonwaivable rules of the state's law that would govern in the absence of such an agreement. Virtually all legal systems recognize this principle and, as ORS 81.120 and 81.125 illustrate, so does Oregon. ORS 81.120(1) provides that, subject to certain conditions and limitations specified therein, “the *contractual* rights and duties of the parties are governed by the law or laws that the parties have chosen.”¹²³ The italicized word, which was deliberately chosen in drafting that provision, limits the permissible scope of a choice-of-law agreement to contractual issues.¹²⁴

Whether the principle of party autonomy should extend to noncontractual claims is a relatively new question, one which has yet to receive a clear or uniform answer. In other words, do contracting parties have the power to choose in advance the law that will govern a future tort between them or other noncontractual claims arising from or related to their relationship? Section 187 of the Restatement (Second) of Conflict of Laws, which is followed by the majority of jurisdictions in the United States, speaks of the law of the state chosen by the parties to govern their “*contractual* rights and duties”¹²⁵ and contains no provision regarding the agreements for noncontractual claims. Many cases apply section 187 literally and hold that the parties’ power to choose the applicable law in advance is confined to contractual issues. However, some cases assume that parties are free to submit noncontractual issues to the chosen law, provided that the parties use clear and unambiguous language expressing such an intent. At the same time, these cases also tend to scrutinize clauses that purport to encompass noncontractual issues much more closely than clauses confined to purely contractual issues. More often than not, these cases either construe the clause to exclude tort issues or conclude that the clause is unenforceable as contrary to public policy.¹²⁶ In contrast, the European Union’s Rome II Regulation

¹²³ OR. REV. STAT. § 81.120(1) (2009) (emphasis added).

¹²⁴ See Official Comments to H.B. 2414, 2001 Or. Laws 164 § 7, cmt. 1 (codified in part as OR. REV. STAT. § 81.120 (2009)). As the Comments note, the quoted provision “makes clear that the exercise of party autonomy within this Act extends only to contractual rights and duties of the parties and not to non-contractual rights and duties such as those arising out of the law of torts and property.” *Id.* (published in Nafziger, *supra* note 43, at 420); Symeonides, *Oregon’s Choice-of-Law Codification for Contract Conflicts*, *supra* note 12, at 223–26 (explaining the exclusion of noncontractual claims).

¹²⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971) (emphasis added).

¹²⁶ For citations, see SYMEONIDES, PRIVATE INTERNATIONAL LAW, *supra* note 70, at 212–14; Symeonides, *Oregon’s Choice-of-Law Codification for Contract Conflicts*, *supra* note 12, at 224–25.

allows predispute choice-of-law agreements for noncontractual issues if: (1) the parties are “pursuing a commercial activity,” (2) the agreement is “freely negotiated,” and (3) the contractually chosen law does not derogate from the mandatory rules of a state in which “all the elements relevant to the situation . . . are located” or, in certain cases, from the mandatory rules of community law.¹²⁷

This Act breaks new ground in the United States by addressing choice-of-law agreements with regard to noncontractual claims. The Act differentiates between agreements entered into before the events giving rise to the dispute (predispute) and those entered into after the parties had knowledge of the events giving rise to the dispute (post-dispute). The reason for this differentiation is that the parties' position in the two situations is qualitatively and significantly different. Before the dispute arises, the parties (assuming they are otherwise contractually related) usually do not—or should not—contemplate a future tort, and the parties do not know (1) who will injure whom or (2) the nature or severity of the injury. An unsophisticated party (or a party in a weak bargaining position) may uncritically or unwittingly sign a choice-of-law agreement—even when the odds of that party becoming the victim are much higher than the odds of that party becoming the tortfeasor. Thus, predispute agreements may facilitate the exploitation of weak parties. In contrast, this danger is less pronounced in postdispute agreements because, after the dispute arises, the parties are in a position to know their rights and obligations and have the opportunity to weigh the pros and cons of a choice-of-law agreement. This is why the Act permits postdispute choice-of-law agreements but does not sanction predispute agreements for noncontractual claims.

The Act differentiates between postdispute agreements choosing Oregon law and post-dispute agreements choosing the law of another state. According to ORS 31.870(1), postdispute agreements choosing Oregon law are enforceable without any limitation—if the agreements are otherwise valid.¹²⁸

¹²⁷ Rome II, *supra* note 82, art. 14. For a critique of this provision, see Symeon C. Symeonides, *Rome II and Tort Conflicts: A Missed Opportunity*, 56 AM. J. COMP. L. 173, 215–17 (2008) (criticizing this provision for its failure to protect weak parties in certain commercial relationships, such as franchises); Symeon C. Symeonides, *Party Autonomy in Rome I and II from a Comparative Perspective*, in CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW—LIBER AMICORUM KURT SIEHR (K. Boele-Woelki, T. Einhorn, D. Girsberger & S. Symeonides eds., forthcoming 2010) [hereinafter Symeonides, *Party Autonomy*].

¹²⁸ See *supra* Part IV.A.

ORS 31.885 applies to postdispute agreements choosing the law of a state other than Oregon. ORS 31.885 provides that such agreements are enforceable provided they conform to the pertinent provisions of ORS 81.100 to 81.135, which establish the requirements for enforcing choice-of-law agreements regarding contractual claims.¹²⁹ Among these requirements are that the agreement: (1) must be formally and substantively valid under the law applicable to those issues under ORS 81.105 to 81.115, or 81.130 to 81.135; (2) “must be express or clearly demonstrated from the terms of the contract” and, in a standard form contract drafted primarily by only one of the parties, the agreement “must be express and conspicuous”;¹³⁰ and (3) must remain within the limits of party autonomy as defined by ORS 81.125. The latter section provides, *inter alia*, that the contractually chosen law does not apply to the extent that its application would “[c]ontravene an established fundamental policy embodied in the law that would otherwise govern the issue in dispute” in the absence of such agreement.¹³¹

By resolving the choice-of-law aspect of a dispute, choice-of-law agreements can facilitate a voluntary settlement of the whole dispute without litigation. Even when litigation is not avoided, choice-of-law agreements can reduce the duration and costs of litigation and make it more predictable. Thus, choice-of-law agreements serve interests beyond those of the parties, such as the interest in conserving judicial resources. For this reason, ORS 31.885 and ORS 31.870(1) should be viewed as expressions of a legislative policy in favor of choice-of-law agreements and an invitation to courts to encourage parties to reach such agreements.¹³²

¹²⁹ ORS 81.102 also preserves the applicability of other Oregon statutes regarding such agreements. For a list of these statutes, see Official Comments to H.B. 2414, 2001 Or. Laws 164 § 2, cmt. 1 (codified in part as OR. REV. STAT. § 81.102 (2009)) (published in Nafziger, *supra* note 43, at 419).

¹³⁰ OR. REV. STAT. § 81.120(2) (2009).

¹³¹ § 81.125(1)(c). Subsection (2) of the same section provides that “an established policy is fundamental only if the policy reflects objectives or gives effect to essential public or societal institutions beyond the allocation of rights and obligations of parties to a contract at issue.” § 81.125(2). For a discussion of this provision, see Symeonides, *Oregon’s Choice-of-Law Codification for Contract Conflicts*, *supra* note 12, at 231–35.

¹³² See generally James A.R. Nafziger, *Avoiding Courtroom “Conflicts” Whenever Possible*, in *LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN* 341 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002); James A.R. Nafziger, Commentary, *Making Choices of Law Together*, 37 *WILLAMETTE L. REV.* 209 (2001); James A.R. Nafziger, *Avoidance of Choice-of-Law Conflicts: An Introduction*, 12 *WILLAMETTE J. INT’L L. & DISP. RESOL.* 179 (2004).

ORS 31.885 does not by itself prohibit parties from agreeing to submit a noncontractual dispute to arbitration.¹³³ The validity of an arbitration agreement is governed by general contract principles. Moreover when the arbitration agreement is valid, this Act is not binding on the arbitral tribunal, unless the agreement expressly provides otherwise. ORS 36.508 provides in pertinent part that the arbitral tribunal shall decide the dispute “in accordance with the rules of law designated by the parties as applicable to the substance of the dispute” and that the designation of the law of a given state “shall be construed, *unless otherwise expressed*, as directly referring to the substantive law of that state and not to its conflict-of-laws rules.”¹³⁴ As part of Oregon’s conflicts law, this Act will be binding on the arbitral tribunal only if the arbitration agreement expressly provides to that effect. ORS 36.508 also provides that if the arbitration agreement does not designate the applicable law, then “the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.”¹³⁵ In such a case, the tribunal may choose to be guided by the provisions of this Act in identifying the “appropriate” rules of law.

B. The General Rules of ORS 31.875

In the absence of a choice-of-law agreement that is enforceable under ORS 31.885, the court or other decision maker should turn to ORS 31.875, which is the heart of the Act. ORS 31.875 provides the general rules for determining the law applicable to claims not covered by the more specific ORS 31.870, 31.872, 31.880, and 31.885. The rules of ORS 31.875 apply only to claims and counter-claims between the “injured person” (and those parties asserting claims through that person) and “the person whose conduct caused the injury” (and those responsible for that person).¹³⁶ For claims by or against third parties or between or among joint tortfeasors, the applicable law is

¹³³ For choice-of-law issues in interstate and international arbitration, see SYMEONIDES, *PRIVATE INTERNATIONAL LAW*, *supra* note 70, at 217–23.

¹³⁴ OR. REV. STAT. § 36.508(1), (2) (2009) (emphasis added).

¹³⁵ § 36.508(3).

¹³⁶ § 31.875(1). The “injured person” and “the person whose conduct caused the injury” are determined under Oregon law as provided in ORS 31.860 and ORS 31.862. ORS 31.862 also provides that Oregon law determines what constitutes “injurious conduct” or “conduct that caused the injury” and where that conduct and the resulting injury occurred. § 31.862.

determined under ORS 31.880, which in turn relegates them to the flexible approach of ORS 31.878.¹³⁷

Under ORS 31.875, the choice of the governing law depends in part on the location of four contacts: (1) the place of the injurious conduct, (2) the place of the resulting injury, (3) the domicile of the injured person, and (4) the domicile of the person whose conduct caused the injury. The following table illustrates the operation of ORS 31.875 by showing the various contact combinations or patterns that fall within its scope as well as the applicable law (indicated by shading).

¹³⁷ The reason for relegating these claims to the flexible approach of ORS 31.878 is that their complexity and variability make them insusceptible to categorical choice-of-law rules. For example, there is no guarantee that the choice-of-law rules of ORS 31.875 will produce sound results in all cases involving these types of third-party claims, although in some cases these rules can provide valuable pointers. In many cases, it may be appropriate to apply the same law to these claims as that which governs the claims between the injured person and the person who caused the injury; while in other cases, it may be more appropriate to apply the law of another state. The approach of ORS 31.878 provides courts with sufficient flexibility to evaluate the complexities and peculiarities of each claim in an individualized way and decide accordingly.

TABLE 2
Cases Covered by ORS 31.875¹³⁸

		#	P's Dom.	Injury	Conduct	D's Dom.
Subsection (2)(a)	Common-domicile cases	1	A	B	B	A
		2	A	B	C	A
		3	A	A	B	A
		4	A	b	A	A
		5	A	B	c	A
		6	A	b	C	A
		7	A	b	c	A
		8	A	b	b	A
		9	A	b	b	A
		10	A	b	c	A
		11	A	a	B	A
		12	A	B	a	A
		13	A	B	c	A
		14	A	b	C	A
		15	A	B	C	A
		16	A	B	B	A
Subsection (2)(b)	Cases analogous to common-domicile cases	17	A	---	---	B
		18	A	---	---	B
Subsection (3)(a)	Split-domicile but conduct and injury in one domiciliary state	19	A	A	A	B
		20	A	B	B	B
		21	A	B	B	B
		22	A	A	A	B
Subsection (3)(b)	Split-domicile and conduct and injury in the same third state	23	A	C	C	B
		24	A	C	C	B
		25	a	C	C	B
		26	A	C	C	B
Subsection (3)(c)	Split-domicile, cross-border torts	27	a	a	B	B
		28	c	a	B	B
		29	a	a	B	C
		30	d	a	B	C

¹³⁸ Cases 1–18 are subject to an exception for the issue of “standard of care.” See § 31.875(2)(a); see also discussion *infra* Part V.B.1.b. Cases 23–26 are subject to an escape if the application of the law of State C “will not serve the objectives of that law.” See § 31.875(3)(b); see also discussion *infra* Part V.B.3.b. All cases (1–36) are subject to a general escape if the application of another law is “substantially more appropriate under the principles of ORS 31.878.” See § 31.875(4); see also *infra* notes 290–91 and accompanying text.

		#	P's Dom.	Injury	Conduct	D's Dom.
		31	D	a	B	C
		32	A	A	b	B
		33	A	A	b	C
		34	D	A	b	C
		35	D	A	b	B
		36	d	A	b	C

In this and all subsequent tables: (1) the letters in the last four columns represent states that have the contacts shown at the top of each column; (2) the use of a capital letter indicates that the state represented in that cell has a pro-recovery law, while the use of a lower-case letter indicates that the state represented in that cell has a law that does not favor recovery; (3) the dash (---) indicates that the law of that state is immaterial; and (4) shaded cells indicate the state of the law applicable under ORS 31.875.

1. *Common-Domicile Cases*

ORS 31.875(2)(a) deals with situations in which, at the time of the injury, the injured person and the person whose conduct caused the injury were domiciled in the same state.¹³⁹ The first sentence of this subsection provides that these cases are to be governed by the law of the common domicile—even if the injurious conduct, the resulting injury, or both occurred in another state or states with a different (or the same) law than that of the common domicile. This sentence is hereinafter referred to as the “common-domicile rule.”

The second sentence of subsection (2)(a) introduces a limitation to the scope of the common-domicile rule by exempting from it the issue of determining the standard of care by which to judge the injurious conduct. That sentence, hereinafter referred to as “the exception” from the common-domicile rule, provides that this issue is governed by the law of the state of conduct if the resulting injury also occurred in that state. If the injury occurred in a state other than the state of conduct, the applicable law is determined under subsection (3)(c),

¹³⁹ The rules for determining the domicile of a natural person or a legal person are found in ORS 31.865 and are discussed *supra* Part III.B.3. Subsection (2)(b) of ORS 31.875 expands the scope of the common-domicile rule of subsection (2)(a) to include persons who are domiciled in different states that have laws that would produce the same outcome. § 31.875(2)(b). The operation and rationale of subsection (2)(b) is explained *infra* Part V.B.2.

which allows the plaintiff to opt for the law of the state of injury under certain conditions discussed later.¹⁴⁰

a. The Common-Domicile Rule

The common-domicile rule codifies prevailing judicial practice in the United States and reflects similar developments in contemporary conflicts law around the world. Since the abandonment of the *lex loci delicti* rule in the United States, the notion of applying the law of the parties' common domicile to certain torts committed entirely in another state has steadily gained ground—so much so that one can speak of the emergence of a true common-domicile rule.¹⁴¹ A “common-country” rule has also emerged in the rest of the world. As documented elsewhere,¹⁴² recent private international law codifications and international conventions have adopted the notion of applying the law of the country with which both the tortfeasor and the victim are affiliated through domicile, habitual residence, or nationality. This notion is implemented either through a common-domicile rule (as in the Swiss, Quebec, and Puerto Rican codifications, and the Hague Convention on the Law Applicable to Products Liability),¹⁴³ or through an exception from the *lex loci* rule. The exception is phrased either in common-domicile or common-habitual residence language (as in the European Union's Rome II Regulation, and the Dutch, German, Hungarian, and Tunisian codifications),¹⁴⁴ or in common-nationality language (as in the Portuguese, Polish, Italian, and Russian codifications).¹⁴⁵ Other

¹⁴⁰ See *infra* Part V.B.3.c.

¹⁴¹ See *infra* notes 148–53 and accompanying text. The parameters of this rule are discussed later.

¹⁴² See SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 804–06.

¹⁴³ See Bundesgesetz über das Internationale Privatrecht [Federal Code of Private International Law] Dec. 18, 1987, SR 291, art. 133 (Switz.); 64 R.S.Q. 3126 (1991) (Can.); Hague Convention on the Law Applicable to Products Liability, art. 5, Oct. 2, 1973, 1056 U.N.T.S. 187; see also Symeonides, *Revising Puerto Rico's Conflicts Law*, *supra* note 3.

¹⁴⁴ See Rome II, *supra* note 82, arts. 4(2), 5(1), 6(2) & 9; 2001 Act Regarding the Conflict of Laws on Torts of 11 Apr. 2001, stb. 2001, 190 art. 3(3) (Neth.); Einführungsgesetz zum Bürgerlichen Gesetzbuche [EGBGB] (Introductory Act to the Civil Code), May 21, 1999, BGBl. I at 1026, art. 40(2) (F.R.G.); Law Decree No. 13 of 1979 on International Private Law § 32(3) (Hung.); Tunisian Code of Private International Law, No. 98-97 art. 70(3) (1998).

¹⁴⁵ See CÓDIGO CIVIL PORTUGUÊS (PORTUGUESE CIV. CODE) art. 45(2) (as amended in 1966); Polish Private International Law Act of 1966, art. 31(2); Legge di riforma del sistema italiano di diritto internazionale private e processuale of May 31, 1995, Gazz. Uff.

codifications contain exceptions which, though not explicitly phrased in common-domicile language, are very likely to be employed in common-domicile situations.¹⁴⁶ Thus, the notion of applying the law of the parties' common affiliation to certain torts seems to enjoy universal acceptance today.

Opinions tend to diverge, however, in (1) compressing this notion into a specific rule; (2) demarcating this rule's boundaries; (3) defining the fact-law patterns, issues, and persons that should be included within its scope; and (4) articulating its philosophical foundations. By way of example—and moving from the narrowest to the broadest formulation—the scope of the common-domicile rule could be defined in at least the following five ways, each of which reflects different philosophical assumptions and biases in favor of either (a) forum law, (b) the law that favors recovery, or (c) both:

- (1) Confine the common-domicile rule to cases in which the parties' common domicile is in the forum state and that state's law is more protective of the victim than the law of the state of conduct and injury;
- (2) Phrase the rule in forum-neutral terms, but confine it to cases in which the law of the common domicile is more protective of the victim than the law of the state of conduct and injury;¹⁴⁷
- (3) Phrase the rule in more neutral terms and apply the law of the common domicile "for better or worse," that is, whether or not that law favors recovery;

no. 128, art. 62 (Italy); *Grazhdanskii Kodeks RF [GK] [Civil Code]* art. 1219(2) (Russ.); see also Chinese Soc'y of Private Int'l Law, *Model Law of Private International Law of the People's Republic of China*, art. 114 (2000), in 3 *YEARBOOK OF PRIVATE INTERNATIONAL LAW* 349 (Peter Šarčević & Paul Volken eds., 2001).

¹⁴⁶ This is the case, for example, in the Austrian codification, the English private international law statute of 1995, the Hague Traffic Accidents Convention, and some other international conventions. These exceptions are not expressly confined to issues of loss distribution. However, the exceptions are more likely to be very confined in actual application because these codifications contain varying admonitions to the effect that, in applying another law, the court should "not prejudice" or should "take into consideration" the laws of conduct and safety prevailing at the place of conduct. For citations and further discussion, see SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 805–06.

¹⁴⁷ Consider the following "rule of choice-of-law," extrapolated by Professor Sedler from the judicial applications of interest analysis: "When two parties from a recovery state, without regard to forum residence, are involved in an accident in a nonrecovery state, recovery will be allowed." Robert Allen Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 *TENN. L. REV.* 975, 1034 (1977) (emphasis omitted).

(4) Extend the rule to cases in which the tortfeasor and the victim are domiciled in different states, if these states have the same law on the issue; or

(5) Apply the rule not only to conflicts of “loss-allocating” rules but also to conflicts of “conduct-regulating” rules.

The above-quoted terms are explained below.¹⁴⁸ Suffice it to say that each of the above iterations of the common-domicile rule has garnered support (as well as opposition), and some of these iterations have received legislative sanction.¹⁴⁹ Under Oregon’s new Act, the common-domicile rule:

(1) is phrased in bilateral, forum-neutral terms;

(2) is phrased in terms that neither favor nor disfavor recovery. In other words, the law of the common domicile is to be applied “for better or worse,” regardless of whether it provides a higher or lower standard of financial protection for the tort victim than the law of the place of the conduct, injury, or both;

(3) extends to cases in which the parties are domiciled in different states “to the extent that laws of those states on the disputed issues would produce the same outcome”,¹⁵⁰

(4) is confined to claims between the “injured person” and the “person whose conduct caused the injury” and does not extend to claims by or against third parties, such as joint tortfeasors;¹⁵¹

(5) is subject to the above-noted exception for the conduct-regulating issue of determining the standard of care by which to judge the injurious conduct;¹⁵² and

(6) is subject to a general escape contained in subsection (4) of ORS 31.875, which is discussed later.¹⁵³

TABLE 3 (below) shows all possible combinations of contacts and laws that fall within the scope of the common-domicile rule of subsection (2)(a) and its exception.¹⁵⁴

¹⁴⁸ See *infra* Part V.B.1.b.

¹⁴⁹ See SYMEONIDES, REVOLUTION, *supra* note 7, at 157–59.

¹⁵⁰ OR. REV. STAT. § 31.875(2)(b) (2009); see also discussion *infra* Part V.B.2.

¹⁵¹ The latter claims are governed by the law selected under ORS 31.880. See discussion *infra* Part V.D.

¹⁵² See *infra* Part V.B.2.

¹⁵³ See *infra* Part VI.

TABLE 3
The Common-Domicile Rule of ORS 31.875(2)(a)

	#	P's Dom.	Injury	Conduct	D's Dom.
Pattern A	1	A	B	B	A
	2	A	B	C	A
	3	A	A	B	A
	4	A	b	A	A
	5	A	B	c	A
	6	A	b	C	A
	7	A	b	c	A
	8	A	b	b	A
Pattern B	9	A	b	b	A
	10	A	b	c	A
	11	A	a	B	A
	12	A	B	a	A
	13	A	B	c	A
	14	A	b	C	A
	15	A	B	C	A
	16	A	B	B	A

The sixteen permutations can be divided into two principal patterns, Patterns A and B:

- (1) Pattern A encompasses cases in which the state of the common domicile has a law that favors recovery. The first eight cases of TABLE 3 fall within this pattern and are arranged in ascending order of difficulty; and
- (2) Pattern B encompasses cases in which the law of the common domicile prohibits or limits recovery. Cases 9 through 16 of TABLE 3 fall within this pattern and are also arranged in ascending order of difficulty.

Although all sixteen permutations fall within the scope of the common-domicile rule, some permutations present relatively easy conflicts, while others are functionally equivalent to easy conflicts.

¹⁵⁴ The letters in the last four columns represent states that have the contacts shown at the top of each column. A capital letter indicates that the state represented by that letter has a pro-recovery law, while a lower-case letter indicates that the state represented by that letter has a law that does not favor recovery.

For example, Cases 1-2 and 9-10 do not present a real conflict because all involved states have either a pro-recovery law (Cases 1 and 2) or a law that denies or limits recovery (Cases 9 and 10). Likewise, Cases 3-4 and 11-12 present relatively easy conflicts because the state of the common domicile has the additional contact of being the place of either the conduct or the injury. Cases 5-6 and 13-14 are functionally similar to the last group because, although the common domicile does not have the additional contact, that contact is located in a state that has the same law as the common domicile.

This leaves the last two cases in each pattern, namely, Cases 7-8 and 15-16 (shown in italics in Table 3), which are cases where the conduct and the injury occur in a state or states with a law that is the opposite of the law of the common domicile. Of these cases, the ones that are statistically most frequent are those in which the conduct and the injury occur in the same state other than the parties' common state, namely, Cases 8 and 16. Case 8 is the same as the landmark New York case *Babcock v. Jackson*,¹⁵⁵ which started the choice-of-law revolution. For the sake of simplicity, the following discussion focuses on *Babcock*-type cases (such as Case 8) and their converse (such as Case 16).

In the terminology of interest analysis, which is the main tool and language for teaching conflicts law in the United States today,¹⁵⁶ a *Babcock*-pattern case presents what is known as the classic "false conflict" paradigm.¹⁵⁷ Only the state of the common domicile has an "interest" in applying its pro-recovery law, while the state of the conduct or injury does not have a countervailing interest in applying its nonrecovery law.¹⁵⁸ Indeed, the state of the common domicile has

¹⁵⁵ 191 N.E.2d 279 (N.Y. 1963); *see also* discussion *supra* note 8.

¹⁵⁶ *See* Courtland H. Peterson, *Restating Conflicts Again: A Cure for Schizophrenia?*, 75 IND. L.J. 549, 559 (2000) (concluding that "the survival of interest analysis as a dominant aspect of conflicts theory is a result of the fact that law professors use it to teach the subject of conflict of laws—even if they do not personally subscribe to its methodology").

¹⁵⁷ The term "false conflict" was first advanced by the chief architect of interest analysis, Professor Brainerd Currie. False conflicts are those in which only one of the involved states has an interest in applying its own law. In contrast, "true conflicts" are those in which both (or more) of the involved states have such an interest. *See* CURRIE, *supra* note 10, at 180.

¹⁵⁸ The use of interest analysis terminology in this Article does not imply the adoption of interest analysis in this Act or by this author. For this author's views on the matter, *see* generally SYMEONIDES, *REVOLUTION*, *supra* note 7, at 365–437. Although coined by interest analysts, the terms "false," "true," "apparent conflicts," or "unprovided for cases" have also been employed or accepted by proponents of other modern choice-of-law

an interest in ensuring that its domiciliary victim and his or her family are compensated by its domiciliary tortfeasor, while the state of the conduct and injury does not have a countervailing interest in denying recovery to the out-of-state victim and protecting the out-of-state defendant. The overwhelming majority of state supreme courts that have encountered such a conflict after the abandonment of the *lex loci delicti* rule have unhesitatingly applied the law of the common domicile. A recent comprehensive study has identified thirty-five cases falling within this pattern. Thirty three of those cases applied the law of the common domicile.¹⁵⁹ One of the two cases that did not do so was subsequently overruled,¹⁶⁰ and the other case was factually atypical.¹⁶¹

On the other hand, when the laws of the two states are reversed, as in the converse of a *Babcock* case (Case 16, above), the resulting conflict arguably is not as clearly a false conflict. This is because, although the state of the common domicile continues to be as interested in allocating losses between its domiciliaries as in the *Babcock*-type case, the state of conduct and injury may also have a certain interest in applying its pro-recovery law in order to deter wrongful conduct in that state and ensure recovery of medical and similar costs incurred in the state of injury. Nevertheless, most American courts encountering this pattern of conflict have applied the law of the parties' common domicile to cases of this pattern. As the same study documents, twenty-six such cases have reached a state supreme court in states that have abandoned the *lex loci* rule. Eighteen of those cases applied the pro-defendant law of the common domicile, and eight applied the pro-plaintiff law of the state of conduct and injury.¹⁶² In seven of the latter cases, that state was also

methodologies and provide a common vocabulary in the dialogue among conflicts lawyers of any philosophical orientation.

¹⁵⁹ For citations and further discussion, see SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 799–806; SYMEONIDES, *REVOLUTION*, *supra* note 7, at 146–51.

¹⁶⁰ See *Dym v. Gordon*, 209 N.E.2d 792 (N.Y. 1965).

¹⁶¹ See *Peters v. Peters*, 634 P.2d 586 (Haw. 1981). *Peters* arose out of a Hawaii traffic accident in which a New York domiciliary was injured while riding in a rented car driven by her husband. *Id.* at 588. Her suit against her husband (and ultimately his insurer) was barred by Hawaii's interspousal immunity law, but not by New York's law. *Id.* at 588–89. The court applied Hawaii law because the insurance policy that had been issued on the rental car in Hawaii had been written in contemplation of Hawaii immunity law. *Id.* at 594–95.

¹⁶² See SYMEONIDES, *REVOLUTION*, *supra* note 7, at 146–55; Symeon C. Symeonides, *Choice of Law in the American Courts in 2008: Twenty-Second Annual Survey*, 57 AM. J. COMP. L. 269, 284–88 (2009) [hereinafter Symeonides, 2008 Survey].

the forum state, and six of those cases were decided under approaches that are skewed in favor of forum law—Leflar’s pro-plaintiff “better-law approach” and Kentucky’s *lex fori* approach.¹⁶³

Be that as it may, based on sheer numbers, one can conclude that American courts apply the law of the common domicile to both Pattern A and Pattern B cases, not only when that law favors the plaintiff, but also when it favors the defendant. ORS 31.875(2)(a) takes the same position. It calls for the application of the law of the common domicile “for better or worse,” regardless of whether that law favors the plaintiff (as in Pattern A cases) or the defendant (as in Pattern B cases). Depending on the circumstances, any inequity that may result in a particular case falling within Pattern B can be addressed through the escape clause of subsection (4) of ORS 31.875, which is discussed later.¹⁶⁴

b. The Exception to the Common-Domicile Rule

It is important to note, however, that all of the aforementioned cases in which American courts have applied the law of the common domicile involved conflicts between “loss-allocation” or “loss-distribution” rules. In contrast, in cases involving conflicts between “conduct-regulating” rules, American courts do *not* apply the law of the common domicile. Instead, they apply the law of the other state or states in which the conduct, injury, or both occurred.¹⁶⁵ This distinction between the two types of conflicts calls for explanation because it provides the dividing line between the common-domicile rule of the first sentence of ORS 31.875(2)(a) and its exception stated in the second sentence of that subsection.

The distinction between conduct-regulating and loss-distributing rules was first articulated by the New York Court of Appeals in the 1963 landmark case *Babcock v. Jackson*.¹⁶⁶ *Babcock* arose out of a single-car accident in Ontario, which resulted in injury to a New York domiciliary who was a guest-passenger in a car driven by a New York host-driver. New York law allowed the passenger to bring a tort action against the host-driver, whereas Ontario’s “guest statute” immunized the driver and his insurer from suits brought by a gratuitous guest-passenger. The court refused to apply the Ontario

¹⁶³ For documentation, see *id.* at 287. The seventh case was factually atypical. See *id.*

¹⁶⁴ See discussion *infra* notes 290–91 and accompanying text.

¹⁶⁵ See SYMEONIDES, REVOLUTION, *supra* note 7, at 213–20.

¹⁶⁶ See 191 N.E.2d 279, 284–85 (N.Y. 1963).

(loss-distribution) statute and instead applied New York law, allowing the action. However, the court also noted that it would have reached a different conclusion “had the issue related to the manner in which the defendant had been driving his car at the time of the accident [or to] the defendant’s exercise of due care.”¹⁶⁷ In such a case, the state in which the conduct occurred “will usually have a predominant, if not exclusive, concern,”¹⁶⁸ and “it would be almost unthinkable to seek the applicable rule in the law of some other place.”¹⁶⁹ In contrast, the issue actually involved in *Babcock* was

not whether the defendant offended against a rule of the road prescribed by Ontario for motorists generally or whether he violated some standard of conduct imposed by that jurisdiction, but rather whether the plaintiff, because she was a guest in the defendant’s automobile, is barred from recovering damages for a wrong concededly committed.¹⁷⁰

Regarding this issue, the court said that the state in which both parties were domiciled and their relationship was centered had “the superior claim for application of its law.”¹⁷¹

This distinction between conduct-regulating and loss-distributing rules has since been reaffirmed many times by the same court and adopted by courts in other states, albeit without always using the same terminology and without a consensus on its precise contours.¹⁷² The Louisiana codification, as well as many European codifications, has also adopted a similar distinction.¹⁷³

The distinction is traceable to the two fundamental objectives of tort law, namely, (1) deterrence and (2) reparation or compensation. This duality gives rise to a distinction of tort rules between (1) rules designed to *primarily* deter or regulate conduct by declaring certain substandard conduct to be tortious, and (2) rules *primarily* designed to allocate between parties the losses caused by admittedly tortious

¹⁶⁷ *Id.* at 284.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 285.

¹⁷² See SYMEONIDES, REVOLUTION, *supra* note 7, at 127 n.22. As one recent study concluded, “while not every state has decided the issue, there are *no* states that have rejected [it].” John T. Cross, *The Conduct-Regulating Exception in Modern United States Choice-of-Law*, 36 CREIGHTON L. REV. 425, 441 (2003).

¹⁷³ See SYMEONIDES, REVOLUTION, *supra* note 7, at 127–29.

conduct.¹⁷⁴ In the words of the New York court, conduct-regulating rules are those that “have the prophylactic effect of governing conduct to prevent injuries from occurring,”¹⁷⁵ while loss-distributing rules are those that “prohibit, assign, or limit liability after the tort occurs”¹⁷⁶ and thus distribute the resulting losses to classes of defendants or plaintiffs. Examples of conduct-regulating rules include not only “rules of the road” like speed limits and traffic-light rules but also: (1) rules prescribing the civil sanctions for violating rules of the road, including presumptions and inferences attached to the violation; (2) rules prescribing safety standards for work sites, buildings, and other premises; (3) rules imposing punitive damages; and (4) rules defining as tortious certain anticompetitive conduct, or conduct amounting to “interference with contract,” “interference with marriage,” or “alienation of affections.” Examples of loss-distributing rules include not only guest statutes, which are now virtually extinct, but also rules that prescribe the amount of compensatory damages, rules of interspousal immunity, parent-child immunity, workers’ compensation immunity, and loss of consortium.

Admittedly, the line between the two categories is not always very bright. While some tort rules are clearly conduct regulating and some are clearly loss distributing, there are many tort rules that do not easily fit in either category, and some rules that appear to fit in both categories because they may both regulate conduct and affect loss distribution. Nevertheless, when one focuses on the rule’s *primary* function, as New York courts have done,¹⁷⁷ most of these difficulties are overcome. In any event, despite difficulties in its application in some cases, this distinction provides a useful starting point for resolving or analyzing many tort conflicts, although the distinction will not make a difference in many other conflicts. The starting point is an assumption that conduct-regulating rules are territorially oriented. Consequently, territorial contacts (namely, the places of conduct and injury) remain relevant in conduct-regulation conflicts. A state’s policy of deterring substandard conduct is implicated whenever such conduct occurs in, or causes injury within, that state’s territory, regardless of whether the involved parties are domiciled there. In contrast, loss-distribution rules are not *necessarily*

¹⁷⁴ For the origins and function of this distinction and its use in American conflicts law, see *id.* at 124–40.

¹⁷⁵ *Padula v. Lilam Props. Corp.*, 644 N.E.2d 1001, 1002 (N.Y. 1994).

¹⁷⁶ *Id.* at 1003.

¹⁷⁷ See *id.*; SYMEONIDES, *REVOLUTION*, *supra* note 7, at 135–37.

territorially oriented. Consequently, both territorial and personal contacts (e.g., the parties' domiciles) are relevant in loss-distribution conflicts. While a state's loss-distribution policy may or may not extend to nondomiciliaries acting within its territory, the policy does extend to state domiciliaries even when they are injured or act outside the state.

This distinction provides a very good basis for delineating the scope of the common-domicile rule. In a common-domicile case when the conflict involves only loss-distribution issues, the interests of the state of the common domicile are paramount, and its law should govern (barring any exceptional circumstances). This is clearly the case in situations falling within Pattern A, above. Despite arguments to the contrary, the same is true in situations like cases falling within Pattern B, above. As one court declared:

[O]ne incontestably valuable contribution of the choice-of-law revolution in the tort conflict field is the line of decisions applying common-domicile law The superiority of the common domicile as the source of law governing loss-distribution issues is evident. At its core is the notion of a social contract, whereby a resident assents to casting her lot with others in accepting burdens as well as benefits of identification with a particular community, and ceding to its lawmaking agencies the authority to make judgments striking the balance between her private substantive interests and competing ones of other members of the community.¹⁷⁸

On the other hand, when the conflict in a common-domicile case involves only conduct-regulating issues, the policies of the common-domicile state are usually not implicated, at least not in the same degree as those of the state of conduct and injury. Travelers do not carry with them the conduct-regulating rules of their home state. Conversely, a state has an interest in enforcing its conduct-regulating rules even if neither the violator nor the victim is domiciled in that state, and even if both parties are domiciled in the same foreign state. A worker injured in State B at a work site operated by his State A employer may not be denied the protection of State B's conduct-regulating rules, nor may the employer claim exemption from those rules. Although both parties are domiciled in State A, State B has "a predominant, if not exclusive, concern," and "it would be almost unthinkable to seek the applicable rule in the law of some other

¹⁷⁸ Collins v. Trius, Inc., 663 A.2d 570, 573 (Me. 1995) (citations omitted).

place.”¹⁷⁹ Indeed as noted earlier, most American courts have *not* applied the law of “some other place,” even that of the common domicile.¹⁸⁰

Through the exception from the common-domicile rule, subsection (2)(a) of ORS 31.875 allows a similar differentiation between loss-distribution and conduct-regulation conflicts. With regard to loss-distribution issues, the applicable part of subsection (2)(a) is the first sentence, which mandates the application of the law of the common domicile. On the other hand, with regard to conduct-regulation issues, the second sentence of subsection (2)(a) becomes applicable as an exception to the common-domicile rule. The exception provides that “the law of the state in which the injurious conduct occurred determines the standard of care by which the conduct is judged”; for example, it determines whether the conduct is tortious.¹⁸¹ Thus, if under the law of the state of conduct, the actor would be judged *not* to have committed a particular tort, then the actor may not be held liable for that tort under the law of the parties’ common domicile. Conversely, if, under the law of the state of conduct, the actor would be judged to have committed a tort—albeit one for which the actor would be immune from suit because of an intrafamily or charitable immunity or other similar rule—then the actor may be held liable under the law of the parties’ common domicile.

The above delineation is in line with the practice of American courts, which, as noted above, apply the law of the common domicile only to loss-distribution conflicts and apply the law of the state of conduct and injury to conduct-regulation conflicts. This delineation is also similar to, but more direct than, the distinction drawn by European codifications. These codifications contain provisions admonishing courts to “take account” of the “conduct and safety” rules of the conduct state when the applicable law is that of another state.¹⁸² The scope of the concept of “conduct and safety” rules varies slightly in the various codifications, but generally it appears

¹⁷⁹ *Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963).

¹⁸⁰ See *supra* Part V.B.1.

¹⁸¹ The next sentence provides that, if the injury occurred in a state other than the state of conduct, the applicable law is determined under ORS 31.875(3)(c), which allows the plaintiff to opt for the law of the state of injury under certain conditions discussed later. See *infra* Part V.B.3.c.

¹⁸² See Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 TUL. L. REV. 1741, 1752–60 (2008) [hereinafter Symeonides, *Reciprocal Lessons*].

narrower than the American concept of conduct-regulating rules. In any event, the major difference is that the European provisions neither mandate nor guarantee the application of these rules but rather invite their consideration (“taking into account”) for certain limited purposes. As discussed in detail elsewhere, this equivocation creates many problems.¹⁸³ The above-quoted provision of the Oregon Act (ORS 31.875(2)(a), second sentence) avoids such problems by mandating the application of the law of the state of conduct to judge the standard of care. Of course like all other provisions of ORS 31.875, this provision is also subject to the general escape provided in subsection (4), which is discussed later.¹⁸⁴

2. *Cases in Which the Parties Are Domiciled in States with Laws that Would Produce the Same Outcome*

Subsection (2)(b) of ORS 31.875 deals with situations in which the injured person and the person whose conduct caused the injury are domiciled in different states that have laws that produce the same outcome on the disputed issue or issues. Cases 17 and 18 in TABLE 2, above, which are also reproduced below in TABLE 4, present this pattern. In Case 17, the parties are domiciled in states that have a pro-recovery law, while, in Case 18, the parties are domiciled in states that have a law that denies or places stricter limits on recovery than the law of the other involved state or states.

TABLE 4
Fictitious Common-Domicile Cases

#	P's Dom.	Injury	Conduct	D's Dom.
17	A	---	---	C
18	A	---	---	c

ORS 31.875(2)(b) brings both of those situations and their permutations¹⁸⁵ under the scope of the common-domicile rule by providing that, in these cases, the parties are to be treated as if they

¹⁸³ See *id.* at 1756–62.

¹⁸⁴ See *infra* notes 290–91 and accompanying text.

¹⁸⁵ The middle columns representing the states or state of conduct and injury are left blank because the content of their laws is immaterial for purposes of applying the rule of ORS 31.875(2)(b). If one were to replace the dashes with letters representing all possible combinations, it would become apparent that the scope of this rule is as wide as that of the common-domicile rule of subsection 2(a). See TABLE 3, *supra* p. 1004.

were domiciled in the same state “to the extent that” the laws of those states would produce the same outcome on the disputed issues.¹⁸⁶

The rationale for this treatment is that these cases are functionally analogous to the common-domicile cases and therefore should be treated alike. For example, in a case like *Babcock* (Case 8 of TABLE 3, above), if the defendant had been domiciled in New Jersey (rather than in New York) and if New Jersey (like New York) did not have a guest statute, there would be little argument both that the resulting conflict would be as false as *Babcock* itself, and that it should be resolved by allowing the action to proceed. Similarly, in a case converse to *Babcock*, if the two parties had been domiciled in Ontario and Quebec, respectively, and both of these provinces had a guest statute prohibiting the action, then the resulting conflict would not differ in any material way from Case 16 of TABLE 3, above, and should be resolved the same way by not allowing the action to proceed. American courts encountering such conflicts have in fact reached the results mandated by ORS 31.875(2)(b).¹⁸⁷ This provision may prove practically useful in cases involving multiple victims or multiple tortfeasors.

Subsection (2)(b) does not define exactly when the two laws would produce “the same outcome,” nor does it designate which of the two laws to apply. Both questions are left to judicial interpretation, but in most instances, the questions will resolve themselves. For example, if both domiciliary states have an intrafamily or charitable immunity rule prohibiting the action, then on the issue of whether the defendant is immune from suit, both states’ laws would produce the same outcome and it would make no difference which of the two laws the court applies; in either case the plaintiff’s suit will be barred. If in another case, one domiciliary state imposes a \$500,000 damages cap and the other domiciliary state imposes a \$1,000,000 cap, then the two laws would produce the same outcome “to the extent” that they both disallow unlimited damages and a different outcome “to the extent” that they allow different amounts. The rule of subsection (2)(b) would apply on the first issue and prevent unlimited damages

¹⁸⁶ For an identical rule, see LA. CIV. CODE ANN. art. 3544(1) (2009); Symeonides, *Louisiana’s New Law*, *supra* note 3, at 769 (“Persons domiciled in states whose law on the particular issue is substantially identical shall be treated as if domiciled in the same state.”); *see also* AM. LAW INST., *supra* note 36, § 6.01(c)(3) (“Plaintiffs shall be considered as sharing a common habitual residence or primary place of business if they are located in states whose laws are not in material conflict.”).

¹⁸⁷ *See* SYMEONIDES, *REVOLUTION*, *supra* note 7, at 160–62.

(even if the state of conduct, injury, or both, does not limit damages), but not on the second issue of the exact amount for which the plaintiff will be eligible. The amount will then depend on which law would be applicable to this issue under the other provisions of ORS 31.875.

One effect of subsection 2(b) is that it will, in some cases, lead to the application of a different law than that designated by the subsequent provision of ORS 31.875, namely subsections (3)(b) and (3)(c). For example, if both the conduct and the injury occurred in State C and the parties were domiciled in States A and B respectively, then the case would fall under subsection (3)(b), which calls for the application of the law of State C (subject to an exception).¹⁸⁸ However, if the laws of States A and B would produce the same outcome, then the court should reach that outcome, rather than the outcome produced by the law of State C. Similarly, if in another situation, the conduct occurred in State A and the injury occurred in State B and the parties were domiciled in States C and D respectively, the case would fall within subsection (3)(c), which calls for the application of the law of State A, unless (under certain conditions) the injured person opts for the law of State B.¹⁸⁹ However, if the laws of States C and D would produce the same outcome, then the court should reach that outcome, rather than the outcome produced by the laws of either State A or State B.

Finally, like the rest of ORS 31.875, subsection (2)(b) is confined to cases in which the injured person and the person whose conduct caused the injury are domiciled in states with laws that would produce the same outcome. This provision does *not* apply to third parties, whose claims are governed by ORS 31.880 and then ORS 31.878. However, nothing prevents a court applying ORS 31.878 from drawing an analogy from the principle of subsection (2)(b) and proceeding accordingly.

3. Cases in Which the Parties Are Domiciled in States with Laws that Would Produce a Different Outcome

ORS 31.875(3) provides for situations in which, at the time of the injury, the injured person and the person whose conduct caused the

¹⁸⁸ See Cases 23–26, in TABLE 2, *supra* pp. 999–1000; TABLE 6, *infra* p. 1020.

¹⁸⁹ See Cases 27–36, in TABLE 2, *supra* pp. 999–1000; TABLE 6, *infra* p. 1020. It should be noted that the two cases discussed here—as well as all other cases that subsection (2)(b) brings under the scope of the common-domicile rule of subsection (2)(a)—are potentially subject to the exception provided for in the second sentence of subsection (2)(a) for determining the applicable standard of care.

injury were domiciled in different states, and the laws of those states would produce *different* outcomes. These situations are portrayed by Cases 19 through 36 in TABLE 2, above, and are discussed below.

a. Split-Domicile Cases in Which the Conduct and the Injury Occurred in One Party's Home State

ORS 31.875(3)(a) deals with situations in which *both* the injurious conduct and the resulting injury occurred in the home state of either the injured person or the person whose conduct caused the injury. Cases 5 through 8 of TABLE 2, above, depict these patterns, which are also reproduced in TABLE 5, below, for the reader's convenience.

TABLE 5
Split-Domicile Cases Arising from Torts in Either Party's Home State

	#	P's Dom.	Injury	Conduct	D's Dom.
Pattern A	19	A	A	A	b
	20	A	B	B	B
Pattern B	21	A	B	B	B
	22	A	A	A	B

In Cases 19 and 22, the conduct and injury occur in the victim's home state, but in Case 19, that state has a law that favors the victim, while in Case 22, it has a law that favors the tortfeasor (who is domiciled in another state whose law favors the victim). In Cases 20 and 21, the conduct and injury occur in the tortfeasor's home state, but in Case 20 that state has a law that favors the tortfeasor, while in Case 21 that state has a law that favors the victim (who is domiciled in another state with laws favoring the tortfeasor).

Subsection (3)(a) provides that, in all four of the above cases, the applicable law shall be the law of the domiciliary state in which both the conduct and the injury occurred, that is, the victim's home state in Cases 19 and 22 and the tortfeasor's home state in Cases 20 and 21.¹⁹⁰ As explained below, this result is in line with the results reached by the majority of courts in other states.¹⁹¹

Under ORS 31.875(3)(a), the law of the designated domiciliary state applies: (1) regardless of whether it favors the domiciliary of

¹⁹⁰ For an identical choice-of-law rule, see LA. CIV. CODE ANN. art. 3544(2)(a); Symeonides, *Louisiana's New Law*, *supra* note 3, at 726–29.

¹⁹¹ See SYMEONIDES, *REVOLUTION*, *supra* note 7, at 163–91.

that state, plaintiff or defendant (as in Cases 19 and 20), or instead the domiciliary of the other involved state, defendant or plaintiff (as in Cases 21 and 22); and (2) regardless of whether the case involves conflicting conduct-regulating or loss-distributing rules. If the case involves conflicting conduct-regulating rules, then applying the law of the state that has both territorial contacts (conduct *and* injury) is most appropriate and entirely uncontroversial. For reasons stated above,¹⁹² that state is the only one that has a legitimate claim to apply its law, regardless of whether it favors or disfavors recovery. Even Professor Currie, whose analysis attributed such a central role to the law of the parties' domiciles, would probably not dispute this.¹⁹³

However, if the case involves conflicting loss-distribution rules, then there is at least some difference of opinion regarding which law should govern. For example, Currie and other interest analysts would divide the above cases into two patterns: (1) Pattern A cases (19 and 20), in which the law of the state of conduct and injury favors the domiciliary of that state (while the law of the other state favors the domiciliary of that state); and (2) Pattern B cases (21 and 22), in which the law of each state favors the domiciliary of the *other* state.

In interest analysis terminology, Pattern A cases present what is known as the "direct" or "true" conflict paradigm. This characterization is based on the assumption that each state would have an interest in protecting its own domiciliary. Currie, the chief proponent of interest analysis, concluded that the only solution for true conflicts in which (as usual) the forum state is one of the interested states is to apply the law of the forum. His rationale was that judges do not have the constitutional power, nor the necessary resources, to weigh conflicting state interests and should not be put in the position of having to subordinate the forum's interests. Currie thought that such a weighing is a "political function of a very high order . . . that should not be committed to courts in a democracy."¹⁹⁴

Currie's rationale was unpersuasive, or at least unrealistic,¹⁹⁵ and most American courts have rejected it, at least for this pattern of cases. As a recent comprehensive study has documented, courts

¹⁹² See *supra* Part V.B.1.b.

¹⁹³ See CURRIE, *supra* note 10, at 58–61, 69 (distinguishing between "compensatory" rules and conduct-regulating rules and recognizing that the latter are territorially oriented).

¹⁹⁴ *Id.* at 182. Currie also speaks of the "embarrassment of [a court] having to nullify the interests of its own sovereign." *Id.* at 278–79, 357; see also Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 778 (1963).

¹⁹⁵ See SYMEONIDES, *REVOLUTION*, *supra* note 7, at 20.

applied the law of the forum in only two of the forty-five reported cases falling within Pattern A.¹⁹⁶ One of the latter cases was decided under Kentucky's *lex fori* approach,¹⁹⁷ and the other under Minnesota's better-law approach.¹⁹⁸ Forty-two of the forty-five cases reached the precise result mandated by ORS 31.875(3)(a) of the Act.¹⁹⁹ Of those cases, twelve presented the same subpattern as Case 19, and thirty cases presented the same subpattern as Case 20. One of the latter cases was an Oregon case, *Casey v. Manson Construction & Engineering Co.*²⁰⁰ In *Casey*, a Washington defendant acting in Washington caused injury in Washington to an Oregon domiciliary. The victim's wife sued the defendant in Oregon for loss of consortium, a remedy that was available under Oregon law but unavailable under Washington law. Oregon courts applied Washington law, reasoning that Washington defendants

should not be required to accommodate themselves to the law of the state of residence of any traveler whom they might injure in Washington; [and] that . . . Washington's interest in the matter, which was protective of Washington defendants, was paramount to Oregon's interest in having its resident recover for her loss.²⁰¹

Casey was correctly decided, and ORS 31.875(3)(a) preserves its holding and reasoning. Indeed, as Professor Cavers proposed:

Where the liability laws of the state in which the defendant acted and caused an injury set a lower standard of . . . financial protection than do the laws of the home state of the person suffering the injury,

¹⁹⁶ See *id.* at 163–71.

¹⁹⁷ See *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972) (applying the law of the forum, which was also the plaintiff's domicile, in a case presenting the same pattern as Case 20 of TABLE 5).

¹⁹⁸ See *Lommen v. City of E. Grand Forks*, 522 N.W.2d 148 (Minn. Ct. App. 1994) (applying the law of the forum—which was also the domicile of the defendant—in a case involving the same factual pattern as Case 19 of TABLE 5).

¹⁹⁹ In the remaining case, *Harris v. City of Memphis*, 119 F. Supp. 2d 893 (E.D. Ark. 2000), a case involving the same pattern as Case 19 of TABLE 5, the court applied the law of the defendant's home state. However, the defendant was a state entity and the decision was based on comity toward that state rather than choice-of-law reasoning.

²⁰⁰ 247 Or. 274, 428 P.2d 898 (1967).

²⁰¹ *Erwin v. Thomas*, 264 Or. 454, 461, 506 P.2d 494, 497 (1973); see also *Casey*, 247 Or. at 294–95, 428 P.2d at 908 (Holman, J., concurring) (“Washington citizens carrying on activities in Washington [should not] have to lift their financial protection to an unaccustomed level and one which would be dependent upon the locality from which the injured party might come.”).

the laws of the state of conduct and injury should determine the standard of conduct or protection applicable to the case.²⁰²

As Cavers reasoned, “[i]nhabitants of [that state] should not be put in jeopardy of liabilities exceeding those [its] law creates simply because persons from states with higher standards of financial protection choose to visit there.”²⁰³

Similar reasoning applies in the converse case, Case 19 above, in which the conduct and the injury both occur in the victim’s home state, the law of which protects the victim. To quote Cavers again, “[The] system of physical and financial protection [of the victim’s domicile] would be impaired if a person who enters the territory of [that] state were not subject to its laws.”²⁰⁴ The domiciliaries of that state “should not be put in jeopardy in [that state] simply because [an out-of-state resident] . . . had come into [that state] from a state whose law provides a lower standard of financial protection.”²⁰⁵ The out-of-state defendant who is held to the higher standard of the state of injury “is not an apt subject for judicial solicitude. He cannot fairly claim to enjoy whatever benefits a state may offer those who enter its bounds and at the same time claim exemption from the burdens.”²⁰⁶ As one case involving this pattern states, “The maxim ‘When in Rome do as the Romans do’ bespeaks the common sense view that it is the traveler who must adjust.”²⁰⁷

In Pattern B cases (21 and 22), each state’s law favors the domiciliary of the *other* state. In interest analysis terminology, these cases present an “inverse” conflict known as an “unprovided-for” or “no-interest” case on the assumption that *neither* state would have an interest in protecting the domiciliary of the other state.²⁰⁸ Again, Currie’s “solution” to this conflict was to apply the law of the forum *qua* forum—even though the forum in such cases is, *ex hypothesi*, a

²⁰² CAVERS, *supra* note 31, at 146 (emphasis omitted). The principle is accompanied by an exception for cases in which the parties had a preexisting relationship. *See id.*

²⁰³ *Id.* at 148–49.

²⁰⁴ *Id.* at 140.

²⁰⁵ *Id.* at 142.

²⁰⁶ *Id.* at 141.

²⁰⁷ *Bledsoe v. Crowley*, 849 F.2d 639, 647 (D.C. Cir. 1988) (Williams, J., concurring).

²⁰⁸ Of course, the “no-interest” label is problematic because it forejudges the answer to the basic question of whether a state actually has an interest in applying its law to the particular case—a question that reasonable minds often answer differently. For this reason, it is better to employ the nonprescriptive term “inverse conflicts,” which simply indicates objectively that each state’s law favors the party affiliated with the other state.

disinterested state. Currie's explanation for applying the law of the forum was that "no good purpose is to be served by putting the parties to the expense and the court to the trouble of ascertaining the foreign law."²⁰⁹ Although this explanation sounds sensible, it overlooks the problem grammarians call *prothysteron*: one cannot know whether the case is a "no-interest" case without first knowing whether the foreign state is uninterested; and one cannot know whether that state is uninterested without first ascertaining the content of its law and identifying its underlying policies.

One of the few cases that adopted Currie's reasoning was an old Oregon case, *Erwin v. Thomas*,²¹⁰ which presented the same subpattern as Case 22 of TABLE 5, above. *Erwin* was an action for loss of consortium filed by a Washington woman whose husband was injured in Washington by the conduct of an Oregon defendant.²¹¹ Oregon law favored the Washington plaintiff by allowing such an action, whereas Washington law favored the Oregon defendant by denying the action.²¹² The court concluded that "neither state ha[d] a vital interest in the outcome of this litigation."²¹³ Washington's defendant-favoring policy was not implicated because this case did not involve a Washington defendant, and Oregon's plaintiff-favoring policy also was not implicated because this case did not involve an Oregon plaintiff.²¹⁴ Thus, as Currie said, "[n]either state cares what happens,"²¹⁵ and hence, said the court, "an Oregon court does what comes naturally and applies Oregon law."²¹⁶

Most courts have rejected *Erwin*'s (and Currie's) rationale,²¹⁷ and so does ORS 31.875(3)(a). The result mandated by subsection (3)(a) may appear intuitively more appropriate when the law of that state favors the domiciliary of that state, as in Pattern A cases (19 and 20 of

²⁰⁹ CURRIE, *supra* note 10, at 156.

²¹⁰ 264 Or. 454, 506 P.2d 494 (1973).

²¹¹ *Id.* at 455, 506 P.2d at 494–95.

²¹² *Id.* at 455–56, 506 P.2d at 494.

²¹³ *Id.* at 459, 506 P.2d at 496.

²¹⁴ *See id.*, 506 P.2d at 496 ("[I]t is stretching the imagination more than a trifle to conceive that the Oregon Legislature was concerned about the rights of all the nonresident married women in the nation whose husbands would be injured outside of the state of Oregon.").

²¹⁵ CURRIE, *supra* note 10, at 152.

²¹⁶ *Erwin*, 264 Or. at 459–60, 506 P.2d at 496–97. The court also noted that Washington would not object to the application of Oregon law. *See id.* at 459, 506 P.2d at 496.

²¹⁷ *See* SYMEONIDES, REVOLUTION, *supra* note 7, at 178–91.

TABLE 5, above). However, for reasons of evenhandedness as well as other reasons, subsection (3)(a) takes the position that the same result is also appropriate even when that law favors the domiciliary of the other state, as in Pattern B cases (21 and 22). When a person is injured in her home state by conduct in that state (Cases 19 and 22), her rights should be determined by the law of that state, even if the person who caused the injury happened to be domiciled in another state and regardless of the other state's law. The law of the latter state should not be interjected to the victim's detriment *or* benefit. By the same token, when a person acting within a home state causes injury in that state (Cases 20 and 21), the individual should be held accountable according to the law of that state, even if the injured person happened to be domiciled in another state and regardless of the other state's law. The law of the latter state should not be interjected to the actor's detriment *or* benefit.

b. Split-Domicile Cases in Which the Conduct and the Injury Occurred in the Same Third State

ORS 31.875(3)(b) deals with situations in which: (1) at the time of the injury, the injured person and the person whose conduct caused the injury were domiciled in different states with laws that would produce a different outcome; and (2) both the injurious conduct and the resulting injury occurred in a third state other than the state in which either person was domiciled. Cases 23 through 26 of TABLE 2, above, depict these situations. For the reader's convenience, these cases are shown again in TABLE 6, below.

TABLE 6
Split-Domicile Cases Arising from Conduct and Injury in a Third State

#	P's Dom.	Injury	Conduct	D's Dom.
23	A	C	C	B
24	a	C	C	B
25	a	c	c	B
26	A	c	c	B

Subsection (3)(b) provides that all such cases are to be governed by the law of the state in which both the conduct and the injury occurred. This appears to be a return to the traditional *lex loci delicti* rule, which has remained the default rule during and after the choice-of-law revolution. There are, however, two important differences. First,

unlike the traditional rule, which mandated the application of the law of the state of *injury* even if the conduct did not occur in that state, the rule of subsection (3)(b) requires the occurrence of *both* the conduct and the injury in the same state in order to apply its law. Second, unlike the traditional rule, which was not subject to any direct exceptions,²¹⁸ the rule of subsection (3)(b) is accompanied by a specific exception (besides the general escape of subsection (4), which is discussed below²¹⁹). The exception provides that, if a party demonstrates to the court's satisfaction that the application of the law of the state of conduct and injury to a disputed issue will not serve the objectives or policies of that law under the circumstances of the particular case, then that issue will be governed by the law selected under ORS 31.878, while the remaining issues (if any) will be governed by the law of the state of conduct and injury.

This exception is necessary (primarily, but not only) because, in some cases, the connections of the state of conduct and injury may be transient, fortuitous, or otherwise tenuous. Suppose, for example, that an airplane that was diverted by bad weather from its scheduled route over State X crashed in State Y due to pilot error that occurred in the airspace of State Y. Suppose further that State Y, which has no other connections with the case, imposes a cap on the amount of compensatory damages for wrongful death, while other involved states do not impose such a cap. Depending on other factors and circumstances, this case may be a good candidate for the exception if the party opposing the application of State Y law demonstrates that the objectives State Y seeks to accomplish by imposing a damages cap (e.g., to protect defendants domiciled or based in that state) would not be served by applying the cap in this case.

Depending on the circumstances, other cases may not be good candidates for this exception, even if the connection of the state of conduct and injury are transient or fortuitous. Suppose, for example, that parties domiciled in States A and B, respectively, are involved in a two-car traffic accident in State X, and one of the disputed issues is whether one of the parties was negligent in driving the car that caused the accident. In the absence of serious countervailing factors, this case would not be a good candidate for the exception because that

²¹⁸ For the various unorthodox "escapes" used by courts that wanted to evade this rule, see SYMEONIDES, *PRIVATE INTERNATIONAL LAW*, *supra* note 70, at 75–85 (describing the misuses of characterization, the substance versus procedure dichotomy, *renvoi*, and the public policy exception).

²¹⁹ See *infra* notes 290–91 and accompanying text.

state's conduct-regulation policies or objectives would be served by applying State X's law for judging what constitutes negligent driving within its borders.²²⁰

c. Split-Domicile Cases Arising from Cross-Border Torts

ORS 31.875(3)(c) deals with situations in which: (1) at the time of the injury, the injured person and the person whose conduct caused the injury were domiciled in different states with different laws; and (2) the injurious conduct occurred in one state and the resulting injury occurred in another state (cross-border torts). These situations are depicted in Cases 27-36 of TABLE 2, above, and are also reproduced in TABLE 7, below, for the reader's convenience.

TABLE 7
Cross-Border Torts Between Parties Domiciled in States with
Different Laws

	#	P's Dom.	Injury	Conduct	D's Dom.
Pattern A	27	a	A	B	B
	28	c	A	B	B
	29	a	A	B	C
	30	d	A	B	C
	31	D	A	B	C
Pattern B	32	A	A	B	B
	33	A	A	B	C
	34	D	A	B	C
	35	D	A	B	B
	36	d	A	B	C

Of these cases, Cases 27 and 32 statistically occur the most frequently. In those cases, the injured person is domiciled in the state of injury and the person whose conduct caused the injury is domiciled in the state of conduct. However, this is not a prerequisite for the application of subsection 3(c). For this reason, TABLE 7 shows all

²²⁰ As the two examples illustrate, the exception is more likely to be invoked when the disputed issue is one of loss distribution rather than when it is one of conduct regulation. However, the court should consider all relevant factors before deciding to apply the exception.

other cases in which one or both parties are domiciled in other states (with different laws).²²¹

ORS 31.875(3)(c) provides that in all of these cases the applicable law is the law of the state of conduct, subject to an exception in favor of the law of the state of injury. The exception applies if two requirements are satisfied.

The first requirement is that the occurrence of the injury *in the state of injury* must have been a foreseeable result of the activities of the person whose conduct caused the injury.²²² This is an objective, rather than a subjective, standard. Moreover, because ORS 31.875(3)(c)(A) is a choice-of-law rule rather than a substantive rule, the term “foreseeable” should be understood in a “spatial” sense and should not be confused with the foreseeability of substantive tort law. The pertinent question here is not whether one should have foreseen the occurrence of the injury, but rather whether one should have foreseen that the injury would occur *in the particular state in which the injury did occur*. For example, one who operates a factory in close proximity to the border with another state should foresee that any harmful emissions from the factory may cause injury in the other state because the wind may blow in that direction.

The second requirement is that the injured person must formally request, by pleading or amended pleading, the application of the law of the state of injury. If such a request is filed, it shall be deemed to encompass all claims and issues against the particular defendant. In other words, the injured person may not “pick and choose” the favorable and discard the unfavorable parts of the law of the state of injury.²²³

The idea of allowing *one* party to choose the applicable law, especially *after* the dispute arises, is new in the United States. It is politically provocative and sounds unilaterally suspicious. Since the beginning of conflicts law history, the choice of the law governing multistate cases has been made either: (1) by the law giver in advance through preformulated choice-of-law rules, (2) by the judge deciding

²²¹ If the laws of the domicile of the two parties would produce the same outcome, the case will be governed by one of those laws under ORS 31.875(2)(b). See discussion *supra* Part V.B.2.

²²² It is important to note that, unlike subsection (3)(c), the traditional *lex loci delicti* rule, which is still followed in ten states, applies the law of the state of injury without regard to whether the occurrence of the injury in that state could have been foreseen.

²²³ This provision is designed to prevent a self-serving, inappropriate *dépeçage*. For a discussion of the concept of *dépeçage*, see *infra* Part V.D.

the particular case, or (3) through a combination of these two methods. In all cases, the goal was to arrive at an unbiased choice made by impartial public actors. The will of private parties has entered the picture only relatively recently. Over the last two centuries, most legal systems have begun resurrecting—and gradually employing—the ancient principle of party autonomy, which allows parties to a multistate dispute to select the law that will govern the dispute.²²⁴

However, this principle has traditionally been limited to the law of contracts and has only contemplated a *pre-dispute* choice agreed to by *both* parties. If the parties to a contract agreed in advance that a particular law would govern their future *contractual* dispute,²²⁵ then a court would honor the agreement as long as the agreement was otherwise valid and it did not exceed certain public policy limits. In recent years, many systems have extended this principle to certain status-like contracts, such as those regulating the property relations of spouses (matrimonial regime) and, lately, testate successions law, where the testator is now allowed (within certain limits) to designate the law that will govern his or her succession.²²⁶ In the latter case, the choice of law is made by a *single* party—the testator—who, besides being in a different position than either party in adversarial litigation, makes the choice *before* the dispute arises. In contrast, ORS 31.875(3)(c) gives a *post-dispute* choice to one party who is already an actual or potential litigant. For this reason, one would be justified in assuming that such a rule is too generous to that party and, thus, unfair to the other party. However, closer examination militates against rushing to such a conclusion.

First, result-oriented choice-of-law rules—albeit more subtle ones—have been around for centuries. Typically, such rules contain a list of alternative references to the laws of several states connected with the case (“alternative-reference” rules) and authorize the court to select a law that produces the preferred substantive result, such as

²²⁴ See *supra* notes 122–27 and accompanying text.

²²⁵ For the ability of contracting parties to choose the law that will govern future noncontractual disputes arising from a contract, see SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 809–12, nn.20–30, 950 n.18; SYMEONIDES, PRIVATE INTERNATIONAL LAW, *supra* note 70, at 212–14; Symeonides, *Party Autonomy*, *supra* note 127.

²²⁶ See SYMEON C. SYMEONIDES, PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS? 38–40, 56–57 (2000) [hereinafter SYMEONIDES, PROGRESS OR REGRESS?]; Symeon C. Symeonides, *Result-Selectivism in Conflicts Law*, 46 WILLAMETTE L. REV. 1, 10–22 (2009) [hereinafter Symeonides, *Result-Selectivism*].

favoring the status of marriage, legitimacy, filiation, or adoption.²²⁷ By favoring a particular status, these rules also favor, directly or indirectly, the party whose interests depend on the particular status.

Second, in recent years many systems have extended the notion of expressly favoring one party over the other party to maintenance obligees, consumers, employees, or other parties whom the legal order considers weak or whose interests are considered worthy of protection.²²⁸ These systems authorize the court to choose the most favorable law from among the laws of several states having contacts with the case. For example, Article 18 of the German codification allows a choice from among the laws of (1) the obligee's habitual residence, (2) the common nationality of the obligor and the obligee, or (3) the law of the forum. Similar rules in the 1973 Hague Convention on the Law Applicable to Maintenance Obligations, the 1989 Inter-American Convention on Support Obligations, and several national or subnational codifications such as those of Belgium, France, Quebec and Tunisia allow similar and sometimes broader choices. The Belgian codification extends the concept of postdispute choice by one party to the owner of stolen cultural property or other movable property. Finally, many systems (including those used by the European Union, Austria, Germany, Japan, South Korea, Quebec, Romania, Russia, Switzerland, and Turkey) protect consumers and employees from the adverse consequences of their own potentially coerced or uninformed assents to choice-of-law clauses.²²⁹ Again, the materially desirable result of favoring members of a protected class is given preference over considerations of "conflicts justice."²³⁰

Third, several conflicts codifications either require the court to apply the law most favorable to the tort victim, or expressly authorize the *victim* to choose between the laws of the state of conduct and the state of injury. The Portuguese codification of 1966 is an example of

²²⁷ See Symeonides, *Result-Selectivism*, *supra* note 226, at 10–22.

²²⁸ See *id.* at 20–22, 25–27.

²²⁹ These systems provide that a choice-of-law clause may not deprive the consumer or employee of the protection afforded by the mandatory rules of the country's law that would govern the consumer or employment contract in the absence of such a clause. Thus, a choice-of-law clause can expand but cannot contract the protection available to consumers or employees. See *id.* at 27.

²³⁰ For the meaning of "conflicts justice" as opposed to "material justice," see Symeon C. Symeonides, *Material Justice and Conflicts Justice in Choice of Law*, in INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM: ESSAYS IN HONOR OF FRIEDRICH K. JUENGER 125 (Patrick J. Borchers & Joachim Zekoll eds., 2001).

the former. Article 45 subjects torts to the law of the place of conduct, but also provides that

[i]f the law of the state of injury holds the actor liable but the law of the state where he acts does not, the law of the former state shall apply, provided the actor could foresee the occurrence of damage in that country as a consequence of his act or omission.²³¹

The German codification of 1999 gives this choice directly to the tort *victim*. Article 40(1) of the codification provides in part that tort claims are governed by the law of the state of conduct, but “[t]he injured person may demand . . . that the law of the state where the result took effect be applied instead.”²³² Likewise, Article 62 of the Italian codification provides in reverse that torts are governed by the law of the state of injury, but “the person suffering damage may request the application of the law of the State in which the event causing the damage took place.”²³³ Several other countries have adopted this same principle for all cross-border torts. Among them are countries as diverse as China, Estonia, Hungary, Korea, Serbia, Slovenia, Tunisia, and Venezuela.²³⁴

Other codifications have adopted this idea only for particular torts. For example, the European Union’s Rome II regulation allows such a choice only in environmental torts, direct actions against insurers, and certain cases involving anticompetitive restrictions; Switzerland does so in cases involving emissions, injury to rights of personality, and products liability; Belgium does in cases involving defamation and in direct actions against insurers; Romania does in cases of defamation, unfair competition, and products liability; and Quebec, Russia, Turkey,

²³¹ CÓDIGO CIVIL PORTUGUÊS (PORTUGUESE CIV. CODE) art. 45(2) (as amended in 1966). This provision is subject to an exception for some cases in which the parties have the same nationality or habitual residence. An identical provision is contained in Article 2097 of the New Peruvian Civil Code of 1984, *translated in* Alejandro M. Garro, 24 I.L.M. 997, 1011 (1985).

²³² Einführungsgesetz zum Bürgerlichen Gesetzbuche [EGBGB] (Introductory Act to the Civil Code), May 21, 1999, BGBl. I at 1026, art. 40(1) (F.R.G.), *translated in* Peter Hay, *From Rule-Oriented to “Approach” in German Conflicts Law: The Effect of the 1986 and 1999 Codifications*, 47 AM. J. COMP. L. 633, 650 (1999). This principle, known as *Gunstigkeitsprinzip*, is traceable to an 1888 decision of the German Reichsgericht. *See* Decision of 20 November 1888, 23 ENTSCHEIDUNG-EN DES REICHSGERICHTS IN ZIVILSACHEN (RGZ) 305 (1888).

²³³ Law No. 218 of 31 May 1995 for the Reform of the Italian System of Private International Law, Gazz. Uff., Supp. Ord. no. 128, art. 62(1), June 3, 1995 (Italy), *translated in* Andrea Giardina, *Italy: Law Reforming the Italian System of Private International Law*, 35 I.L.M. 760, 779 (1996) [hereinafter ITALIAN PIL ACT].

²³⁴ *See* Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 HASTINGS L.J. 337, 398–403 (2009) [hereinafter Symeonides, *Cross-Border Torts*].

and the Hague Convention do likewise in products liability conflicts.²³⁵ Similar rules have been proposed in the United States for products liability.²³⁶

Although at least one of the above codifications conditions the application of the law of the state of injury to an express foreseeability proviso,²³⁷ most codifications fail to include such a proviso. For example, the German, Hungarian, and Tunisian codifications provide for the application of the law of the state of conduct, but allow the application of the law of the state of injury at the victim's request—without conditioning such application on foreseeability.²³⁸ The Italian and Venezuelan codifications and the Rome II regulation do the reverse by applying the law of the injury state unless the victim requests application of the law of the state of conduct.²³⁹

The list above of result-oriented rules is a reminder, if one were needed, that conflicts law often adopts rules that are directly designed to reach a specific substantive result that the system considers preferable. The common denominator among the above rules is that they are all designed to level the conflicts field between presumptively strong parties and presumptively weak parties, such as tort victims or maintenance obligees. Initially, the leveling tool was entrusted only to the courts. In recent years, it has been given directly to the presumptively weak parties themselves.

²³⁵ See *id.* at 400–02.

²³⁶ See David F. Cavers, *The Proper Law of Producer's Liability*, 26 INT'L & COMP. L.Q. 703, 728–29 (1977) (permitting the plaintiff to choose from among the laws of: (1) the place of manufacture; (2) the place of the plaintiff's habitual residence if that place coincides with either the place of injury or the place of the product's acquisition; or (3) the place of acquisition, if that place is also the place of injury); Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 148 (giving both the victim and the tortfeasor a choice under certain circumstances); Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (and a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 450–51, 472–74 (2000) (discussing the same notion but different choices).

²³⁷ See CÓDIGO CIVIL PORTUGUÊS (PORTUGUESE CIV. CODE) art. 45(2) (as amended in 1966).

²³⁸ See EGBGB, arts. 40(1), 44; HUNGARIAN PIL ACT, §§ 32–33; TUNISIAN PIL CODE, art. 70(2). The German codification also provides an escape clause, which may enable courts to avoid unfair results. See EGBGB, art. 41.

²³⁹ See ITALIAN PIL ACT, art. 62.1; VENEZUELAN PIL ACT, art. 32 (2); ROME II, *supra* note 82, art. 7 (applicable to environmental torts only). The provisions of the Quebec, Russian, and Swiss codifications include a foreseeability proviso but do not condition the application of the law of the state of injury on whether that law is favorable to the victim or the tortfeasor. See QUEBEC CIV. CODE, art. 3126(1); Grazhdanski Kodeks RF [GK] [Civil Code] art. 1219(1) (Russ.); SWISS PIL ACT, arts. 133(2), 137, 135, 139, 142(2). Clearly, the foreseeability proviso is needed only when that law is unfavorable to the tortfeasor.

ORS 31.875(3)(c) adopts this approach. Two questions remain to be addressed. First, why give the choice to a party rather than the *court*? The answer is that, in either case, the result would be the same, both from the tortfeasor's and the victim's perspective. The only difference is from the court's perspective. A rule that directly allows a party to choose which law governs the claim has distinct practical advantages. When the choice is given to the court, the court must determine and explain why one state's law is more favorable than the other state's law. Surprisingly perhaps, this is not always easy, and an erroneous determination would be a ground for appeal. On the other hand, if the choice is given to a party, this would obviate the need for a judicial answer to the question of whether a given law indeed favors that party. This is particularly helpful not only in cases in which that answer is unclear, but also in cases in which one state's law favors one party on some issues and the other party on other issues. The rule of ORS 31.875(3)(c) avoids the possibility of an inappropriate *dépeçage*, or "picking and choosing." The plaintiff will have to carefully weigh all the pros and cons of exercising or not exercising the right to choose, and if the plaintiff exercises that right, the choice must be for "all claims and issues against that defendant."²⁴⁰ If the choice proves ill-advised, it will not be appealable, and the plaintiff will only have himself or herself to blame.

The second question is why give the choice to the *victim* rather than the tortfeasor? This question can be answered at many levels, ranging from the philosophical to the practical, but it is better to begin with experience. How have other states and countries handled cross-border torts? A recent comprehensive study of all cross-border cases decided by U.S. state and federal courts in states that have abandoned the traditional *lex loci delicti* rule shows that these courts have reached the same results as subsection 3(c) provides. As the study documents, these cases are evenly split between applying the law of the state of conduct and the law of the state of injury, but the overwhelming majority of all cases nationwide (eighty-six percent) have applied whichever of the two laws prescribed a higher standard of conduct for the defendant or of financial protection for the plaintiff.²⁴¹ The courts that decided these cases often reached these results after laborious and sometimes uncertain analysis. By adopting the rule of applying the law of the state of conduct but also allowing the injured person to opt for the law of the

²⁴⁰ OR. REV. STAT. § 31.875(3)(c)(B) (2009).

²⁴¹ See Symeonides, *Cross-Border Torts*, *supra* note 234, at 380.

state of injury in narrowly defined circumstances, ORS 31.875(3)(c) accomplishes the same result but in a much more efficient and cost-effective way that will provide predictability to prospective litigants and help conserve judicial resources.

In any event, it is important to stress that although ORS 31.875(3)(c) may have the *effect* of favoring plaintiffs, the true *reason* for giving plaintiffs a choice between the laws of the state of conduct and the state of injury in this narrow circumstance is to effectuate the policies of those states in deterring wrongful conduct, preventing injuries, and providing adequate recoveries for those injuries.²⁴² To appreciate this point, it may be helpful to distinguish between the two principal patterns of cases covered by ORS 31.875(3)(a), namely:

- (1) cases which, under the main rule of subsection 3(c), are governed by the law of the state of conduct because the plaintiff did not invoke the exception (presumably because that state has a pro-plaintiff law). Cases 27-31 of TABLE 7, above, fall within this pattern (hereafter referred to as “Pattern C”); and
- (2) cases governed by the law of the state of injury because the plaintiff successfully invoked the exception (apparently because the state of injury has a pro-plaintiff law). Cases 32-36 of TABLE 7, above, fall within this pattern (hereafter “Pattern D”).

In Pattern C cases, the conduct state has an undeniable interest in applying its pro-plaintiff law in order to police and deter conduct occurring within its territory and violating its law, even if the injury occurs outside its borders. Indeed, the effectiveness of this law is undermined if it is not applied to out-of-state injuries. On the other hand, the state of injury has no clear interest in applying its pro-defendant law because that law is designed to protect conduct within, not outside, that state. In other words, the application of the stricter law of the conduct state promotes the policy of that state in policing conduct within its borders—without subordinating the (nonimplicated) policies embodied in the less strict law of the state of injury.²⁴³

²⁴² For the role and importance of these policies, see OR. REV. STAT. § 31.878(3)(a) (2009); see also discussion *infra* Part V.C.2.c.

²⁴³ In interest analysis terminology, the classification of this conflict depends both (a) on whether the conflict is one between conduct-regulating or loss-distribution issues, and in the latter case, (b) on the location of each party's domicile. If the case involves a conflict between conduct-regulating rules, the case presents the false conflict paradigm for reasons explained in the text. If the case involves a conflict between loss-distribution rules, the classification depends on where the parties are domiciled. In the usual case in which the tortfeasor is

Moreover, there is nothing unfair in subjecting tortfeasors to the law of the state in which they acted because it is a state with which they voluntarily associated themselves and which, more often than not, is also their home state. Having violated the standards of that state, tortfeasors should bear the consequences of such a violation and should not be allowed to invoke the lower standards of another state. The tortfeasor's conduct "is just as bad when the victim is an outsider as an insider,"²⁴⁴ regardless of whether the injury materializes within or outside that state.²⁴⁵

In Pattern D cases, the application of the law of the state of injury vindicates that state's interest in (1) preventing injuries that occurred within its territory and were caused by conduct considered unlawful there; and (2) protecting or compensating persons injured, and often domiciled or hospitalized, there. The state of conduct also has a countervailing interest in protecting conduct occurring within its territory and considered lawful there.²⁴⁶ However, under ORS 31.875(3)(c)(A), the law of the state of injury becomes applicable only if

domiciled in the state of conduct and the victim in the state of injury (Case 27, TABLE 2, *supra* p. 999), the resulting inverse conflict arguably presents the so-called "no interest" paradigm because neither state has an interest in applying its law for the benefit of the domiciliary of the other state. In practice, this difference has not had an appreciable bearing on the outcome of cases; courts have applied the pro-plaintiff law of the state of conduct at approximately the same rate in both categories of cases. See Symeonides, *Cross-Border Torts*, *supra* note 234, at 353–66.

²⁴⁴ CAVERS, *supra* note 30, at 160.

²⁴⁵ *Id.* at 160–66. Professor Cavers advocated for the application of the law of the state of conduct to cases of this pattern. See *id.* at 159.

Where the state in which a defendant acted has established special controls, including the sanction of civil liability, over conduct of the kind in which the defendant was engaged when he caused a foreseeable injury to the plaintiff in another state, the plaintiff, though having no relationship to defendant, should be accorded the benefit of the special standards of conduct and of financial protection in the state of the defendant's conduct, even though the state of injury had imposed no such controls or sanctions.

Id.

²⁴⁶ In interest analysis terminology, Pattern B cases present the "true conflict" paradigm, regardless of whether the conflict is between conduct-regulating or loss-distributing rules. In conduct-regulation conflicts, each of the two states have the interests stated in the text. In loss-distribution conflicts, the conduct state has an interest in protecting conduct that is legal within its territory, and the second state has an interest in ensuring reparation for injuries it considers tortious. Additionally, however, each state arguably has an interest in protecting the parties affiliated with it. The first state has an interest in protecting a tortfeasor acting (and usually domiciled) within its territory, and the second state has an interest in protecting victims injured (and often domiciled or hospitalized) within its territory. Most American cases involving this pattern have applied the pro-plaintiff law of the state of injury. See Symeonides, *Cross-Border Torts*, *supra* note 234, at 366–79.

the tortfeasors activities “were such as to make foreseeable the occurrence of the injury in that state.”²⁴⁷ Because of this foreseeability proviso, the application of the law of the state of injury is not only constitutionally permissible, but also appropriate from the choice-of-law perspective. It is a factor of sufficient weight to tip the scales in favor of applying the law of the state that will likely experience the impact of the injurious conduct and a good response to any argument of unfair surprise by the defendant. To quote Cavers, once again:

Th[e] system of physical and financial protection [of the state of injury] would be impaired . . . if actions outside the state but having foreseeable effects within it were not also subject to its law. . . . [T]he fact that [the defendant] would be held to a lower standard . . . back in the state where he had his home (or in the state where he acted) or, indeed, the fact that he enjoyed an immunity there, all would ordinarily seem matters of little consequence to the state of the injury.

....

. . . If he has not entered the state but has caused harm within it by his act outside it, then, save perhaps where the physical or legal consequences of his action were not foreseeable, it is equally fair to hold him to the standards of the state into which he sent whatever harmful agent, animal, object, or message caused the injury.²⁴⁸

In conclusion, ORS 31.875(3)(c) resolves these difficult conflicts in a way that is not only in line with the current American case law but also serves the *implicated* policies of the involved states, without unfairly surprising defendants. It is true this provision has the effect of benefiting plaintiffs, even if that effect is coincidental. However, it is important to stress that none of the other provisions of ORS 31.875, or of the Act as a whole, have this effect. A perusal of TABLE 2, above, confirms this point. Of the twenty-six patterns falling within the scope of ORS 31.875 subsections (2), (3)(a), and (3)(b), thirteen patterns will be governed by a law that favors the tort victim (indicated by shading

²⁴⁷ § 31.875(3)(c)(A).

²⁴⁸ CAVERS, *supra* note 31, at 140–41. Cavers also argued that the same rationale applies even if the victim is not domiciled in the state of injury, but rather is domiciled in a state that has a lower standard of financial protection than the state of injury. *See id.* at 144.

[T]he financial protection a state has prescribed, being a part of its provision for the general security, is in part a sanction for wrongfully causing harm. As a consequence its purposes include elements of deterrence and retribution even though it may be couched in essentially compensatory terms. When the laws of the state of injury are viewed in this light, the restrictive laws of the plaintiff's home state tend to fade into irrelevance.

Id.

and capital letters) and thirteen patterns will be governed by a law that favors the tortfeasor (indicated by shading and lower-case letters).²⁴⁹ Secondly, tort conflicts by definition involve conflicting value judgments of at least two states as to who should bear the social and economic losses caused by injurious conduct that at least one state considers tortious. In the final analysis, of the two parties involved in the conflict, the tortfeasor is the one who is likely to be in a better position to prevent the loss.

C. *The General Approach of ORS 31.878*

ORS 31.878 sets forth the Act's general choice-of-law approach for noncontractual claims. This approach applies "except as otherwise provided"²⁵⁰ in ORS 31.865 through 31.875, which prescribe specific rules derived from this approach, as well as ORS 31.885, which provides for situations in which the parties have validly agreed on the governing law.²⁵¹

The opening paragraph of ORS 31.878 sets forth the goal or objective of the choice-of-law process for noncontractual claims, while the remainder of the section prescribes the process or method for achieving that goal and the factors one should consider in reaching that goal.

1. *The Goal and the Catchphrase*

The goal is to identify and apply the law of the state with contacts with the parties and the dispute and with policies regarding the disputed issues²⁵² that make application of its law the "most appropriate" for those issues.²⁵³ The phrase "most appropriate" law, which is also used in the corresponding provision of the choice-of-law statute for contract

²⁴⁹ See TABLE 2, *supra* pp. 999–1000.

²⁵⁰ § 31.878.

²⁵¹ Although the rules of ORS 31.872 and 31.875 have been derived from the general approach of ORS 31.878, these rules prevail over ORS 31.878 because they are more specific on the subjects they cover. However, as with any a priori rules, the rules of ORS 31.872 and 31.875 may, in exceptional cases, produce a result that is incompatible with the general objective of ORS 31.878. In order to avoid such a result, ORS 31.872(3) and 31.875(4) each provide an "escape clause" that is anchored in ORS 31.878. Moreover, ORS 31.872—and, to a lesser extent, ORS 31.875—do not cover the entire spectrum of cases or issues that might fall under the general headings of these sections. The remaining cases or issues are governed by ORS 31.878 as the residual section. Thus, ORS 31.878 is intended to perform a general as well as a residual role.

²⁵² For the importance of the use of the word "issues" and the requirement for issue-by-issue analysis, see discussion *infra* Part V.D.

²⁵³ § 31.878.

conflicts,²⁵⁴ is likely to become a catchphrase by which commentators will describe this Act—without necessarily paying attention to the specifics that follow the phrase. Some authors may be tempted to draw comparisons with acoustically similar phrases, such as Professor Morris's "proper law" concept,²⁵⁵ and at least one author has described the identical phrase in the contract statute as signaling a tilt toward "material justice."²⁵⁶

For reasons explained elsewhere, that description is inaccurate with regard to the contracts statute.²⁵⁷ It would be equally inaccurate with regard to this Act. As in the contracts statute, the quoted phrase was chosen precisely because it is ideologically neutral and because it is different than comparable catchphrases used by other codifications and methodologies, including: Professor Currie's interest analysis, Leflar's better-law approach and other "material justice" approaches, a significant-contacts approach, or a significant-relationship approach like that of the second Restatement. The approach of this Act is intended to be—and *is*—different and independent from the above approaches, especially the "material justice" approaches. What makes application of a state's law "most appropriate" under ORS 31.878 (and the Act as a whole) is not the perceived material justness or goodness of that law but rather that state's "contacts with the parties and the dispute and [its] policies on the disputed issues."²⁵⁸ To use Gerhard Kegel's terms, the goal of the choice-of-law process under the Act is to find "the spatially best solution" ("conflicts justice"), rather than "the materially best solution."²⁵⁹

²⁵⁴ See OR. REV. STAT. § 81.130 (2009).

²⁵⁵ See J.H.C. Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951).

²⁵⁶ See Nafziger, *supra* note 43, at 400–03 (contending that ORS 81.130 is designed to attain "several stipulated objectives of material justice" and describing the Oregon contracts statute as "a comprehensive framework of rules for determining the appropriate law, as a matter of material justice").

²⁵⁷ See Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts*, *supra* note 12, at 236–37.

²⁵⁸ § 31.878.

²⁵⁹ Gerhard Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 AM. J. COMP. L. 615, 616–17 (1979) (emphasis omitted). The only provision of the Act that could be described as containing a tilt toward material justice is ORS 31.875(3)(c), which has the effect of favoring the plaintiff in some cross-border torts. However, for reasons explained earlier, the *rationale* for that provision is grounded in conflict justice rather than material justice. See *supra* note 230 and accompanying text.

2. *The Process*

The balance of ORS 31.878 prescribes the process or method for achieving the goal set forth in the opening paragraph. This process consists of three steps: (1) identifying the states that have relevant contacts, (2) identifying the relevant policies of those states, and (3) evaluating the strength and pertinence of those policies. These steps are described below.

a. *Identifying the Involved States*

The first step of the process is to identify the involved states—in addition to the forum state, which is *ex hypothesi* involved—by examining their relevant contacts with the parties and the facts that gave rise to the dispute. ORS 31.878(1) lists some of the contacts that are usually relevant in conflicts involving noncontractual claims: the place of the injurious conduct, the place of the resulting injury, the domicile, the habitual residence or pertinent place of business of each person, and the place in which the relationship (if any) between the parties was centered. This list of contacts is neither exhaustive nor hierarchical. Depending on the circumstances, other contacts may also be relevant. Moreover, not all the listed contacts will be relevant in all cases. Finally, the listing of these contacts should not be taken as an invitation for a mechanistic counting of contacts as a means of choosing the applicable law. That one state has more contacts than other states does not necessarily mean that its law should be applied to any or all disputed issues. Those contacts must be the kind that bring into play that state's policies that will make application of that law the “most appropriate” in light of the other policies and factors listed in ORS 31.878.

The reference to the parties' domiciles or habitual residences in subsection (1) is not accompanied by any specific time designation. This means that although a party's domicile at the time of the injury remains the most relevant domicile, the court is free to also take into account a party's domicile at the time of the choice-of-law decision, if this factor is relevant in “evaluating the strength and pertinence”²⁶⁰ of the policies of the involved states. For example, a postinjury change of domicile by the injured person may reduce the pertinence of the compensatory policies of the state of the former domicile and bring into

²⁶⁰ § 31.878(3).

play the corresponding policies of the state of the new domicile.²⁶¹ Likewise, a postinjury change of domicile by a tortfeasor may reduce the pertinence of the policies of the tortfeasor's previous domicile in deterring or protecting tortfeasors and bring into play the corresponding policies of the new domicile. Consequently, in selecting the applicable law in cases decided under ORS 31.878—or in deciding whether to employ the escape clauses found in ORS 31.872(3) and 31.875(3), both of which are anchored in ORS 31.878—the court is free to take into account a party's domicile at both the time of the injury and the time of the choice-of-law decision.

According to ORS 31.865(2), the domicile of a legal person is located in the state in which the person maintains its principal place of business. However, if the dispute arises from activities directed from another state in which the legal person maintains a place of business, then either state may be deemed as the domicile at the choice of the opposing party. In addition, under ORS 31.878(1), a “pertinent place of business”²⁶² (pertinent to the disputed issues) of a legal person—or, for that matter, a natural person—may be a relative contact in appropriate circumstances.

b. Identifying the Pertinent Policies of the Involved States

The second step of the process is to identify the substantive rule or rules of each involved state that appear to be in material conflict with the corresponding rule or rules of another involved state, and then identify the policies embodied in those rules. As used in this context, “policy” means the objective or *telos* the state seeks to accomplish by adopting or continuing to follow the particular rule.²⁶³ If the particular rule is a statutory rule, its policy is identified through the same process of statutory interpretation used in nonconflicts cases. If the rule is judicially created, its policy is identified in the same way one identifies the policy of any common law rule.

c. Evaluating the Conflicting Policies

The third step of the process is to evaluate the relative “strength and pertinence” of the conflicting policies of the involved states in light of,

²⁶¹ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (finding that the plaintiff's postaccident, good faith acquisition of a new domicile in Minnesota was a factor implicating that state's interest in protecting the plaintiff).

²⁶² § 31.878(1).

²⁶³ See *SYMEONIDES, REVOLUTION*, *supra* note 7, at 396–98 (discussing the teleological method of interpretation in conflicts cases).

and “with due regard to,”²⁶⁴ two sets of policies listed in ORS 31.878(3) subsections (a) and (b)—in order to select the law that is “the most appropriate” to apply to the disputed issues. What is to be evaluated is not the wisdom or soundness of a state policy—either in the abstract or in comparison with the policy of another state—but rather the “strength and pertinence” of the policy at the multistate level. A legislative policy that a state strongly espouses for intrastate cases may in fact be attenuated in a particular multistate case that has only minimal contacts with that state. Similarly, the same policy may prove far less pertinent even though the case has sufficient contacts with that state if the contacts are not of the type that actually implicate that policy.

The first set of policies used to evaluate the strength and pertinence of the conflicting state policies are the general policies of the law of torts and noncontractual claims. These policies are phrased in a general way: “encouraging responsible conduct, deterring injurious conduct, and providing adequate remedies for the conduct.”²⁶⁵ The court or other decision maker is to assess the extent to which the choice of law accomplishes or retards these general policies.

The second set of policies is multistate policies derived from Oregon’s membership in the interstate and international community. In making the choice of law, the decision maker should always keep in mind the “needs and policies of the interstate and international systems,” including the policy of “minimizing adverse effects on strongly held policies of other states.”²⁶⁶ The quoted phrases go beyond the self-evident and unavoidable requirement of complying with the minimal limits prescribed by the U.S. Constitution for state choice-of-law decisions.²⁶⁷ In some instances, what may be constitutionally permissible may not necessarily be appropriate from the choice-of-law perspective. Courts should strive for decisions that not only stay within the limits prescribed by the Constitution, but also remain deferential and sensitive to the needs and policies of the interstate and international

²⁶⁴ § 31.878(3).

²⁶⁵ § 31.878(3)(a).

²⁶⁶ § 31.878(3)(b).

²⁶⁷ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). For a general discussion of these limits, see MCDUGAL ET AL., *supra* note 70, at 189–216; WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, *THE FULL FAITH AND CREDIT CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* (2005); SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 149–76; SYMEONIDES, *PRIVATE INTERNATIONAL LAW*, *supra* note 70, at 46–61; WEINTRAUB, *supra* note 70, at 511–72.

systems.²⁶⁸ In summary, the court or other decision maker should (1) always be mindful of the *adverse consequences* of the choice-of-law decision on the strongly held policies of the involved states; and (2) choose the law of the state which, in light of its relationship to the parties and the dispute and its policies rendered pertinent by that relationship, would sustain the most serious legal, social, economic, and other consequences of the choice-of-law decision.²⁶⁹

d. Policies and “Interests”

In general terms, a state may be said to have an “interest” in seeing that the policies and values embodied in its law are observed—or at least not disregarded—in cases that fall within the intended reach of that law.²⁷⁰ Nevertheless, ORS 31.878 and the Act avoid using the term “interest” in order to disassociate the approach of this section and this Act from Professor Currie’s “governmental interest analysis” and other modern American approaches that seem to perceive the choice-of-law problem as a problem of interstate competition, rather than as a problem of interstate cooperation in conflict avoidance. Instead, ORS 31.878 calls for a focus on the *adverse* consequences of the choice-of-law decision on the policies of the involved states.²⁷¹ By definition, conflicts cases involve situations that either fall or appear to fall within the reach of the laws of more than one state, and the choice-of-law process is called upon to resolve these conflicts of overlapping reach. Inevitably, when the overlap is real, the choice of one state’s law will have some adverse effect on the policies of the other state. Even so, the choice-of-law process under ORS 31.878 should aspire to resolve the conflict in a way that causes the least adverse consequences to the policies of the involved states.

²⁶⁸ See SYMEONIDES, *REVOLUTION*, *supra* note 7, at 373 (“To paraphrase John Donne, *no state is an island*, even if geographically it is. The selfish pursuit of the forum’s interests is inimical to individual justice and state coexistence, as well as detrimental to the forum’s own interests in the long run.”).

²⁶⁹ For consequentialism- and consequences-based choice-of-law approaches, see *id.* at 30–31, 116–19, 382–84.

²⁷⁰ See *id.* at 370–73.

²⁷¹ See *id.* at 372–73 (“[T]he policies, purposes, and values embodied in a state’s law *can* be adversely affected when that law is *not* applied to a case that law was intended to reach. In this sense, speaking of a state’s ‘interest’ in applying its law is simply a shorthand way of describing this *adverse consequence*. Whether one calls this an ‘interest’ or a ‘concern’ . . . is really a secondary matter. The bottom line is that states are *not* indifferent to the resolution of conflicts between their respective laws. Consequently, a choice-of-law analysis that fails to take this factor into account is presumptively deficient.” (footnote omitted)).

D. Issue-by-Issue Analysis and Dépeçage

The goal of the choice-of-law process under section 9 is to identify and apply the law that is most appropriate with regard to the “disputed issues.”²⁷² The word “issue” or “issues” is used repeatedly in ORS 31.878 and throughout the Act.²⁷³ This use is intended to focus the choice-of-law-process on the particular issue as to which there exists an actual conflict of law.

This “issue-by-issue analysis” is a common feature of all modern choice-of-law methodologies that emerged from the revolution.²⁷⁴ Unlike the traditional method, which selected the applicable law for the entire cause of action, modern approaches have narrowed the choice-of-law inquiry to the various issues that make up a cause of action. This mode of analysis is based on the elementary realization that, in many situations, the involved states may have closer connections with a case—or be interested in different aspects of it. Often, the conflict remains confined to only certain aspects or “issues” of the case. Consequently, rather than seeking to choose a law as if all aspects of the case were in dispute, one should focus on the narrow issues with regard to which a conflict exists. When a conflict exists with regard to only one issue, the court should focus on the factual contacts and policies that are pertinent to that issue. When a conflict exists with regard to more than one issue, each issue is to be analyzed separately because each issue may implicate different states or bring into play different policies of those states. Seen from another angle, each state having relevant contacts with a given multistate case may not be equally concerned with regulating all issues in the case, but may only be concerned with those issues that actually implicate its policies in a significant way.

One possible result of this analysis is that, in some cases, the laws of different states will govern different issues in the same cause of action. This phenomenon is known in conflicts literature by its French name of *dépeçage*.²⁷⁵ Although infrequently referred to by this name, this phenomenon is now a common occurrence in the United States.²⁷⁶

²⁷² OR. REV. STAT. § 31.878, (2) (2009).

²⁷³ See OR. REV. STAT. §§ 31.862, 31.865(1)(c), 31.872(3)–(4), 31.875(2)(b), (3)(b), (3)(c)(B), (4), 31.878, (2), 31.880, 31.885 (2009).

²⁷⁴ See SYMEONIDES, *REVOLUTION*, *supra* note 7, at 102–03.

²⁷⁵ See *id.* at 103.

²⁷⁶ See *id.* For a discussion of issue-by-issue analysis and *dépeçage* in European codifications, see Symeonides, *Reciprocal Lessons*, *supra* note 182, at 1782–84.

“[D]épeçage is, per se, neither good nor bad.”²⁷⁷ It is not an end in itself, nor is it something that should be avoided at any cost. Rather, it is a recognition of the reality that, in some cases, the states involved in the case may be interested in different aspects of it, or at least interested in varying degrees. However in some cases, the use of the law of two different states for different issues in the same cause of action may defeat the policies of both states. “In such cases, *dépeçage* is inappropriate and must be avoided.”²⁷⁸

Issue-by-issue analysis is the *proper* mode of analysis under this Act. Moreover, it is the *required* mode of analysis for: (1) all cases that fall directly within the scope of ORS 31.878; (2) claims and counter-claims of third parties or between joint tortfeasors, which are exempted from the scope of ORS 31.870 through 31.875 and which ORS 31.880 relegates to ORS 31.878; (3) issues for which a party invokes the escapes of ORS 31.872(3), 31.875(3)(b), and 31.875(4); (4) all other cases in which the applicable provision of the Act uses the term issue or issues in the sense described here;²⁷⁹ and (5) cases falling under ORS 31.875(2)(a), which requires separation of the issue of the “standard of care” from the other issues in the case.²⁸⁰

The latter situation is the only one in which the Act *requires* a *dépeçage* between the “standard of care” and the other issues of the case. Even in that case, however, *dépeçage* can be avoided if the circumstances are such as to justify applying the escape found in ORS 31.875(4). In contrast, in two other situations, the Act *prohibits* *dépeçage*. The first situation includes all actions that are governed by Oregon law under ORS 31.870 with regard to claims between the plaintiff and the defendant.²⁸¹ The second situation occurs in cases involving cross-border torts in which the injured party requests the application of the law of the state of injury under ORS 31.875(3)(c)(B).

²⁷⁷ SYMEONIDES, *REVOLUTION*, *supra* note 7, at 105.

²⁷⁸ *Id.* For the criteria for distinguishing permissible from inappropriate *dépeçage*, see SYMEON SYMEONIDES, WENDY COLLINS PERDUE & ARTHUR T. VON MEHREN, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL: CASES AND MATERIALS* 260–61 (2d ed. 2003).

²⁷⁹ See OR. REV. STAT. §§ 31.862, 31.865(1)(c), 31.872(4), 31.875(2)(b), & 31.885.

²⁸⁰ See discussion *supra* Part V.B.1.

²⁸¹ However, as noted earlier, ORS 31.870 does not encompass claims and counterclaims of third parties or between joint tortfeasors, and ORS 31.880 relegates these claims to ORS 31.878. Thus, *dépeçage* is possible in these cases if the court applies non-Oregon law to the latter claims.

In such a case, the request “shall be deemed to encompass all claims and issues” against that defendant.²⁸²

In all other cases mentioned above, the Act *allows dépeçage*. In most of these cases, *dépeçage* will be appropriate or innocuous. For example, when a choice-of-law agreement meeting the requirements of ORS 31.885 covers only some but not all issues in dispute, the court must subject the remaining issues to the law designated by the pertinent provisions of the Act, even if it is a law other than the one designated in the agreement. Likewise, it may be entirely appropriate to apply the law of one state to claims between the tortfeasor and the victim under ORS 31.870, 31.872, or 31.875, and the law of another state to claims by or against third parties or between joint tortfeasors under ORS 31.878 and 31.880. Finally, it may be equally appropriate to apply the law of one state to some issues under ORS 21.872 or 31.875 but the law of another state to certain issues under the exceptions contained in ORS 31.872(3), 31.875(3)(b), and 31.875(4). If *dépeçage* is inappropriate in the particular cases or issue because it defeats the policy of both states, then the court can avoid it by exercising the discretion allowed by the above provisions.

VI

ESCAPE CLAUSES AND THE BALANCE BETWEEN CERTAINTY AND FLEXIBILITY

The tension between the need for legal certainty and predictability, on the one hand, and the desire for flexible, equitable, individualized solutions on the other is as old as law itself. Aristotle described it more than twenty-three centuries ago when he spoke of the role of equity as a corrective of the written law.²⁸³ As René David put it, “There is and will always be in all countries, a contradiction between two requirements of justice: the law must be certain and predictable on one

²⁸² OR. REV. STAT. § 31.875(3)(c)(B) (2009); *see also* discussion *supra* Part V.B.3.b.

²⁸³ *See* ARISTOTLE, THE NICOMACHEAN ETHICS V. x 4–7.

[T]he law always speaks in general terms, yet in many cases it is impossible to speak in terms that are both general and correct at the same time. . . . [W]hen the law enunciates a general rule and thereafter a case arises that is not covered by the general rule, then it is proper, where the law-maker’s pronouncement is defective because of its over-simplicity, to rectify the defect by deciding the case in the same way as the lawmaker would have decided . . . had he been cognizant of the case. . . . This is in essence the nature of equity (*epieikia*): a corrective of the law when the law is defective due to its generality.

Id. (as translated by the author of this Article).

hand, it must be flexible and adaptable to circumstances on the other.”²⁸⁴

The law of conflict of laws is not immune from this contradiction, and perhaps it is particularly susceptible to it. Every legal system has wrestled with this contradiction and has striven to attain an appropriate equilibrium between these two competing—yet necessary—goals. Naturally, the equilibrium differs not only from system to system, but also from subject to subject and from time to time. As noted above, American conflicts law (and with it Oregon conflicts law) has moved from one extreme of total certainty to the exclusion of flexibility (represented by the first Conflicts Restatement) to the other extreme of total flexibility and no certainty, represented by the choice-of-law revolution.

This Act restores an appropriate equilibrium between certainty and flexibility. The provisions of the Act discussed in this Article restore legal certainty by designating the applicable law to claims and issues falling within the scope of those provisions. This certainty is what has been missing—at least since the 1960s, when Oregon abandoned the *lex loci delicti* rule.

At the same time, however, the Act avoids the mistake of moving to the other extreme of total certainty. Instead, the Act provides a good measure of flexibility through two principal means:

- (1) By subjecting to the flexible approach of ORS 31.878 all claims for which the other sections of the Act do not designate the applicable law—such as claims by or against third parties or between joint tortfeasors in all cases²⁸⁵—and all claims in certain products liability cases that lack the necessary contacts for the application of Oregon law under ORS 31.872,²⁸⁶ and
- (2) By providing in ORS 31.872 and 31.875 three escapes that are anchored in ORS 31.878. These exceptions are discussed below.

The first exception applies to products liability cases governed by Oregon law under ORS 31.872. ORS 31.872(3) provides that, “[i]f a party demonstrates that the application of the law of a state other than Oregon to a disputed issue is substantially more appropriate under the

²⁸⁴ RENÉ DAVID, *ENGLISH LAW AND FRENCH LAW: A COMPARISON IN SUBSTANCE* 24 (1980).

²⁸⁵ See § 31.880.

²⁸⁶ See § 31.872(4).

principles of ORS 31.878 . . . , that issue shall be governed by the law of the other state.”²⁸⁷

The second and third exceptions apply to nonproducts liability cases that fall within the general rules of ORS 31.875. One of these rules is the first sentence of subsection (3)(b), which provides that cases in which the tortfeasor and the victim are domiciled in different states that have different laws and in which both the conduct and injury occurred in the same third state are governed by the law of that state.²⁸⁸ The second sentence of subsection (3)(b) provides an escape for cases in which the application of that law to a disputed issue “will not serve the objectives of that law.”²⁸⁹ In such a case, that issue will be governed by the law selected under the flexible approach of ORS 31.878.

The third and final escape is found in ORS 31.875(4). Unlike the previous escape, this escape qualifies all the previous rules of ORS 31.875.²⁹⁰ The escape provides that, if a party demonstrates that the application to a “disputed issue” of the law of a state other than the state designated by those other rules is “substantially more appropriate under the principles of ORS 31.878,” then that issue will be governed by the law of the other state.²⁹¹

All three escapes operate on an issue-by-issue basis, and all three are tied to the general approach of ORS 31.878, as they should be, because ORS 31.878 contains the general approach from which the rules of the other sections have been derived. As noted earlier, ORS 31.878 directs the decision maker to apply the law of the state with contacts with the case and the parties and with policies on the disputed issues that make application of its law “the most appropriate” for those issues. ORS 31.878 then lists the general principles and factors for identifying the “most appropriate” law. Relying on the same general principles, ORS 31.872 and 31.875 designate in advance the “most appropriate” law in certain categories of cases. In so doing, these two sections will provide prospective litigants with a measure of predictability and will unburden courts or other decision makers from the laborious analysis ORS 31.878 requires.

²⁸⁷ § 31.872(3). ORS 31.872(2) also contains a more particularized escape for cases in which the defendant demonstrates that “the use in Oregon of the product that caused the injury could not have been foreseen and that none of defendant’s products of the same type were available in Oregon in the ordinary course of trade at the time of the injury.” § 31.872(2).

²⁸⁸ See Cases 23–26 in TABLE 2, *supra* p. 999; Cases 23–26 in TABLE 6, *supra* p. 1020.

²⁸⁹ § 31.875(3)(b).

²⁹⁰ See Cases 1–36 in TABLE 2, *supra* pp. 999–1000.

²⁹¹ § 31.878(4).

However, as with any a priori choice-of-law rules, the rules of ORS 31.872 and 31.875 may, in exceptional cases, produce a result that is incompatible with the principles of ORS 31.878, or “substantially less appropriate” than the result produced by the law that would have been applicable under those principles. The escapes allow a court to avoid such a result and to select another “substantially more appropriate” law under the principles of ORS 31.878.

Other codifications provide similar escapes.²⁹² Indeed, despite contrary perceptions, a decision to codify the law does not entail outlawing judicial discretion.²⁹³ With some notable exceptions, most modern legislatures seem to have become aware of the inherent limitations in their ability to anticipate everything,²⁹⁴ and they have learned to entrust judges with greater discretion than in the past. There seems to be an increasing realization that any preformulated rule, no matter how carefully or wisely drafted, may, “because of its generality”²⁹⁵ or because of its specificity, produce results that are contrary to the purpose for which the rule was designed. In the words of Peter Hay, this “is a natural consequence of the difference between *law making* and *law application*.”²⁹⁶ Contemporary rule makers attempt to avert such undesirable results by expressly granting judges the authority to adjust or avoid altogether the application of the rule when the peculiarities of the individual case so dictate. This grant of authority takes the form of escape clauses attached to the rules.²⁹⁷

²⁹² See SYMEONIDES, *PROGRESS OR REGRESS?*, *supra* note 226, at 26–30; Symeonides, *Reciprocal Lessons*, *supra* note 182, at 1773–82.

²⁹³ As early as 1804, the redactors of the Code Napoléon recognized the simple truth that had escaped the drafters of the Prussian Code of 1794: that for the *legislateur* “to anticipate everything is a goal impossible of attainment.” Portalis, Tronchet, Bigot-Préameneu & Maleville, *Texte du Discours Préliminaire*, in 1 J. LOCRÉ, *LA LÉGISLATION CIVILE, COMMERCIALE ET CRIMINELLE DE LA FRANCE* 251, 255 (1827). Consequently, the legislator’s role is “to set, by taking a broad approach, the general propositions of the law, [and] to establish principles which will be fertile in application. . . . It is for the judge and the jurist, imbued with the general spirit of the laws to direct their application.” *Id.*

²⁹⁴ *See id.*

²⁹⁵ ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 282.

²⁹⁶ Peter Hay, *Flexibility Versus Predictability and Uniformity in Choice of Law: Reflections on Current European and United States Conflicts Law*, 226 *RECUEIL DES COURS* 281, 291 (1991).

²⁹⁷ From the rich literature on the subject, see CEZAR DUBLER, *LES CLAUSES D’EXCEPTION EN DROIT INTERNATIONAL PRIVÉ* (1983); DEMETRA KOKKINI-IATRIDOU, *LES CLAUSES D’EXCEPTION EN MATIÈRE DE CONFLITS DE LOIS ET DE CONFLITS DE JURIDICTIONS—OU LE PRINCIPE DE PROXIMITÉ* (D. Kokkini-Iatridou ed., 1994); SYMEONIDES, *PROGRESS OR REGRESS?*, *supra* note 226, at 31–34; Peter Hay & Robert B. Ellis, *Bridging the Gap Between Rules and Approaches in Tort Choice of Law in the United States: A Survey of Current Case*

The escapes discussed above are an example of such a grant of authority. Their presence will ensure that judges applying the Act will be able to consider all the peculiarities of the particular case and apply the “most appropriate” law under the circumstances.

CONCLUSION

The process of drafting the Oregon Act took considerable and respectful account of the experience of other countries in drafting their own codifications.²⁹⁸ Even so, the Act is based primarily on the American experience since the choice-of-law revolution. As the discussion in this Article has demonstrated, most of the Act’s rules—especially those of ORS 31.875, which is the heart of the whole Act—have been derived directly from judicial precedents and trends in the rest of the United States. In this sense, the Oregon Act can be seen as a true restatement or codification of the American experience.

To some critics, restating or codifying the case law is not necessarily a good thing. After all, “‘what courts [are] really doing’ might not always be an appropriate solution,”²⁹⁹ and our task is to improve on those solutions rather than merely reproduce them. For what it is worth, this author’s view is that law reports contain a great deal of wisdom. Although academics and legislators have an equal claim on wisdom, the courts have a unique advantage. In trying actual disputes—and doing so with the high frequency that American courts try conflicts cases³⁰⁰—courts are in a position to put to the test not only their own ideas and assumptions, but also those of academics and legislators. The patterns and solutions that emerge from these tests reflect the ideas that survived this grindstone of reality and, for this reason, they carry a strong presumption of correctness.³⁰¹ One who drafts rules for legislative enactment owes respect to these solutions.

Law, 27 INT’L LAW. 369 (1993); Franco Mosconi, *Exceptions to the Operation of Choice of Law Rules*, 217 RECUEIL DES COURS 9, 189–95 (1989); Alfred E. von Overbeck, *Les Questions Générales du Droit International Privé à la Lumière des Codifications et Projets Récents*, 176 RECUEIL DES COURS 9, 186–207 (1982); Symeon C. Symeonides, *Exception Clauses in American Conflicts Law*, 42 AM. J. COMP. L. 813 (Supp. 1994).

²⁹⁸ See discussion *supra* note 50.

²⁹⁹ SCOLES, HAY, BORCHERS & SYMEONIDES, *supra* note 6, at 106.

³⁰⁰ For example, in 2008, American state and federal courts rendered nearly four thousand reported decisions involving conflicts issues. See Symeonides, *2008 Survey*, *supra* note 162, at 271.

³⁰¹ Another author has expressed this better. See Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1648 (2005) (reviewing SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION IN THE COURTS: TODAY AND TOMORROW*

At the same time, one must recognize that certain risks are inherent in compressing judicially crafted solutions into statutory rules. One such risk is that what has been a good solution in past cases may not always be a good solution for future cases. One way to minimize this risk is by not over-legislating. The Oregon Act has avoided this risk both by providing specific rules only for cases that have been resolved by the case law fairly uniformly and without controversy and by relegating the remaining cases or issues to the flexible approach of ORS 31.878, which merely lays down parameters for judicial decision rather than prescriptions of specific results. A second way is to provide courts with the authority and tools to adjust the specific rules to the exigencies of exceptional or unanticipated cases. The Oregon Act has done this as well by employing the escape clauses discussed above.

Thus, the Oregon Act remains true to the lessons of the American choice-of-law revolution. The Act codifies the results produced by the courts that have joined the revolution, and it thus provides a certain degree of certainty and efficiency so that prospective litigants will have a better idea of their rights and obligations, and courts will not be forced to reinvent the wheel in each case. At the same time, the Act also provides courts with a sufficient degree of flexibility so as to resolve individual cases fairly and to help develop the law of the future.

(2005) (“Symeonides acts on the principle that what courts do, and their measure of agreement in what they do, are phenomena to be taken very seriously indeed. . . . Symeonides has the strong conviction that to glean truth from reality one has to handle a great deal of reality, and to do so with utmost care.”).

APPENDIX

75TH OREGON LEGISLATIVE ASSEMBLY—2009 REGULAR SESSION

AN ACT
ON CHOICE-OF-LAW FOR TORTS AND OTHER
NONCONTRACTUAL CLAIMS*Be It Enacted by the People of the State of Oregon:*

DEFINITIONS

OR. REV. STAT. § 31.850

DEFINITIONS. For the purposes of ORS 31.850 to 31.890:

- (1) “Conduct” means an act or omission that has occurred or that may occur in the future.
- (2) “Domicile” means the place identified under ORS 31.865.
- (3) “Injury” means physical or nonphysical harm to a person or property caused by the conduct of another person.
- (4) “Law,” when used in reference to the law of another state, does not include that state’s choice-of-law rules.
- (5) “Noncontractual claim” means a claim, other than a claim for failure to perform a contractual or other consensual obligation, that arises from a tort as defined in ORS 30.260, or any conduct that caused or may cause injury compensable by damages, without regard to whether damages are sought.
- (6) “Person” means a person as defined in ORS 174.100 and a public body.
- (7) “Public body” means a public body as defined in ORS 174.109, the Oregon Health and Science University, and the Oregon State Bar.
- (8) “State” means, unless the context requires otherwise, the United States, any state, territory, possession or other jurisdiction of the United States, any Indian tribe or other Native American, Hawaiian or Alaskan group recognized by federal law or formally acknowledged by a state of the United States, and any foreign country or territorial subdivision of such country that has its own system of laws. [2009 c.451 §1]

APPLICABILITY

OR. REV. STAT. § 31.855

APPLICABILITY. ORS 31.850 to 31.890 govern the choice of law applicable to noncontractual claims when a choice between or among the laws of more than one state is at issue. ORS 31.850 to 31.890 do not supersede the provisions of other Oregon statutes that expressly designate the law governing a particular noncontractual claim. [2009 c.451 §2]

PRELIMINARY ISSUES

OR. REV. STAT. § 31.860

CHARACTERIZATION. (1) Oregon law determines the scope and meaning of terms used in ORS 31.850 to 31.890, including whether a claim is a noncontractual claim.

(2) The law of the state determined to be applicable under ORS 31.850 to 31.890 determines the scope and meaning of terms used in that law. [2009 c.451 §3]

OR. REV. STAT. § 31.862

LOCALIZATION AND OTHER FACTUAL DETERMINATIONS. For the purposes of ORS 31.850 to 31.890, the following issues are determined under Oregon law:

(1) What conduct caused the injury, and where the conduct occurred. If injurious conduct occurs in more than one state, the state where the conduct occurred that is primarily responsible for the injury is the state where the injurious conduct occurred.

(2) Who caused the injury. If a person is liable for the conduct of another person, both persons are considered to have caused the injury.

(3) Where the injury occurred. If the same conduct causes injury in more than one state, the place of injury is in the state in which most of the injurious effects occurred or may occur. If different persons suffer injury in different states by reason of the same conduct, the place of injury is determined separately for each person. If a person suffers loss by reason of injury or death of another person, the place of injury is determined based on the injury to the other person.

(4) Who suffered the injury. If a claim is made for loss caused by injury or death of another person, both the claimant and the other person are considered to be injured persons. [2009 c.451 §4]

OR. REV. STAT. § 31.865

DETERMINING DOMICILE. For the purposes of ORS 31.850 to 31.890:

(1)(a) The domicile of a natural person is in the state in which the person resides with the intent to make it the person's home for an indefinite period of time.

(b) A domicile once established continues until it is superseded by the acquisition of a new domicile. If a person's intent to change domicile is legally ineffective, the previously established domicile continues to be the person's domicile.

(c) If a person's intent to have a domicile in a given state would be legally effective but cannot be ascertained, the state in which the person resides is the person's domicile, and if the person resides in more than one state, the residence state that has the most pertinent connection to the disputed issue is deemed to be the domicile with regard to that issue.

(2) The domicile of a person other than a natural person is located in the state in which the person maintains its principal place of business. If the dispute arises from activities directed from another state in which the person maintains a place of business other than the principal place of business, either state may be considered as the domicile at the choice of the other party.

(3) The domicile of a person is determined as of the date of the injury for which the noncontractual claim is made. [2009 c.451 §5]

CLAIMS GOVERNED BY OREGON LAW

OR. REV. STAT. § 31.870

CLAIMS GOVERNED BY OREGON LAW. Notwithstanding ORS 31.875, 31.878 and 31.885, Oregon law governs noncontractual claims in the following actions:

(1) Actions in which, after the events giving rise to the dispute, the parties agree to the application of Oregon law.

(2) Actions in which none of the parties raises the issue of applicability of foreign law.

(3) Actions in which the party or parties who rely on foreign law fail to assist the court in establishing the relevant provisions of foreign law after being requested by the court to do so.

(4) Actions filed against a public body of the State of Oregon, unless the application of Oregon law is waived by a person authorized by Oregon law to make the waiver on behalf of the public body.

(5) Actions against an owner, lessor or possessor of land, buildings or other real property situated in Oregon that seek to recover for, or to prevent, injury on that property and arising out of conduct that occurs in Oregon.

(6) Actions between an employer and an employee who is primarily employed in Oregon that arise out of an injury that occurs in Oregon.

(7) Actions for professional malpractice arising from services rendered entirely in Oregon by personnel licensed to perform those services under Oregon law. [2009 c.451 §6]

OR. REV. STAT. § 31.872

PRODUCT LIABILITY CIVIL ACTIONS. (1) Notwithstanding ORS 31.875 and 31.878, Oregon law applies to product liability civil actions, as defined in ORS 30.900, if:

(a) The injured person was domiciled in Oregon and the injury occurred in Oregon; or

(b) The injured person was domiciled in Oregon or the injury occurred in Oregon, and the product:

(A) Was manufactured or produced in Oregon; or

(B) Was delivered when new for use or consumption in Oregon.

(2) Subsection (1) of this section does not apply to a product liability civil action if a defendant demonstrates that the use in Oregon of the product that caused the injury could not have been foreseen and that none of the defendant's products of the same type were available in Oregon in the ordinary course of trade at the time of the injury.

(3) If a party demonstrates that the application of the law of a state other than Oregon to a disputed issue is substantially more appropriate under the principles of ORS 31.878, that issue shall be governed by the law of the other state.

(4) All noncontractual claims or issues in product liability civil actions not provided for or not disposed of under this section are governed by the law of the state determined under ORS 31.878. [2009 c.451 §7]

CHOICE OF LAW

OR. REV. STAT. § 31.875

GENERAL RULES. (1) Noncontractual claims between an injured person and the person whose conduct caused the injury are governed by the law of the state designated in this section.

(2)(a) If the injured person and the person whose conduct caused the injury were domiciled in the same state, the law of that state governs. However, the law of the state in which the injurious conduct occurred determines the standard of care by which the conduct is judged. If the injury occurred in a state other than the one in which the conduct occurred, the provisions of subsection (3)(c) of this section apply.

(b) For the purposes of this section, persons domiciled in different states shall be treated as if domiciled in the same state to the extent that laws of those states on the disputed issues would produce the same outcome.

(3) If the injured person and the person whose conduct caused the injury were domiciled in different states and the laws of those states on the disputed issues would produce a different outcome, the law of the state designated in this subsection governs.

(a) If both the injurious conduct and the resulting injury occurred in the same state, the law of that state governs if either the injured person or the person whose conduct caused the injury was domiciled in that state.

(b) If both the injurious conduct and the resulting injury occurred in a state other than the state in which either the injured person or the person whose conduct caused the injury were domiciled, the law of the state of conduct and injury governs. If a party demonstrates that, under the circumstances of the particular case, the application of that law to a disputed issue will not serve the objectives of that law, that issue will be governed by the law selected under ORS 31.878.

(c) If the injurious conduct occurred in one state and the resulting injury in another state, the law of the state of conduct governs. However, the law of the state of injury governs if:

(A) The activities of the person whose conduct caused the injury were such as to make foreseeable the occurrence of injury in that state; and

(B) The injured person formally requests the application of that state's law by a pleading or amended pleading. The request shall be deemed to encompass all claims and issues against that defendant.

(4) If a party demonstrates that application to a disputed issue of the law of a state other than the state designated by subsection (2) or (3) of this section is substantially more appropriate under the principles of ORS 31.878, that issue is governed by the law of the other state. [2009 c.451 §8]

OR. REV. STAT. § 31.878

GENERAL AND RESIDUAL APPROACH. Except as provided in ORS 31.870, 31.872, 31.875 and 31.885, the rights and liabilities of the parties with regard to disputed issues in a noncontractual claim are governed by the law of the state whose contacts with the parties and the dispute and whose policies on the disputed issues make application of the state's law the most appropriate for those issues. The most appropriate law is determined by:

(1) Identifying the states that have a relevant contact with the dispute, such as the place of the injurious conduct, the place of the resulting injury, the domicile, habitual residence or pertinent place of business of each person, or the place in which the relationship between the parties was centered;

(2) Identifying the policies embodied in the laws of these states on the disputed issues; and

(3) Evaluating the relative strength and pertinence of these policies with due regard to:

(a) The policies of encouraging responsible conduct, deterring injurious conduct and providing adequate remedies for the conduct; and

(b) The needs and policies of the interstate and international systems, including the policy of minimizing adverse effects on strongly held policies of other states. [2009 c.451 §9]

OR. REV. STAT. § 31.880

JOINT TORTFEASORS AND THIRD PARTIES. Notwithstanding ORS 31.870, 31.872 and 31.875, if two or more persons are liable for the same claim, the rights and liabilities between those persons are governed by the law determined for the particular issue under ORS 31.878. If a third party pays compensation to a person injured by the

conduct of another person, the right of the third party to recoup the amount paid is governed by the law determined for the particular issue under ORS 31.878. [2009 c.451 §10]

OR. REV. STAT. § 31.885

AGREEMENTS ON APPLICABLE FOREIGN LAW. Notwithstanding ORS 31.875, 31.878 and 31.880, but subject to ORS 81.100 to 81.135, an agreement providing that an issue or issues falling within the scope of ORS 31.850 to 31.890 will be governed by the law of a state other than Oregon is enforceable in Oregon if the agreement was entered into after the parties had knowledge of the events giving rise to the dispute. [2009 c.451 §11]

OR. REV. STAT. § 31.890

COMMENTARY. The Oregon Law Commission shall make available on the website maintained by the commission a copy of the commentary approved by the commission for the provisions of ORS 31.850 to 31.890. [2009 c.451 §12]