Interest Analysis and Conflicts between Statutes of Limitation

Gary L. Milhollin
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By GARY L. MILHOLLIN*

On September 12, 1960 the William S. Merrell Company applied for permission to market its new drug, thalidomide, in the United States. Merrell extolled the pill's qualities as a somnifer, and promoted it heavily. The drug was already on the market in Canada, England, and Germany, and little difficulty was expected here. Less than one month after filing its U.S. application, Merrell began to arrange for shipments of 1,500 bottles of the tablets for testing in teaching hospitals in the United States.¹

Of course thalidomide was never marketed in the United States. It was tested very widely, however, before the news from Europe caused Merrell to withdraw its United States application. Altogether, the United States testing program distributed pills to 1,248 physicians who treated 15,904 patients. Of these, 3,272 were American women of childbearing age. Fortunately, few American infants were damaged by the testing program before its abrupt end, but citizens of other countries were not so fortunate. In Canada, the victims of thalidomide are beginning now to enter their teens, a time when the enormous burden of the children's handicaps will begin to shift from the parents to the children themselves.

This article will study the conflict of laws issue raised in the case of one of these children, Denis Henry, who sued Merrell in a United States court after his local statute of limitations had run. The discussion will

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* B.S., 1961, Purdue University; J.D., 1965, Georgetown University. Associate Professor of Law, Catholic University of America; Member, District of Columbia Bar.

¹ In an internal memorandum, a Merrell executive expressed the following opinion: "we shall not only hasten to produce tablets for the above [testing] program, but we also might as well get underway with our own production since we have sufficient raw material for 15 million tablets . . . . I do not feel . . . . that we should wait for final approval of our New Drug Application for the initiation of tablet production." Interdepartmental Memo of 10 October 1960, exhibit BB to Supplemental Affidavit of Arthur G. Raynes, in Henry v. Richardson-Merrell, Inc., 366 F. Supp. 1192 (D.N.J. 1973), rev'd, 508 F.2d 28 (3d Cir. 1975).
begin with an analysis of statutes of limitations generally and then examine the complications which borrowing statutes pose.

Quebec, where Denis Henry was born, has a 1-year statute of limitations on personal injury actions, and the statute runs against minors. A year expired before Denis's parents had recovered sufficiently from Denis's birth to think of bringing suit against anyone. Also at that time, Quebec prohibited its attorneys from making contingent fee arrangements. Since Denis's father brought home only $100 per week, the Henrys could not have retained a lawyer even if they had thought of doing so in time. These barriers in Quebec law were formidable, but the Henrys faced still another disability: the Quebec limitation was "prescriptive," which means that when the statute had run, it absolutely extinguished the obligation, cutting off the right as well as the remedy. The Henry case posed the question whether Denis Henry could recover compensation in a foreign forum whose statute of limitation had not run.

A federal diversity court sitting in New Jersey applied governmental interest analysis and found that New Jersey policy would be advanced by applying New Jersey's longer period to the case. On appeal, the Third Circuit accepted interest analysis as the correct approach but reversed because it disagreed with the manner in which the district court had applied it to the facts. The reasoning these courts used contradicts the conventional rule of choice of law for limitations, and probably would have astonished even the scholars who have long criticized the conventional rule. This article will discuss the conventional rule and its critics, will comment upon the Henry holdings, and will present some proposed rules of decision which reflect the new law.

The Conventional Doctrine

American courts have generally decided conflicts between statutes...
of limitation according to the distinction between "substance" and "procedure." The statute of limitations, according to one theory, was a bar only to the remedy: a plaintiff could enforce the right, which continued to exist, elsewhere if a remedy could be found. This theory assumed that the law of the jurisdiction which created the substantive right did not destroy that right by virtue of its statute of limitations; the statute was intended merely to deny a remedy in its courts after a certain time had passed. Thus, the right itself continued and could be enforced wherever a remedy was still available. On the other hand, the theory also assumed that since the forum always applied its own procedure to cases brought in its courts, the forum's period would be applied even to cases in which the "substantive" rights were created by the law of some other state.

In its purest form, this approach ignored the question whether the foreign period was longer or shorter than the one at the forum. Thus, a tort plaintiff barred by the period in effect at the place of injury—the choice of law reference for questions of "substance" under the conventional theory—could go looking for a forum with a longer period and sue there if the defendant could be served. If the period at the defendant's residence had run, however, the plaintiff would be barred there, even though the action remained alive at the place of injury.

As a corollary to the right/remedy distinction, the courts chose not to apply the forum's longer period when the shorter period imposed by the locus of the wrong also limited the "right" itself. If, in addition to barring the remedy, the locus law extinguished the right after a certain lapse of time, then the plaintiff had nothing left to enforce elsewhere, even though some other state's longer period might afford an opportunity for suit. When the law of the locus extinguished the right as well as the remedy, the locus's limitation was deemed "substantive" and was imported by the forum along with the other substantive rules of the locus. The best known formulation of this corollary is found in The Harrisburg, an admiralty case in which recovery was based upon state


10. See id. § 604; De Cervera, The Statute of Limitations in American Conflicts of Law § 3; Lorenzen, supra note 8, at 495. For a more recent case applying the longer statute of the forum, see Bournias v. Atlantic Maritime Co., 220 F.2d 152 (2d Cir. 1955).


12. 119 U.S. 199 (1886).
statutes giving a right of action for wrongful death. These same statutes contained limitations of one year upon the time for bringing suit. The Supreme Court held:

[T]he time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone . . . . The liability and the remedy are created by the same statutes, and the liability and the remedy are, therefore, to be treated as limitations of the right. 18

Thus it was error to apply the forum's longer period. Because of the position taken in The Harrisburg and similar cases, the courts have found it necessary to devise a method for distinguishing those limitation periods which extinguish the "right" from those which bar only the "remedy." The Court did not decide The Harrisburg on constitutional grounds, so the decision did not bind the states to the Harrisburg analysis.

Courts have proposed several tests for separating "substantive" statutes of limitation from "procedural" ones. In The Harrisburg itself, the Court emphasized the fact that actions for wrongful death were purely statutory, unknown to the common law, and so when the legislature created this new right it must have intended for it to be limited by the time for suit specially provided in the enactment. This rationale was referred to as the "same statute" test. In Davis v. Mills, 14 however, the Supreme Court noted that it was not essential that the limitation be in the same enactment; it could be in a different one so long as the limitation "was directed to the newly created liability so specifically as to warrant saying that it qualified the right." 15 This variation became known as the "specificity" test. In Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 16 the court proposed that the foreign limitation be examined to see whether it possessed characteristics which, under forum law, would make it "procedural." If, for example, under

13. Id. at 214.
15. Id. at 454.
16. 43 F.2d 941 (2d Cir. 1930). See also Noe v. United States Fidelity and Guar. Co., 406 S.W.2d 666 (Mo. 1966), in which the Missouri court held that a Louisiana direct action statute, which included venue provisions naming certain parishes in Louisiana as places where the action was to be brought, was procedural in the sense that a person injured in Louisiana by a Louisiana insured could not sue the insured directly in Missouri. The approach in Wood & Selick received a boost when the Fifth Circuit adopted it to decide Ramsay v. Boeing Co., 432 F.2d 592 (5th Cir. 1970). The opinion has been criticized in Comment, A Foreign Statute of Limitations Possessing Attributes Characterized as Substantive Will Bar An Action at the Forum if Barred by the Otherwise Applicable Law of the Foreign Jurisdiction, 37 J. AIR L. & COMM. 235 (1971).
foreign law the defendant waived the limitation by failing to plead it, and if the forum law considered such waivers as procedural, then the limitation was procedural. If the limitation could not be waived under foreign law, and if the forum considered nonwaivable defenses as substantive, then it was substantive. Finally, in *Goodwin v. Townsend*, the court declared the test to be whether the limitation was considered procedural solely according to the courts of the foreign state. All these tests were evaluated in *Bournias v. Atlantic Maritime Co.*, in which the court chose the "specificity" test of *Davis v. Mills* and held that a Panamanian seaman could recover against a Panamanian shipowner under the Panama Labor Code, even though the "non-specific" time limitation of Panama had expired.

In the journals, an avalanche of criticism has greeted the substance-procedure distinction. Professor Lorenzen's view is the most venerable of a long line:

There is no reason, as regards statutes of limitation . . . why the internal test, which classifies them as procedural or as relating to the remedy, should be carried over into the conflict of laws. A right which can be enforced no longer by an action at law is shorn of its most valuable attribute. After the enforcement of the right of action is gone under the law governing the rights of the parties, it would seem clear upon principle that the same consequences should attach to the operative facts everywhere . . . . It follows that no court should enforce a foreign cause of action which is barred by the law governing the substantive rights of the parties.

Thus, when the period at the place of injury bars the tort plaintiff's claim, he may not sue anywhere. According to Lorenzen it does not follow that if the period at the place of injury has not run, the plaintiff is not barred elsewhere. If the shorter period at the forum has expired, the action will also be precluded:

The question affects not merely the parties to the litigation but the interests of the [forum] state as a whole. It relates directly to the administration of justice in the state . . . . The period prescribed by the [forum] statute of limitations itself defines the maximum time within which, in the estimation of the legislature of that state, substantial justice can be done in the particular case . . . . It follows as a matter of course that the maximum period prescribed [by the forum] must apply to all causes of action, irrespective of the place where they may have arisen.

The result under Lorenzen's view would thus be to bar any plaintiff who

17. 197 F.2d 970 (3d Cir. 1952).
18. 220 F.2d 152 (2d Cir. 1955).
20. *Id.* at 497-98.
sues after the expiration of either the period at the locus or the period at the forum. Most conflicts scholars, unlike most courts, have retained this basic critical position up to the present time. Professor Cook, for example, has suggested that the forum court should borrow the foreign procedural rule whenever it can do so without “inconveniencing” itself by taking over too much foreign enforcement machinery. Professor Sedler would have the court adopt the “outcome” test laid down for federal diversity cases in *Guaranty Trust Co. v. York,* so that the foreign procedural rule would apply whenever it would affect the result. In effect these scholars would treat the statute of limitations as

21. “In determining the legal consequences of certain conduct or events it has seemed reasonable to apply foreign substantive law because of some factual connection of the situation with the foreign state; but on the other hand it would obviously be quite inconvenient for the court of the forum, though not unfair to the litigants concerned, to take over all the machinery of the foreign court for the ‘enforcement,’ as we say, of the ‘substantive rights.’ If we admit that the ‘substantive’ shades off by imperceptible degrees into the ‘procedure,’ and that the ‘line’ between them does not ‘exist,’ to be discovered merely by logic and analysis, but is rather to be drawn so as to best carry out our purpose, we see that our problem resolves itself eventually into this: How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?

“Against the inconvenience involved in learning the foreign rule is the fact that so closely are ‘procedure’ and ‘substance’ connected that in many cases a refusal to accept the foreign rule as to a matter of falling into the doubtful class will defeat the policy involved in following the foreign substantive law.” Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 YALE L.J. 333, 343-44, in W. Cook, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS 154, 166 (1942).

If Professor Cook’s argument is applied to the statute of limitations, it is clear that the foreign period would be characterized as “substantive,” since it is convenient to ascertain. Of course, the more basic point is that the distinction between substance and procedure should be used in conflicts theory only after determination of the purpose to be served by such a distinction.


23. Sedler, The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws, 37 N.Y.U. L. REV. 813 (1962). Professor Sedler asks: “Are statutes of limitation ‘procedural’ for conflicts purposes because they destroy only the remedy and not the right? Or do they destroy only the remedy and not the right because they are procedural for conflicts purposes?” Id. at 846. When the Supreme Court adopted the “outcome” test in *Guaranty Trust,* it took pains to reject the "substance-procedure" method for dealing with the statute of limitations: “it is . . . immaterial whether statutes of limitation are characterized as ‘substantive’ or ‘procedural’ in State court opinions in any use of those terms unrelated to the specific issue before us . . . . [T]he intent of [the Erie] decision was to insure that . . . the outcome of the litigation in the federal court should be substantially the same . . . . as it would be if tried in a State court.” *Guaranty Trust Co. v. York,* 326 U.S. 99, 109 (1945).

Since the policy of preventing forum shopping between state and federal courts is analogous to the conflicts objective of preventing it among state courts, it follows that the shorter term of the locus should apply because it determines the outcome. It is important to note, however, that since deciding *Guaranty Trust* the Supreme Court has
"substantive" for choice of law. The Restatement of Conflict of Laws Second rejects outright the substance-procedure distinction in its comments,24 but in the "black letter" portion the Restatement Second still follows the older doctrine. The forum may apply its own longer period when the action is barred at the locus,25 with an exception, still following the old corollary, in favor of the locus period when it is "substantive."26

How would Denis Henry fare under the older doctrine, and would he fare any better under the rule advocated by scholars? Under the older doctrine he could bring an action in any state in which the period had not run, the statute of limitations being "procedural," unless the statute at the locus were deemed "substantive." Since the Quebec statute was found to be "substantive," he would be barred everywhere under the older rule. The result would be the same under the Restatement Second. Under the rule generally advocated by scholars, he would be barred because the "substantive" tort liability is furnished by the law of Quebec, and "no court should enforce a foreign cause of action which is barred by the law governing the substantive rights of the parties."27

The Modern Approach

The reasoning behind the Henry case is an example of the new

24. "These characterizations, [of something as either substantive or procedural] while harmless in themselves, have led some courts into unthinking adherence to precedents that have classified a given issue as 'procedural' or 'substantive,' regardless of what purposes were involved in the earlier classifications. . . . To avoid encouraging error of that sort, the rules stated in this Chapter do not attempt to classify issues as 'procedural' or 'substantive'. Instead, they face directly the question whether the forum's rule should be applied." Restatement (Second) of Conflict of Laws § 122, comment b at 352 (1969).

25. "An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state except as stated in § 143." Id. § 142(2). The only justification given is that "each state determines for itself when a claim becomes stale." Id. comment g at 397.

26. "An action will not be entertained in another state if it is barred in the state of the otherwise applicable law by a statute of limitations which bars the right and not merely the remedy." Id. § 143. The principal rationale for this section is that section 142(2), quoted in note 25 supra, has been criticized, "Dissatisfaction . . . has been felt with that part of the rule [§ 142(2)] which permits maintenance of an action that is barred by the statute of limitations of the state of otherwise applicable law but is not barred by the statute of limitations of the forum." Id. § 143 comment a at 400.

27. Lorenzen, supra note 8, at 496-97.
approach. In *Henry*, the federal diversity court sitting in New Jersey faced a New Jersey precedent rejecting the older rule and adopting the scholars' approach. *Heavner v. Uniroyal, Inc.* had held that New Jersey would not apply its own longer period to a claim for personal injuries barred under the shorter period of North Carolina, the place of injury. A defective tire purchased in North Carolina by the North Carolina plaintiff had blown out and caused the plaintiff's truck to crash into an abutment. The *Uniroyal* court held that since New Jersey had "no substantial interest in the matter," and since all parties were amenable to the jurisdiction of North Carolina, New Jersey would hold the suit barred because North Carolina would bar it also. Thus, the court broke with the older rule and treated the statute of limitations as "substantive," importing the locus period into forum law just as it would import the other "substantive" provisions of locus law.

In *Henry*, it was necessary to apply this precedent in the context of interest analysis, which was New Jersey's choice-of-law technique for

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29. *Id.* at 140-41, 305 A.2d at 418.
30. One of the best short descriptions of interest analysis is the following:
    "1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.
2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applied to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purposes.
3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.
4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.
5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest." Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L.J. 171, 178 in B. Currie, *Selected Essays on Conflict of Laws* 177, 183-84 (1963). New Jersey's brand of interest analysis is set out principally in three cases: *Rose v. Port of New York Authority*, 61 N.J. 129, 293 A.2d 371 (1972); *Pfau v. Trent Aluminum Co.*, 55 N.J. 511, 263 A.2d 129 (1970); *Mellk v. Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967). The cases and their methodology are discussed in Note, *Conflict of Laws—The Application in New Jersey of the Governmental Interest Analysis Approach to Choice of Law Problems of Tort Liability*, 3 Rutgers (Camden) L.J. 165 (1971).
deciding "substantive" questions in tort cases. If New Jersey's contacts with the transaction were such that, by holding the defendant, the court would advance a New Jersey policy, then New Jersey would apply its own law rather than looking mechanically to the law of the place of injury. The Third Circuit found that New Jersey's longer period contained two policies: deterrence of wrongful acts, and compensation of persons injured by such acts. The court held that enforcing the plaintiff's claim would not promote the policy of deterrence because Merrell made the decision to manufacture, test, and distribute thalidomide in Ohio, not New Jersey. Enforcing the claim would not advance the second policy, compensation, because the court assumed the limitation was designed for the benefit of plaintiffs from New Jersey, not Quebec. Barring the claim would advance Quebec's interests because Quebec's shorter period expressed policies of respose for the benefit of defendants, such as Richardson-Merrell, doing business in Quebec and of judicial economy by discouraging stale claims (but that court-protecting policy was irrelevant because the case was not before a Quebec court). Thus the court applied Quebec law in order to advance the policy of the only interested state.

Later in this article I will argue that the Third Circuit erred in its assessment of New Jersey's deterrence policy. At this point, however, we need simply note that the analysis in Henry differs radically from the traditional rule. The reasoning of Henry, when combined with that of Uniroyal, completely upsets the older doctrine. First, by treating the statute of limitations as "substantive," the court denies the forum's longer period to a plaintiff whose recovery is not required by any "substantive" policy of the forum. Second, the corollary of the older doctrine, the "specificity" test of Davis v. Mills, is set on its head since the court ignores even "substantive" periods at the place of injury whenever the "substantive" interests of the forum are advanced by applying the longer forum period. Third, the decision casts an entirely new light on the scholarly criticism urging "substantive" treatment for the statute of limitations. When the scholars argued that the forum should always apply the period of the state whose substantive law creates the right, they hardly could have anticipated that under interest analysis

32. Id.
33. Id. at 38.
34. The district court held that the question whether Quebec's period was "substantive" was "no longer a particularly relevant consideration in resolving the statute of limitations issue . . . ." Henry v. Richardson-Merrell, Inc., 366 F. Supp. 1192, 1197-98 (D.N.J. 1973).
the policy expressed by the forum's longer period, that of deterrence or compensation, might be defeated by applying the shorter period of another state; they could not have foreseen that states other than that of the locus of injury could also find their "substantive" interests advanced by applying their longer local periods. Of course, this result is hardly a reason for faulting the scholars, since their work pointed the direction toward interest analysis before anyone realized the full implications of that approach.

Under the reasoning of Henry, neither the older rule, nor its corollary, nor the Restatement Second is any longer the law in New Jersey. Henry and the cases like it will ultimately obliterate the distinction between substance and procedure in choice of law. More specifically, the effect of Henry is to show that interest analysis and the distinction between substance and procedure are fundamentally irreconcilable.

Before examining other recent cases, it would be well to set out the specific methodology by which one might apply interest analysis to the statute of limitations. As the Henry court noted, two basic policies are thought to underlie statutes of limitation: repose for defendants and judicial economy. Regarding the first, it is thought unfair to ask defendants to respond to claims beyond a certain time because evidence and witnesses may have disappeared and because the lingering fear of belated judgments imposes too great a restraint on business. Regarding the second policy, the assumption is that by limiting its docket to the more current disputes, the court encourages plaintiffs to act promptly, avoids the burden of weighing stale evidence, and shifts the judiciary's efforts to matters of greater urgency.35

Given these policies, it follows, according to interest analysis, that applying the foreign state's shorter period would advance the foreign state's policy of repose whenever that period appears designed to benefit the defendant at bar (when, for example, the defendant is a resident of the foreign state). When the defendant is not a resident of that foreign state and when there is no other connection between the defendant and that state sufficient to warrant applying the foreign period to him, the court should not apply the foreign state's shorter period because no policy of the foreign state would be advanced by doing so. In like manner, applying the forum's shorter period would advance the forum's

35. "New Jersey's statute of limitations policy is somewhat similar to that of Quebec. [I]t . . . is chiefly designed to penalize dilatoriness, stimulate litigants to prosecute causes of action diligently, and spare the courts and citizens of this State from litigating stale claims." Id. at 1202. See also Ester, Borrowing Statutes of Limitation and Conflict of Laws, 15 U. FLA. L. REV. 33 (1962) [hereinafter cited as Ester].
policy of repose whenever the defendant by his residence, domicile, or other connection with the case was intended to benefit from that forum policy.

The policy of economy of judicial effort would be advanced by applying the forum's shorter period to any action brought in a forum court simply because of the forum's interest in its own judicial administration.36 Accordingly, this policy could never be advanced by applying a shorter foreign period because the case, by definition, is not in a foreign court.

Statutes of limitation also express, by negative implication, a policy of protecting plaintiffs. The exact point in time at which an action is barred represents a compromise between the desire to protect the defendant and the judiciary and the desire to afford the plaintiff a reasonable time in which to bring an action.37 In New Jersey, for example, the regular period for personal injuries was tolled for the benefit of minors.38 This provision is a clear example of a policy designed specifically to benefit plaintiffs. Another is the tolling which commonly occurs during the defendant's absence from the state.

It would follow from this plaintiff-protecting policy that whenever it appears that the forum's longer period was designed to benefit the plaintiff at bar, the forum should advance its policy by applying its own law. If the foreign period is the longer, and if the plaintiff at bar resides in the foreign state, the plaintiff-protecting policy of the foreign state can also be advanced by applying its longer period. A forum can never apply a longer foreign period, however, without defeating the policy of judicial economy expressed by the shorter period at the forum. Whether the longer period of either state is designed to benefit the plaintiff at bar depends, of course, upon the connection between the respective states and the transaction, and between the respective states and the plaintiff.

As these policies are applied to particular cases, the result would appear to depend upon the governmental interests generated by the

36. See Schenck v. Piper Aircraft Corp., 377 F. Supp. 477, 480 (W.D. Pa. 1974): "While we would agree that the significant contacts of this cause of action with Pennsylvania are minimal, being solely the domicile of the defendant corporation, nevertheless Pennsylvania has a valid public interest in the administration of its judicial system sufficient to support a separate conflict of laws rule on the applicable statute of limitations on actions brought under foreign law."

37. See Peterson v. Roloff, 57 Wis. 2d 1, 6, 203 N.W.2d 699, 702 (1973): "Two conflicting policies confront each other when statutes of limitation are presented: (1) that of discouraging stale and fraudulent claims, and (2) that of allowing meritorious claimants, who have been as diligent as possible, an opportunity to seek redress for injuries sustained."

particular facts and parties at bar. A "false conflict" would exist, for example, if both parties resided in the forum in a case in which the injury occurred in another state and the forum's period was longer. The plaintiff-protecting policy of the forum's longer period could be advanced without impairing any interest of the foreign state since the defendant did not reside in the foreign state. If the defendant did reside in the foreign state, however, a "true conflict" would arise because the forum could not advance its policy of protecting the local plaintiff without frustrating the foreign state's policy of granting repose to its defendant. 39 One would then expect the forum either to weigh the competing interests, or to apply its own law. 40

The foregoing is a general statement of what should be a court's approach according to interest analysis. To what extent have the courts begun to use it?

_Baldwin v. Brown_, 41 decided in 1962, is one of the earliest cases applying interest analysis to a conflicts problem involving the statute of limitations. In _Baldwin_, one Michigan citizen injured another in Ontario. The Michigan court refused to apply the shorter Ontario period:

The purposes of statutes of limitations are, at most, to protect courts and defendants. The Ontario legislature can claim no interest in protecting Michigan courts against imposition nor any interest in protecting Michigan defendants against stale claims. Hence, there is no good reason for allowing the time in which the action may be brought to be governed by Ontario law. . . . Michigan, as the forum state and as the residence of defendant, has declared a policy regarding limitations of actions in its limitations statute. There is no good reason that this policy should be made to give way to the differing view of any other state or country in a situation such as this. 42

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40. "[W]here several states have different policies, and also legitimate interests in the application of their policies, a court is in no position to 'weigh' the competing interests, or evaluate their relative merits, and choose between them accordingly. . . . A court need never hold the interest of the foreign state inferior; it can simply apply its own law as such." Currie, _Notes on Methods and Objectives in the Conflict of Laws_, 1959 _DUKE L.J._ 171, 176 in B. CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS 177, 181-82 (1963).


42. _Id._ at 51 (citation omitted).
The court in Baldwin made a clear move to advance the plaintiff-protecting policy of its own longer statute and found that it could do so without impairing any policy of the foreign state because that state's shorter period was not intended to benefit the defendant at bar. Finding a "false conflict," the court abandoned the traditional approach and applied the law of the only interested state.

In 1965 the Seventh Circuit decided Gianni v. Fort Wayne Air Service, Inc., simply basing the decision on the reasoning given in a companion case, Watts v. Pioneer Corn Co., which involved a conflict in the measure of damages for wrongful death. Both cases applied Indiana law. In Watts, an Indiana citizen wrongfully killed a Kentucky resident in Illinois, and the surviving beneficiaries, also Indiana citizens, sued in Indiana. The Indiana wrongful death act apportioned damages according to the degree of dependence of the beneficiaries on the deceased; this method of calculation would have resulted in a smaller recovery than the rule in Illinois permitted. The court ignored the law of the locus and applied forum law:

The five potential beneficiaries as well as the two defendants are all residents of Indiana. If the Illinois statute applies, the Indiana requirement of dependence as a prerequisite for recovery in a wrongful death situation would be circumvented by the fortuitous occurrence of the accident in Illinois. That state does not have a sufficiently substantial interest in the recovery of damages by Indiana beneficiaries from Indiana defendants.

Since the court based the result in Gianni on the same reasoning, it has held that interest analysis should be adopted to resolve conflicts between statutes of limitation as well as conflicts between statutes limiting damages. Apparently the court found the similarity between these issues too obvious for comment. Despite a contrary provision of "substantive" law in effect at the locus, the court in Watts advanced the forum's defendant-protecting policy by applying a local statute in favor of a local defendant whom the policy was designed to protect.

43. 342 F.2d 621 (7th Cir. 1965).
44. 342 F.2d 617 (7th Cir. 1965).
45. Id. at 620.
46. The court in Watts assumes, of course, that Illinois has no interest in having its more plaintiff-protecting measure apply, since no litigant was a resident or citizen of that state. An important court, however, has just held that the state of injury expresses a deterrent policy when it grants higher damages for wrongful death, and that this policy is advanced by applying it to all defendants who cause injuries within its borders. Hurtado v. Superior Ct., 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974). See also Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973); Kell v. Henderson, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (Sup. Ct. 1965), aff'd, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966). The state of injury may also have an interest in
In *Gianni* the plaintiff's decedent was killed in an airplane crash in Massachusetts. The defendant, an Indiana corporation, asked the Indiana court to apply the shorter "substantive" period of Massachusetts; instead, the court applied the longer period of Indiana. Since the court in *Gianni* simply rested its decision on the *Watts* case, we may work through the reasoning the court might have used. Clearly the longer forum period expressed no policy of repose or judicial economy under these facts since the action was still timely in Indiana. Thus, the court would have concluded that no local policy barred recovery. No policy of any foreign state stood in the way, either, since the defendant did not reside in any foreign state and the case was not in a foreign court. The question, then was whether recovery had to advance some state's plaintiff-protecting policy before the forum would entertain the suit. The shorter period of Massachusetts, the place of injury, declared no such policy.

The court could have consulted the period in Connecticut, the residence of the plaintiff and his decedent. If it were longer, one could argue that it should be interpreted as favoring compensation of its residents in the courts of another state for injuries received in yet a third state. If the issue here, instead of the limitation of time for suit, had been limitation on damages for wrongful death, the facts in *Gianni* would have been the same as those in *Reich v. Purcell*,47 in which the California court declared that Ohio, the plaintiff's residence, was the state whose policy would be advanced in a case in which the plaintiff's decedent was wrongfully killed in Missouri by a California defendant. Missouri limited damages for wrongful death; Ohio and California did not. The court in *Reich* held that Missouri's defendant-protecting policy was not intended to shield "travelers from states having no similar

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limitation."\textsuperscript{48} \textit{Gianni} and \textit{Reich} are indistinguishable if the statute of limitation is really "substantive." Statutes of limitation and limitations on damages are both part of the total scheme by which a state seeks to achieve, in tort cases, its policies of compensation and deterrence without placing undue burdens on defendants. Under interest analysis there is no rational basis for distinguishing these devices except when the policies they express bear differently on the facts of a given case. On the facts in \textit{Gianni} and \textit{Reich}, the plaintiff-protecting policies apply in the same way, and it follows that any court following \textit{Reich} should consider the Connecticut period when faced with the facts in \textit{Gianni}.

In \textit{Dindo v. Whitney},\textsuperscript{49} decided in 1970, an automobile crash occurred while the parties were traveling together through Quebec on a hunting trip to northern Maine. The Vermont plaintiff sued the New Hampshire defendant in New Hampshire, and the defendant asked the court to apply Quebec's shorter period because it was "prescriptive." The court said, "[W]e attach no weight to the fact that under the Quebec statute plaintiff's cause of action [was] 'extinguished.' "\textsuperscript{50} The interests were analyzed as follows:

The parties involved have only the most fortuitous relations to Quebec. Quebec's only interests underlying its statute of limitations are to protect its own citizens, and possibly its own courts, from "stale" claims. Application of the Quebec limitation period here furthers neither Quebec interest, but would frustrate New Hampshire's interest to some degree, for New Hampshire has said that its citizens should be suable and its courts open for a period long enough to permit this plaintiff's claim.\textsuperscript{51}

It is true, of course, that applying Quebec law could advance no Quebec interest. It does seem odd, however, for the court to conclude that Quebec has no interest in protecting the defendant because he does not live in Quebec, and at the same time hold that New Hampshire does have an interest in protecting the plaintiff who does not live in New Hampshire. Surely New Hampshire's interest in the Vermont plaintiff is no greater than Quebec's interest in the New Hampshire defendant. It would be more logical for the New Hampshire court simply to recognize Vermont's interest in compensating its own plaintiff. Vermont's period

\textsuperscript{48} 67 Cal. 2d at 556, 432 P.2d at 731, 63 Cal. Rptr. at 35.
\textsuperscript{50} 429 F.2d at 26.
\textsuperscript{51} Id.
had not yet expired. This method, at least, was the one used by the California court in Reich.

In 1973 two more courts switched to interest analysis in dealing with statutes of limitation. *Air Products & Chems., Inc. v. Fairbanks Morse, Inc.* was a buyer's suit, in Wisconsin, for breach of warranty and strict liability against the seller of large electric motors. The plaintiff, a Delaware corporation, had its principal place of business in Pennsylvania; the defendant, also a Delaware corporation, had its principal place of business in New York. Under Wisconsin's longer period the suit was still timely. The shorter Pennsylvania limit had expired. Although Wisconsin was the place of manufacture, the parties agreed that all issues other than the statute of limitations would be decided under Pennsylvania law. Before addressing the limitations issue, the court looked back over its doctrinal voyage through choice of law. The court noted that it had first broken with *lex loci* by adopting "center of gravity." Then it had "refined" the concept of "center of gravity" by turning to a list of "choice-influencing considerations." In order to decide the present case, however, the court turned to interest analysis:

A determination that Wisconsin's six-year statute controls would in no way affect any legitimate interest of Pennsylvania since their statute, like ours, is designed to protect defendants and in this case, Air Products, the Pennsylvania resident, is the plaintiff—not the defendant. Likewise, Pennsylvania is in no position to in any way influence what Wisconsin feels to be an appropriate period of protection for both itself and defendants from stale lawsuits.

In *Farrier v. May Dep't Stores Co.*, the plaintiff, a California

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52. 58 Wis. 2d 193, 206 N.W.2d 414 (1973).
53. Id. at 202, 206 N.W.2d at 418, citing Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).
54. The "choice influencing considerations" were listed as follows:
"Predictability of results;
"Maintenance of interstate and international order;
"Simplification of the judicial task;
"Advancement of the forum's governmental interests;
"Application of the better rule of law."
Id. at 202, 206 N.W.2d at 418, quoting Heath v. Zellmer, 35 Wis. 2d 578, 596, 151 N.W.2d 664, 672 (1967). See R. Leflar, *supra* note 8, at 245.
55. 58 Wis. 2d at 203-04, 206 N.W.2d at 419. The court also attempted to find a Wisconsin policy favoring the plaintiff: "Moreover, by the decision of the legislature to permit aggrieved parties six instead of four years to prosecute their claims, a decision contrary to the recommended period by drafters of the Uniform Commercial Code which was ultimately adopted in Pennsylvania, the legislature determined that the interests of Wisconsin are best advanced by a longer period. We affirm the order sustaining demurrers to defendants' affirmative defenses on the statute of limitations." Id. at 204, 206 N.W.2d at 419.
citizen residing in Virginia, was injured by a fall while in the defendant's Virginia store. Virginia's shorter two-year period had expired when the action was filed in the District of Columbia. It was still timely, however, under District law. After explaining that the District had adopted inter-

est analysis, the court observed that “[t]here is no reason why the *lex fori* rule... should not similarly be superseded by the interest analysis doctrine in tort cases where there are conflicts between statutes of limitations.” The court's language paralleled that in *Air Products* when it analyzed the interests:

The purpose of both the Virginia and District of Columbia statutes of limitations is to protect domiciliaries from the prosecution of stale claims... The District of Columbia has no relation to the plaintiff, a Virginia resident, and no person or property in the District of Columbia has been adversely affected by the alleged act of negligence which occurred in Virginia... Thus there is no interest of the District of Columbia which compels the application of its statute. Virginia is the only jurisdiction whose interest would be served by the application of its laws.

*Farrier* was followed in 1974 by another District of Columbia case, *Cornwell v. C.I.T. Corp.* The plaintiff, a Virginia citizen, suffered injuries while riding in the defendant's airplane when it crashed on takeoff at Anchorage, Alaska. He brought his action in the District of Columbia against the airplane owner, the C.I.T. Corporation of New York, and the operator, a Tennessee corporation. The defendant pleaded the two-year periods of Virginia, Alaska, and the Warsaw Convention. The District's three-year period had not expired. The court said that “[i]n consequence to the abandonment of the outdated notion that statutes of limitations are 'procedural' in character, the door is now open in this jurisdiction for a rational consideration of the limitations question...” Citing *Farrier*, the court held that “[t]he District of Columbia has no relationship to the instant dispute aside from the fact that C.I.T.

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58. 357 F. Supp. at 191.
59. *Id.* It should be noted here that if the accident in *Farrier* had occurred in the District, one would expect the District to apply its longer period to advance the District's interest in deterring negligence and compensating medical creditors. See Gaither v. Meyers, 404 F.2d 216 (D.C. Cir. 1968). See also Hurtado v. Superior Ct., 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974); see note 46 supra. It also should be noted that under the traditional theory, or that of the *Restatement Second, Farrier* would have been decided for the plaintiff by a “procedural” characterization of the statute of limitations. This latter result, of course, would have been wholly irrational because under the facts the District has no interest whatever in the case.
61. *Id.* at 664.
has an agent here and, therefore, is subject to service of process." It followed that the court "would only apply the D.C. Statute of Limitations if that was the result called for under the 'interest analysis' formula of the local conflict of laws rule." Other decisions by important courts seem simply to have assumed that interest analysis would apply to statutes of limitation.

**Some Tentative Rules**

What conclusions can one draw from all these cases? At least, one can say that a significant number of courts following interest analysis have rejected any distinction between substance and procedure, and have found, quite explicitly, that interest analysis provides a satisfactory means for resolving conflicts between statutes of limitations. Given the basic premise of interest analysis, that solutions to choice of law problems can be rational only upon consideration of the relevant governmental policies, it seems logical to treat conflicts between statutes of limitation the same as conflicts between other rules of law. Courts following interest analysis should, therefore, be expected to apply it eventually to statutes of limitation. In those courts which have already done so, a

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62. *Id.* at 665.

63. *Id.* The court also relied upon language by the District of Columbia hinting that interest analysis was required for the statute of limitations. See Nyhus v. Travel Management Corp., 466 F.2d 440, 443 n.11 (D.C. Cir. 1972).

64. The Ninth Circuit, for example, affirmed the decision in a California diversity case which held that the shorter forum period barred action by citizens of Missouri against a California defendant for injuries sustained in a California accident. The court said that "[u]nder the California significant contacts approach, we find too little Missouri significant contacts and too many in California to apply the Missouri statute." Horton v. Jessie, 423 F.2d 722 (9th Cir. 1970) (*per curiam*); cf. Cuthbertson v. Uhley, 509 F.2d 225 (8th Cir. 1975) (Minnesota diversity case applying the shorter forum period by rejecting interest analysis). In another California diversity case, the court granted plaintiff's motion to transfer from a forum whose period had run to a forum where the action was still timely. The court said the original forum "no longer had [any] substantial connection" with the case. Les Schwimley Motors, Inc. v. Chrysler Motors Corp., 270 F. Supp. 418, 421 (E.D. Cal. 1967). In a Kentucky diversity case, Wisconsin plaintiffs suing an Alabama defendant in Kentucky after Kentucky's period had expired were granted leave to amend to show that some other state had a "more significant relationship with the occurrence." Gore v. Debaryshe, 278 F. Supp. 883, 884 (W.D. Ky. 1968). And finally, the appellate division of the Supreme Court of New York affirmed a recovery for the wrongful death of a New Yorker killed in Massachusetts, despite the "specific" period of limitation contained in the Massachusetts act. Paris v. General Elec. Co., 29 App. Div. 2d 939, 290 N.Y.S.2d 1015 (1968) *aff'd mem.* 54 Misc. 2d 310, 282 N.Y.S.2d 348 (Sup. Ct. 1967).

65. There could be a considerable number. For a recent list of the jurisdictions following interest analysis, see Weintraub, supra note 39, at 234.
pattern of analysis is emerging which can be identified and even anticipated. A set of “rules” might be stated as follows:

(I) If the forum’s period is shorter, the forum will apply its own law.

The reason for this first and simplest of rules is that the forum’s policy of judicial economy considers the claim to be stale. If the defendant was intended to benefit from the forum’s policy of repose, there is an additional reason for applying the forum period. Whenever the longer foreign period was intended to benefit the plaintiff, there will be a “true conflict” with the forum’s policy of judicial economy and also with the forum’s policy of repose if it was intended to benefit the defendant. In such cases the forum would have no reason to prefer the foreign state’s policy to its own and should apply its own law.

(II) If the foreign period is shorter, it will be applied whenever

(1) the defendant was intended to benefit from it and
(2) neither the forum’s longer period nor any other longer period was intended to benefit the plaintiff.

This situation presents a “false conflict” in the sense that no policy of the forum or of any other state really opposes advancing the defendant-protecting policy of the foreign state. An illustration is *Farrier v. May Dep’t Stores Co.*,66 in which the shorter period of Virginia, the place of injury, expressed a policy of protecting its resident defendant, and the longer period of the District of Columbia expressed no policy of protecting the non-resident plaintiff. A similar result was reached by similar reasoning in *Heavner v. Uniroyal, Inc.*,67 it follows here that the policy of the only state with a true interest, the foreign state, should prevail.

(III) The shorter foreign period will not be applied whenever it is not intended to benefit the defendant and the longer forum period is designed to benefit the plaintiff.

Here also there is a “false conflict,” because the forum can advance its policy of protecting the plaintiff without defeating any defendant-protecting policy of the foreign state. This situation is illustrated by the case of *Baldwin v. Brown*,68 in which the Michigan court applied the longer Michigan period in behalf of a Michigan plaintiff. The court held that the shorter period of Ontario, the place of the injury, expressed no relevant interest because the defendant resided in Michigan. Ontario's

only contact was fortuitous and the forum could advance no defendant or court-protecting policy of Ontario.

Note that this "false conflict" analysis might produce a different result than would the "center of gravity" or "grouping of contracts" approach used by the Restatement Second. If one ignores the Restatement's sections on limitations, and treats the statute of limitations as "substantive," one would refer to the "state of the most significant relationship," which, for a personal injury case, may well be the locus of injury and negligence. Since in Baldwin the "false conflicts" analysis would assume a clear forum interest because of the plaintiff's residence and a total lack of locus interest because of the defendant's residence, the court would undoubtedly apply forum law. Another point of difference with the Restatement Second is that under interest analysis it is irrelevant in a false conflict whether or not the period at the locus of injury is characterized as "substantive." The decision of the locus to "extinguish" a claim barred by the locus can have little meaning in a case in which the defendant was not intended to benefit from that period. Had the issue in Baldwin been a guest statute at the locus or a locus limit on damages for wrongful death, a Michigan court would not have hesitated under interest analysis to apply forum law if the defendant was not from the locus and if the plaintiff was from the forum.


70. Under the Restatement Second the choice of law reference is to the place of injury "unless some other state has a more significant relationship . . . ." Restatement (Second) of Conflict of Laws § 146 (1969). One determines this latter point by referring to the following principles in section 6: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. Id. § 6.

When considered in light of the facts in Baldwin, principle (b) indicates that the Michigan period should apply, since the forum's interest would be advanced by applying the forum's longer period in behalf of the local plaintiff. Principle (c) would not suggest the Ontario period, however, because Ontario's policy would not require the protection of Michigan defendants from Michigan plaintiffs. The other principles are rather uncertain in application. The only other guide declares: "subject only to rare exceptions, the local law of the state where conduct and injury occurred will be applied to determine whether the actor satisfied minimum standards of acceptable conduct." Id. § 145, comment d at 417.

71. Section 143 of the Restatement Second looks to the place of injury when that state's limitation is "substantive." See note 26 supra.

those issues the absence of a "right" under locus law would have been irrelevant. It should also be irrelevant whether or not the locus has "extinguished" a right which it once gave.

(IV) The court will not apply a shorter foreign period whenever it is not intended to benefit the defendant and some other foreign state intended its longer period to benefit the plaintiff.

A court would resolve this "false conflict" the same way as the others. In Dindo v. Whitney,78 where the New Hampshire court allowed a Vermont plaintiff to recover against a New Hampshire defendant for injuries received in Quebec, the court found a "false conflict" because it could advance Vermont's plaintiff-protecting policy without defeating any interest of Quebec. If the forum period had expired in Dindo, the suit would have been barred under Rule I. If the Vermont period had expired, the conflict would fall under Rule V.

(V) The shorter foreign period may or may not be applied whenever:

(a) It is intended to benefit the defendant and the longer period of the forum or some other foreign state is intended to benefit the plaintiff, or

(b) It is not intended to benefit the defendant and neither the longer period at the forum nor that of any other state is intended to benefit the plaintiff.

In (a) above there is a "true" conflict. When the plaintiff resides in the forum state, the forum cannot advance its plaintiff-protecting policy without defeating the foreign state's defendant-protecting policy. If there is no reason for the forum to sacrifice its own policy, it should apply its own law. The policy of judicial economy which the shorter foreign period expresses is irrelevant, of course, because the case is not in a foreign court. One may argue that when the entire transaction occurs in the defendant's home state, it would be chauvinistic for the forum to apply its own law simply because the plaintiff is a forum resident. Of course, the forum applied its own law every time under the traditional theory, because limitations were labeled as "procedural." One cannot, however, justify a chauvinistic result by pointing to its existence under earlier theories. To use interest analysis, one must decide explicitly whether domicile alone generates enough forum interest to override the interest of the locus. If the longer locus period expresses a policy of repose for defendants domiciled at home, then locus policy is frustrated

73. 429 F.2d 25 (1st Cir. 1970).
by allowing suit in the forum after the locus period expires. The policy of repose, as distinguished from that of judicial economy, would be relevant wherever the plaintiff sued. Should the forum nevertheless advance its own policy by applying its own period to its own plaintiffs? The courts have hesitated when the defendant may have relied upon his own law in a transaction occurring wholly within his own state. In Neumeier v. Kuehner, a guest statute case involving an Ontario plaintiff, the New York court stated, in dictum: "When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile." In Rosenthal v. Warren, however, the Second Circuit disregarded Massachusetts law in a New York diversity suit for the wrongful death of a New Yorker who had gone to Massachusetts to be operated upon there by a Massachusetts physician. The only real contact with New York was the plaintiff's residence. Nevertheless, the court predicted that residence would be enough under the New York decisions. It is unknown, of course, whether or not New York would really go this far; the dictum in Neumeier suggests that it would not.

Are decisions such as Neumeier and Rosenthal, which weigh the forum interest on issues such as guest statutes and damage limitations, 

74. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).
77. This conclusion is doubtful. None of the cases relied upon by the court really compels its result, and the dictum in Neumeier is contra. The cases relied upon were Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968); Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). In Miller, the court expressly held that no locus interest existed because the defendants had moved from the locus to the forum while the case was pending. In Tooker, the defendant was a citizen of the forum, not the locus. And in Kilberg, the plaintiff's decedent had purchased tickets and departed from the forum on a regularly scheduled flight—the crash of which in the locus was fortuitous. See also Pryor v. Swarner, 445 F.2d 1272 (2nd Cir. 1971) (New York plaintiff failed to avoid the guest statutes of Ohio and Florida when he was injured in an Ohio accident allegedly caused by a Florida defendant).
78. But see Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974). In Turcotte, Rhode Island applied its own law of strict liability and damages to a Massachusetts auto crash in which a Rhode Island passenger was burned to death. The suit alleged negligent placement of the gas tank during manufacture in Michigan. The auto, which had been sold in Massachusetts to the driver, also a Rhode Island resident, exploded on impact in a rear-end collision.
really precedents for a court which weighs conflicting periods of limitation? The answer would seem to be "yes" when the forum's period is the longer, for then the forum necessarily must assess the plaintiff-protecting policies expressed by the forum's period. A longer time for suit is simply an ancillary means for advancing the same primary policies of compensation and deterrence which the forum has declared in its decisions on guest statutes and damage limitations. If the forum's contacts generate enough forum interest to apply forum law on those issues, the same should be true for the forum's longer period of limitations.79

A true conflict also exists when neither party resides in the forum and the transaction occurred elsewhere. In such a case, the "disinterested" forum must weigh the conflicting policies of the concerned states. One would expect the forum to be guided by the same considerations—set forth above—as would apply if one of the parties were a forum resident.80

Part (b) of Rule V presents a wholly different problem. When the shorter foreign period is not designed to benefit the defendant and the


80. Several weighing tests have been proposed for resolving true conflicts between rules of law other than limitations. See, e.g., D. CAVERS, THE CHOICE OF LAW PROCESS 114-203 (1965); Baxter, Choice of Law and the Federal System, 16 STAN. L. REV. 1, 18-19 (1963). The variation in judicial approach is illustrated by the following two cases. In Thomas v. United Air Lines, Inc., 24 N.Y.2d 714, 249 N.E.2d 755, 301 N.Y.S.2d 973 (1969), cert. denied, 396 U.S. 991 (1969), suit was brought in New York for the wrongful death in Illinois of passengers from New Jersey, Connecticut, and Iowa. The New York court refused to apply the Illinois damage limit, quoting with approval the following language from a recent Illinois case: "The predominant interests to be served on the issue of damages are those of the states containing the people or estates which will receive the recoverable damages, if any, for their injuries or their decedent's death." Id. at 724, 249 N.E.2d at 759-60, 301 N.Y.S.2d at 979, quoting Manos v. Trans World Airlines, 295 F. Supp. 1170, 1173 (N.D. Ill. 1969). In Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C. Cir. 1965), suit was brought in the District of Columbia against a Brazilian airline for the wrongful death of a Maryland resident in Brazil. The court, applying the Brazilian damage limit of $170, assessed the interest of Maryland as follows: "Maryland's only relationship with the parties or the transaction is that it is appellant's residence, and was that of the decedent, but its interest in the matter of appellant's recovery is not insignificant, for it is on the citizens of Maryland that the burden of her support, if she is unable to support herself, is likely to fall." Id. at 473. The court avoided the task of interest weighing, however, by holding that Maryland would have applied Brazilian law if the case had been brought in Maryland.
longer forum period is not designed to benefit the plaintiff, no policy of either state can be advanced by applying its law. In *Cornwell*, the defendants did not reside in Alaska, the place of injury, or in any other state the court considered, and the period at the plaintiff's residence had expired. The court apparently thought it appropriate, therefore, to refer to one of the more general policies of fairness recognized throughout the legal system, that of protecting expectations. The court refused to apply the forum's longer period and said that to allow recovery would be "transparently inequitable, since it has the effect of exposing the defendant to a claim which he was entitled to consider as in repose."81 Apparently the court believed the defendant had relied upon Alaska law. The court never considered the possibility of looking to the periods of the states in which the defendants resided. The method of *Reich v. Purcell*82 does not occur to many courts.

Part (b) of this Rule is also illustrated by two additional cases, *Air Products & Chems., Inc. v. Fairbanks Morse, Inc.*83 and *Gianni v. Fort Wayne Air Service, Inc.*,84 which point to a result opposite from the one reached in *Cornwell*. In *Air Products*, as in *Cornwell*, the defendant, a New York corporation, did not reside in either Pennsylvania or Wisconsin, the states the court considered, and the shorter period of Pennsylvania, the plaintiff's residence, had run. Hence, application of Pennsylvania's period could not advance its policy because the defendant was from New York, and application of Wisconsin's longer period could not advance its policy because the plaintiff was from Pennsylvania. The Wisconsin court allowed a recovery, however, because it viewed the absence of any Pennsylvania interest in the defendant as an adequate basis for applying its own longer period. The court in *Gianni* also allowed a recovery, denying the defendant who lived in Indiana, the forum, the benefit of the shorter period of Massachusetts, the place of injury, when the plaintiff was from Connecticut. No Massachusetts policy could be advanced by applying its longer period to the Indiana defendant, and no Indiana policy could be advanced by applying its longer period to the Connecticut plaintiff. In neither *Air Products* nor *Gianni* could the court advance any defendant or plaintiff-protecting policy, but in each case the court assumed that the forum's longer period would normally apply in

82. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); see notes 47-48 & accompanying text *supra*.
83. 58 Wis. 2d 193, 206 N.W.2d 414 (1973); see notes 43-48 & accompanying text *supra*.
84. 342 F.2d 621 (7th Cir. 1965); see notes 52-55 & accompanying text *supra*.
any case in which the court could find no reason for displacing it. The
court in Cornwell, of course, seemed to make a similar assumption about
the place of injury. It would appear, therefore, that when the courts can
find no policy rationale, they will revert to one of the earlier methods of
decision. Either, as in Air Products and Gianni, the court assumes the
forum law applies unless displaced, or, as in Cornwell, the court as-
sumes the locus law applies unless displaced. These solutions are proba-
bly as good as any in which by definition there can be no better
rationale.

These rules describe what the courts have been doing and predict
what they will do in light of the logical premises of interest analysis.
They have been framed, however, without any attention to “borrowing”
statutes—those popular antidotes to the rule that statutes of limitation
are “procedural.” According to a recent study, all but twelve of the
fifty states have adopted statutes which, in certain cases, borrow the
shorter period of some other state, and consequently most conflicts
between periods of limitation cannot be resolved without confronting a
borrowing statute. Perhaps the rules developed above for solving con-
licts in the absence of these statutes will help courts decide how to apply
these statutes to cases which they govern.

Borrowing Statutes

The actual effect of most borrowing statutes has been to com-
ound, rather than simplify, the choice of law problem. This result is
 surprising because the policies underlying these statutes are well defined
and generally accepted. The courts, however, in interpreting the statutes,
have created a decisional chaos hardly equalled in any other branch of
law. This confusion is due mainly to the language which makes the
choice of law reference depend upon where the cause of action “arose.”
The Pennsylvania Act is a good example:

When a cause of action has been fully barred by the laws of the
state or country in which it arose, such bar shall be a complete
defense to an action thereon brought in any of the courts of this
commonwealth.

85. Comment, Impact of Significant Contacts on the Pennsylvania Borrowing
Statute, 72 DICK. L. REV. 598, 600 (1968). See also Ester, supra note 35, at 79; Ver-
non, Statutes of Limitation in the Conflict of Laws: Borrowing Statutes, 32 ROCKY
MT. L. REV. 287, 294 (1960) [hereinafter cited as Vernon].
86. It was possible to discuss the Henry, Dindo, and Farrer cases independently
of these statutes because neither New Hampshire, New Jersey, nor the District of Co-
lumbia had such a statute. See notes 1-7, 49-51, 56-59 & accompanying text supra.
87. PA. STAT. tit. 12, § 39 (1936). There is considerable variation among bor-
The Third Circuit recently construed this language in *Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co.*[^88^] Bendix had sold brake pedal assemblies to Mack for use in its trucks. When an assembly broke in Florida, the injured Florida purchaser recovered a judgment there against Mack. Mack paid the judgment in Florida, and the Florida court entered a satisfaction in the record. Mack then sued Bendix for indemnity in Pennsylvania, where the assembly had been manufactured, purchased, delivered, and installed in the truck. Pennsylvania was also the state in which Mack was engaged in business. The Third Circuit interpreted the Pennsylvania borrowing statute to refer to Florida because Mack had paid the judgment there. The cause of action "arose" in Florida, said the court, because "the cause of action arises where as well as when the final significant event that is essential to a suable claim occurs."[^89^] Under this interpretation of the statute, the Pennsylvania plaintiff was denied the benefit of Pennsylvania's longer period.

On the purely literal level, it is surprising to find a court which can still say that a cause of action is created "at" a physical location—the windshield which injures a passenger's head, or the rubber stamp of the clerk who cashes the check which pays the judgment.

The circularity of so holding has frequently been pointed out. How, for example, does the court know a cause of action arises "where" as well as "when" an event occurs? By looking at the law of the state within the borders of which the event occurred? But this answer does not solve the problem of deciding which state's law to apply. Only by assuming the solution in advance can one say that a cause of action arises "where" an event occurred because the event occurred there.[^90^]

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[^89^]: Id. at 20.

[^90^]: The circularity is even more obvious in cases in which the "time" of accrual is also at issue. If, after a surgical operation in New York, the patient returns to California to convalesce, does the cause of action accrue in California when the malpractice is discovered, as provided by California law, or does it accrue in New York at the moment treatment ends, as provided by New York law? See *Chartener v. Kice*, 270 F. Supp. 432 (E.D.N.Y. 1967); see note 123 [*infra*]. And in a case of conversion, in which the defendant innocently received property in Pennsylvania, does the cause of action accrue in Pennsylvania where the property was received, as provided by Pennsylvania law, or does it accrue in New York when the defendant's right to demand return of the property becomes complete, as provided by New York law? See *Federal Ins. Co. v. Fries*, 355 N.Y.S.2d 741 (N.Y. City Civ. Ct. 1974); see note 146 [*infra*].
In *Babcock v. Jackson,*\(^91\) in which a New York guest in a New York automobile was injured in Ontario by the negligence of his New York host, the New York court ignored Ontario's guest statute and allowed a recovery under New York law. Did the cause of action “arise” in Ontario? In *Griffith v. United Airlines, Inc.,*\(^92\) in which a Pennsylvania decedent was killed in an air crash in Colorado, the Pennsylvania court ignored Colorado's damage limit and allowed a full recovery under Pennsylvania law. Did the right to full damages “arise” in Colorado? In neither of those cases could the court determine the legal consequences of the events which occurred simply by looking at the events. The legal effect of an event, the “arising of a cause of action,” is only determined by a law. It is obvious that the laws of New York and Pennsylvania attached certain consequences to these events even though they occurred outside the borders of those states. Whether Ontario or Colorado also attached the same consequences does not matter. One wonders whether, if one New York astronaut negligently injured another New York astronaut while walking on the moon, anyone would say the cause of action “arose” on the moon. A cause of action would “arise” or “not arise” under the law of New York or of any other jurisdiction whose law applied.\(^93\) What if the defendant insisted, as the court did in *Mack Trucks,* that the cause of action arose “where” as well as “when” the “final event occurred”? If New York allowed a recovery, the answer would be that New York law was in force on the moon. Would it add anything to say that “where” the cause of action arose was “on the moon” under New York law? The point, again, is simply that a cause of action does not arise “in” a physical location. It is not “created by a moon rock, a windshield, or a banker’s rubber stamp; a cause of action is created by a law.

Since the rights at issue in *Babcock* and *Griffith* in fact “arose” under the laws of New York and Pennsylvania, what basis—even literally—is there for saying that the duration of those rights should be limited by either Ontario or Colorado? In *Mack Trucks,* the right of indemnity depended upon the contractual or quasi-contractual duties arising from the contract of purchase. That contract was made and breached in Pennsylvania. The law of Pennsylvania recognizes a right of action upon

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such facts. How, then, can one say this right "arose" in Florida or that
the Florida statute of limitations should limit it? If the check for
payment had been executed and cashed in Idaho would the cause of
action have arisen "in" Idaho? If the plaintiff had been forced to sue
upon the judgment in Pennsylvania, would the cause of action have
arisen "in" Pennsylvania upon satisfaction? These questions seem ab-
surd and they are absurd. The Supreme Court long ago put to rest the
territorialist idea that a cause of action can arise under only one legal
system. A single event can cause rights of action to arise simultane-
ously in as many legal systems as are prepared to give relief. It was
principally to avoid the absurdities of territorialism that Pennsylvania
adopted interest analysis. If, in *Griffith*, Pennsylvania was prepared to
ignore Colorado's limitation on damages because Pennsylvania interests
predominated, would it not have ignored the Colorado limitation on
time for suit for the same reason? Likewise, the court in *Mack Trucks*
should have ignored Florida's shorter period in a suit for indemnity by a
Pennsylvania plaintiff on a Pennsylvania contract in a Pennsylvania
court.

We cannot really evaluate the *Mack Trucks* case, of course, by
staying within the discredited logic used to decide it. To deal with a
borrowing statute realistically one must identify first the reasons for its
enactment. Borrowing statutes advance the following policies:

(1) *Repose for defendants.* One would expect this policy to include the
interest of sparing the defendant the added hardship of defending
when the lapse of time has made proof more difficult. A borrowing
statute, however, is not used unless the forum's period is longer. Thus,
one cannot say a borrowing statute is designed to "bar stale
claims" in the forum because the forum's stated policy is that the
claim is still timely. The only conceivable policy of repose, there-
fore, would be a sense that it is "unfair" to expose the defendant
once again to liability when he was safe under those periods which
he could reasonably expect to apply.

(2) *Prevention of forum shopping.* By subjecting the plaintiff to a
foreign period which may bar his claim, the statute reduces the
forum court's workload. Since, however, the claim is not "stale"

94. See, e.g., Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964); Carroll v. Lanza,
349 U.S. 408 (1955); Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954);
Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939);

95. See *Ester*, supra note 35, at 66; *Vernon*, supra note 85, at 298-99. See also
according to forum policy, and since the forum's courts stand ready to hear all timely claims, some additional characteristic must mark some of these timely claims for the special treatment which borrowing entails. There must be a policy against hearing certain types of claims—those which, because of either their facts or their law, are really "foreign"; that is, those in which some other court is the more appropriate place for litigation.

(3) **Mitigating the effect of the forum's tolling statute.** Since, because of tolling, most statutes of limitation do not begin to run until the defendant enters the state,⁹⁶ there is the problem of perpetual liability for the ambulatory defendant. This difficulty may be avoided if the defendant can also plead some other period of limitation.

To these policies⁹⁷ we should add the negative pregnant which they contain, that plaintiffs should be able to bring their suits when these defendant and court-protecting policies do not apply.

With respect to the policies of preventing forum shopping and protecting defendants, it seems fairly clear why the drafters of so many borrowing statutes refer the courts to the law of the state "where the cause of action arose." Applying the period of a foreign state can advance both policies when the foreign state is the only one concerned with the transaction. In the typical tort case, for example, in which the parties have had an accident in their own state, borrowing that state's period protects the defendant's reliance on that period by preventing the plaintiff from reviving the case in an unrelated second state which has a longer period. Borrowing spares the courts of the state with the longer period the burden of hearing cases with foreign parties, foreign facts, and foreign law. A state should be able to enact a long period for cases which concern it without being drowned in a flood of claims—barred elsewhere by shorter periods—which do not concern it. By borrowing the period where the cause "arises," the statutes achieve these ends.

In the light of these policies the decision in *Mack Trucks* is disappointing. The defendant could not reasonably have relied upon the shorter Florida period because the claim for indemnity was upon a contract made, performed, and breached in Pennsylvania. Nor was the cause "foreign" from the point of view of Pennsylvania's interest in


⁹⁷. Other policies, in effect in a few states, have also been identified. For an excellent general discussion see Ester, *supra* note 35.
judicial economy, since it is a primary function of the Pennsylvania courts to compensate Pennsylvania citizens for losses caused under Pennsylvania contracts breached in Pennsylvania. Nor was there a tolling problem. Borrowing Florida law advanced no conceivable policy underlying the statute, whether defendant-protecting or court-protecting. On the contrary, the court frustrated a clear Pennsylvania policy of affording Pennsylvania citizens a reasonable time to sue in Pennsylvania courts on Pennsylvania claims. The only interest of Florida lapsed when its citizen was paid by Mack. Florida could have no possible concern with a dispute between two foreign manufacturers over the out-of-state breach of their foreign contract.

To believe that the statutory language, which is not self-defining, refers to Florida, one must believe the legislature intended to freeze choice of law thinking forever into the territorialist mold. This possibility hardly seems likely since legislatures have generally counted upon the courts to develop choice of law rules. There is no reason to think that by passing an interstitial corrective, the legislature meant to halt this forward motion. Even when statutes have intervened, the courts have been expected to carry the law forward from the point where the statute stops. Courts have generally decided, for example, when the time for suit begins to run, whether the period for torts or for contracts applies in a given case, and how the various tolling provisions should operate. In all these matters, the courts have been expected to consider and develop the policies underlying the various statutes. It thus seems far more likely that the legislature intended the concept of "arising" to change with new judicial conceptions of what the state's choice of law policies were meant to achieve. In Mack Trucks, Judge Freedman took this view in his dissent:

Statutes of limitation seem simple on their face because the time period they fix can be measured by the clock. Experience has shown, however, that even here unexpected problems arise which present significant alternatives that can only be determined by a choice of policy.

The Pennsylvania Borrowing Statute in speaking of a "cause of action" and where it "arose" has not undertaken to define these

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100. See, e.g., West v. Theis, 15 Idaho 167, 96 P. 932 (1908), discussed in n.160 infra.
terms, but has left them to be given content by judicial refinement and clarification. This includes judicial developments in the future as well as those which have taken place in the past. While we may not alter the legislative command that the statutory period fixed by the foreign state shall prevail in the designated cases, nevertheless, what is a “cause of action” and when and where it “arose” are matters for judicial interpretation and should reflect current views of the relative significance of state interest as a determinant of decision.101

Subsequent Pennsylvania cases reveal the soundness of Judge Freedman’s dissent. In Boeing Co. v. Spar Aerospace Prods. Ltd.,102 a case virtually identical to Mack Trucks, the court was asked to interpret Pennsylvania’s “long arm” statute, which applied only to causes “arising within this Commonwealth.”103 The defendant Spar had sold parts in Pennsylvania to Boeing to install there into Boeing’s helicopters. After one of the machines crashed in California, the heirs of the passengers filed actions in California against Boeing, which Boeing settled. Boeing then sued Spar in Pennsylvania for indemnity. The court said:

[It] is clear, under the facts of this case, that plaintiff’s cause of action arises out of the sale and delivery of helicopter component parts to plaintiff in Pennsylvania for assembly in the helicopter herein involved at plaintiff’s Pennsylvania plant. The instant action therefore clearly “arises within” Pennsylvania under any construction of that phrase, even though arguably plaintiff had no cause of action against defendants until plaintiff’s liability to the crash victims was determined by settlement of the civil actions filed in California State Court.104

In reaching this conclusion, the court relied upon a similar holding by another federal diversity court sitting in Pennsylvania,105 and upon a Third Circuit opinion interpreting this same “arising” requirement as meaning “nothing more than that the cause of action be filed in Pennsylvania.”106 In view of these developments, the majority position in Mack Trucks already seems ripe for abandonment.

The “arising” or “accrual” language has also led to perverse results in other states using interest analysis. In McIndoo v. Burnett,107 two

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104. 380 F. Supp. at 103-04.
105. Keene v. Multicore Solders Ltd., 379 F. Supp. 1279 (E.D. Pa. 1974). See also Cohn v. Krauss, 45 Ohio L. Abs. 148, 67 N.E.2d 62 (Ct. App. 1943) (Ohio court held that a cause of action for indemnity arose where the promise was made and not where the debt was discharged).
107. 494 F.2d 1311 (8th Cir. 1974).
Missouri residents agreed to travel together to a bowling tournament in Illinois. The passenger, McIndoo, was injured in Illinois when Burnett's car left the road and struck a tree. McIndoo's suit in Missouri was filed within the Missouri period, but the defendant invoked the Missouri borrowing statute and the shorter period of Illinois. The court held that Illinois law applied, reasoning that "where the tort takes place in a foreign jurisdiction Missouri will adopt the statute of limitations of that jurisdiction . . . ." Of course, the very issue to be decided was "whether the tort [took] place in a foreign jurisdiction." To assume the conclusion, that the tort "takes place" at the place of injury, is totally unresponsive in a state following interest analysis. Illinois has no conceivable interest in shortening the time for suit by one Missouri resident against another in a Missouri court. Missouri, on the other hand, has a clear policy of permitting its own citizens to file claims arising out of Missouri facts within the time Missouri has allowed. The court's decision simply seems perverse.

Characterization, that familiar device, has been used to manipulate the choice of law reference when the claim can be in either contract or tort. In Colhoun v. Greyhound Lines, Inc. a Florida resident was injured in Tennessee on a bus trip which began in Florida, where she purchased her ticket. Her Florida suit was timely under Florida's three-year limit but was barred by the shorter period of Tennessee. Florida's borrowing statute required a foreign reference "when the cause of action has arisen in another state or territory of the United States." The court held that the tort claim arose in Tennessee because "a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred." The contract claim, however, was a different matter: "Where the last act necessary to complete the contract is performed, that is the place of the contract. . . . The contract in the instant case was completed in Florida with the purchase

108. "Whenever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state." Mo. Ann. Stat. § 516.190 (Vernon Supp. 1975).
109. 494 F.2d at 1313.
110. The diversity court was compelled to this result by the earlier Missouri decisions. See Gates v. Trans World Airlines, 493 S.W.2d 668 (Mo. App. 1973); Girth v. Beaty Grocery Co., 407 S.W.2d 881 (Mo. 1966), criticized in Weintraub, supra note 39, at 52.
111. 265 So. 2d 18 (Fla. 1972).
113. 265 So. 2d at 21, quoting Ester, supra note 35, at 47.
of a bus ticket." One can only smile at the quaintness of this distinction. Under the contract, the "last act necessary to establish liability" was not, after all, the breach. The court's reasoning ignores, of course, the old doctrine that questions of performance are governed by the place of performance.

It is obvious what is happening. The court in Colhoun is straining to accomplish the same result that New York did in Kilberg v. Northeast Airlines, Inc. In both cases, a local citizen on a trip from his home was injured outside the state by a carrier who had a continuous and important local business, and in each case the forum did a characterization trick so that local policy would apply. New York characterized the issue of damage limitations as "procedural," and Florida characterized an accident claim for personal injuries as "contractual." Kilberg was only a way station for New York on the road to interest analysis; Colhoun may well be the same for Florida.

There are other examples of this straining. In Meyers v. Dunlop Tire & Rubber Corp., a Kentucky resident was injured in Kentucky by a defective tire manufactured in New York and sold to his Kentucky employer F.O.B. Buffalo. When asked to apply the New York borrowing statute, the appellate division held that the tort claim arose in Kentucky, where it was barred, but that the contract claim arose in New York, where it was timely. In Coan v. Cessna Aircraft, the Illinois court interpreted its tolling statute in such a way as to exempt from its borrowing statute an Illinois plaintiff injured in Kentucky. The Illinois tolling statute provided that no tolling would occur if the parties were nonresidents. That provision meant, according to the court, that tolling must occur if the parties were residents. If the borrowing statute applied to residents, however, a resident plaintiff would not have the benefit of the tolled Illinois period against an absent resident defendant because the borrowing statute might, despite the absence, refer to the shorter

114. Id. (citation omitted).
116. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). In Kilberg New York applied its own higher measure of damages in a wrongful death case arising from the crash in Massachusetts of an airliner bound for Nantucket from New York City. The court held that it was contrary to New York public policy to limit the damages for wrongful death and held also that damage limitations were "procedural" questions governed by forum law. This latter ground was withdrawn in Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).
118. 53 Ill. 2d 526, 293 N.E.2d 588 (1973).
period of another state. Thus, in order to allow the tolling statute to operate fully, said the court, the borrowing statute must be interpreted not to apply when both parties are forum residents. This result, when judged by policy, makes sense: the court in a false conflict advances forum policy by applying its plaintiff-protecting longer period when the state of injury is indifferent to the defendant. The result announced by the court, however, is illogical because plaintiff never alleged that the defendant was ever absent from Illinois. Perhaps the most bizarre effort of all occurred in *Holdsworth v. Chesapeake & O. Ry.*119 in which a diversity court in Indiana held that it could not determine, under the Indiana borrowing statute, where a cause of action arose under the Illinois Dram Shop Act.120 The plaintiff was injured in Indiana by an automobile the driver of which had allegedly purchased intoxicating liquor in Illinois from the Illinois defendant. The Dram Shop Act barred all actions under it not commenced within one year, and the plaintiff's claim was not within that limit. Since Indiana had no law creating any liability whatever on the facts alleged, it is logically impossible that the claim could have "arisen" under Indiana law. Whether it arose "in" Indiana "under" Illinois law reminds one of the moon hypothetical. Once it is clear that only Illinois law can be the foundation of any right, it cannot conceivably matter where the injury occurred.

One can see a transition in *Klondike Helicopters, Ltd. v. Fairchild Hiller Corp.*121 There, a citizen of British Columbia was killed in British Columbia by the crash of a helicopter he had purchased in California from the Maryland defendant. Plaintiff filed suit in Illinois, where it was timely, but the defendant invoked the familiar "arising" language of the Illinois borrowing statute. The diversity court applied the Restatement Second's "most significant relationship" test to determine where the tort claim for personal injuries arose. The court noted that Illinois had recently adopted that approach.122 Since the plaintiff was domiciled in British Columbia, where the crash occurred, British Columbia had the most significant relationship to the case, and the claim "arose" there despite the negligence alleged to have occurred in California. On the "contractual" claim for breach of warranty, however, the court reverted


to the traditional theory. It referred to California, on admittedly firmer
ground than in *Colhoun*, because the helicopter was contracted for in
California, and also was delivered there. One wonders how the signifi-
cance of British Columbia's relation to the claim, whether tested by
residence, place of injury, place of contracting, or place of negligence,
can vary according to whether the same facts are given one label or
another.

As one might expect, this territorial view of the "place of arising"
has shown the same pattern of development, and decay, as the territorial
theory itself. First, we see a mechanical formula producing results
arbitrary from the standpoint of logic and policy, then we see manip-
ulation of the formula so the results can be avoided, and finally, we see a
move toward disavowal of the formula.

The first case to use anything like a policy analysis to interpret a

123. The "last act" doctrine might be illustrated further. In a New York diversity
case, a Massachusetts purchaser of stock sued his New York broker in New York for
violations of the federal securities laws. The transactions occurred by long distance tel-
phone between the two states. Since there was no federal period of limitations, the
diversity court looked to New York's choice of law rules. The court said that "the cause
of action accrues for purposes of the borrowing statute in the state where the injury
is suffered rather than where the defendant committed the wrongful acts." Sack v. Low,
478 F.2d 360, 366 (2d Cir. 1973). Thus, the issue became where the loss was sust-
ained. In true territorialist fashion, the court speculated on where this might be: "We
do not know exactly how plaintiffs paid for the securities—whether by check sent from
Massachusetts or in some other fashion; perhaps if the plaintiffs maintained an open
account at defendant's New York offices, and the loss was reflected in that account,
this might make some difference," *Id.* at 367-68. This effort seems particularly mis-
placed in a case in which the right is given by federal law. The defendant has breached
a duty declared by the people of the United States, the remedy for which would appear
to arise everywhere simultaneously. The "arising" language of a borrowing statute is
meaningless here. A better guide is found in a Sixth Circuit case in which the court
said that it should "choose among the several state statutes of limitation and apply that
one which best effectuates the federal policy at issue." Charney v. Thomas, 372 F.2d
97, 100 (6th Cir. 1967).

In a second case, a California resident brought a New York diversity suit for mal-
practice against a New York physician. The plaintiff sought damages for the wrongful
death and pain and suffering of his wife, who had been treated by the defendant during
her trips to New York. The court held that the New York borrowing statute did not
apply to the survival action for pain and suffering, because the cause of action accrued
in New York upon "termination of the last treatment." The borrowing statute did ap-
ply, however, to the wrongful death claim because it accrued upon the wife's death in
California, where she had gone to convalesce. Chartener v. Kice, 270 F. Supp. 432,
438 (E.D.N.Y. 1967). In a case such as this, in which the defendant is probably not
suitable in the state whose period is borrowed, it is difficult to see how "a cause of ac-
tion" can "accrue" there in any meaningful sense. New York has, of course, applied
its own wrongful death act to a death occurring outside New York. Farber v. Smolack,
borrowing statute was *George v. Douglas Aircraft Co.* Crewmembers on a Braniff flight from Florida to South America were injured when the plane crashed in Florida after takeoff. Their diversity suit in New York alleged that Douglas had breached an implied warranty when it sold the plane to Braniff. The sale, manufacture and delivery occurred in California. As to the question of substantive liability, the court said New York would look to Florida law to define the extent of the warranty; it then held, however, that the claim “arose” in California for purposes of the New York borrowing statute. The court managed to reach this conclusion by deciding which policies should be taken to underlie the statute. It found the main policy to be that of counteracting tolling. Since New York was really a disinterested forum (no party was from New York and no part of the transaction occurred in New York) the court felt that it could best achieve this purpose by referring to the state where the defendant would always be amenable to suit:

In personal injury actions against a manufacturer, the latter’s amenability to suit in the place of injury would be fortuitous . . . and the usual tolling statute in that state might indefinitely prolong the limitations period. On the other hand, the manufacturer would always be suable in the state of manufacture and generally in that of delivery, the two latter being identical in the instant case. It followed that reference to California law would best advance New York policy. It was “more likely to . . . (avoid) prolonging the period of limitations because of the defendant's absence from a jurisdiction where there was no reason to expect him to be present.” In effect, *George* exemplifies a disinterested forum using interest analysis to protect itself against foreign claims which could have been litigated elsewhere. The court applied the period most likely to cut off the claim. The court might have reached the same result without a borrowing statute if it had used the method of *Heavner v. Uniroyal, Inc.* discussed above. There, New Jersey refused its own longer period to a foreign plaintiff, who could have sued elsewhere on his foreign claim, by treating the limitation issue as substantive and then finding no New Jersey policy in favor of allowing suit.

The *George* case is still more complicated than that, however. By referring to California law, the court did advance the California policy of shielding the California defendant behind California’s shorter period. This was done, though, at the expense of whatever interest Florida may

125. *Id.* at 78.
126. *Id.*
127. 63 N.J. 130, 305 A.2d 412 (1973); see text accompanying notes 27-33 *supra*.
have had in allowing a recovery. The George court recognized this Florida interest by preferring it over California's on the issues of warranty and strict liability. One must ask, then, what the reason was for preferring California on the limitations point. If the purpose was simply to reject all claims in which the forum is disinterested, then the court should also have referred to California's liability law, if that would have defeated the plaintiff's claim. One way of pruning the docket is as good as another. The only rational answer would seem to lie in the court's concern for tolling. A reference to the place of injury would indeed prolong the time unreasonably if that state's period were tolled by the defendant's absence. If this reasoning is the basis for the rule, then one wonders what the court would do when the defendant would be suable in the state of injury.

Tolling was not an issue in Gross v. McDonald,128 in which the auto of parties temporarily residing in Kentucky crashed in Indiana during a round trip drive to a boat club just across the border. A diversity court in Pennsylvania, the disinterested forum, held that Kentucky's policy on liability should prevail over Indiana's guest statute. The court held that Indiana's policy was inapplicable because neither the defendant nor his insurer resided in Indiana. On the question of borrowing, however, the court referred to Indiana, citing Mack Trucks. Since in Indiana the suit was still timely, the result was a recovery in Pennsylvania on a claim blocked in Indiana by a guest statute and barred in Kentucky by an expired statute of limitations. Whatever this may be (dépeçage129 is probably the word), it is clear that the method of George is not being followed. In Gross, the method is wholly mechanical; Indiana was picked under the "last act" doctrine.

The best way to understand and evaluate these cases is to look at them through a policy analysis. In George, a disinterested forum resolved a true conflict by preferring the place where the defendant resided and where he manufactured the plane, and it did so on perhaps the only policy basis available—avoiding the perpetual liability sometimes caused by the borrowing of tolling provisions. In Gross, a disinterested forum faced a false conflict. Kentucky's shorter period declared a clear policy of shielding its resident defendant. The intent of Indiana's longer period was more complicated because a longer period can imple-

ment policies of deterrence as well as compensation.\textsuperscript{130} Indiana’s longer period in \textit{Gross}, therefore, could be taken as implementing the deterrent aspect of any right in tort created by Indiana on these facts, even though the plaintiff was from another state. The problem is that Indiana has not created any rights on these facts because of its guest statute. The longer period for suit cannot implement what is not there. It follows that applying Indiana’s longer period would advance none of its policies, unless, perhaps, Indiana would not apply its guest statute to nonresident parties under these facts. If it would not,\textsuperscript{131} its only excuse would be interest analysis, which should then cause it to respect the shorter period of Kentucky for the reasons given by New Jersey in \textit{Heavner v. Uniroyal, Inc.}, discussed above.\textsuperscript{132} In short, the \textit{Gross} decision thwarts the only policy which the court could conceivably advance, that of Kentucky, without advancing any policy whatsoever of Indiana, and it does so by permitting suit in Pennsylvania under a statute designed to protect that state from foreign claims. Obviously, the method of \textit{George} is to be preferred.\textsuperscript{133}

Since \textit{George}, other courts have also applied interest analysis to borrowing statutes. In \textit{Thigpen v. Greyhound Lines, Inc.},\textsuperscript{134} Alabama residents were injured in Kentucky by a collision between the bus in which they were riding and another vehicle. They had boarded the bus in Alabama and were bound for Ohio. In the Ohio suit, the defendant bus company urged that Kentucky’s shorter period be applied under the Ohio borrowing statute. The court refused because the contract portion of the claim clearly arose in Alabama or Ohio\textsuperscript{135} and because “[e]ven as a tort action, the facts alleged in the petition [that the injury occurred in Kentucky] are too incomplete to afford any conclusion on the degree of nexus that Kentucky has to the cause of action as compared to Ohio

\textsuperscript{130} California, for example, has held that its higher measure of damages for wrongful death expresses a policy of deterrence and that granting full damages when a nonresident is killed in California advances this policy. \textit{Hurtado v. Superior Ct.}, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974).

\textsuperscript{131} Indiana has accepted interest analysis in the context of guest statutes. \textit{Witherspoon v. Salm}, 142 Ind. App. 655, 237 N.E.2d 116 (1968). See also \textit{Watts v. Pioneer Corn Co.}, 342 F.2d 617 (7th Cir. 1965); see text accompanying notes 44-46 supra.

\textsuperscript{132} See text accompanying notes 27-33 supra.


\textsuperscript{134} 11 Ohio App. 2d 179, 229 N.E.2d 107 (1967).

\textsuperscript{135} \textit{Id.} at 181, 229 N.E.2d at 109. See \textit{Colhoun v. Greyhound Lines, Inc.}, 265 So. 2d 18 (Fla. 1972); see text accompanying notes 111-16 supra.
and Alabama."\textsuperscript{136} In Braniff Airways, Inc. v. Curtiss-Wright Corp.,\textsuperscript{137} a second claim growing out of the same Florida crash which gave rise to George, the Second Circuit again rejected the "jurisdiction-selecting" approach of the older cases and wisely applied the New York law of accrual, under which the period for breach of warranty accrues at sale, instead of the Florida law of accrual, under which the period accrues at the date of discovery. It did so because the claim was no longer timely in the New York forum and because it found a policy of judicial economy in the New York law of accrual.\textsuperscript{138}

The most explicit example of policy analysis to date, however, occurred in O'Keefe v. Boeing Co.\textsuperscript{139} There, the Air Force crew of a B-52 bomber sued Boeing in New York for injuries caused by a crash in Maine during training exercises. Having planned two alternative routes for the flight, the crew decided after takeoff in Massachusetts to follow the northern one over Maine rather than the southern one over the Carolinas. The plane crashed when the tail assembly separated during heavy turbulence. Boeing argued, of course, that Maine law controlled both liability and the time for bringing suit.

The court's opinion began with a reference to Long v. Pan American World Airways, Inc.,\textsuperscript{140} in which New York applied the Pennsylvania wrongful death act to an air crash in Maryland. The court compared Long with O'Keefe:

Maine's relationship to the case at bar is certainly no less accidental nor more significant than Maryland's relationship to Long. For example, a B-52 is hardly an instrument of commercial carriages flying regularly scheduled commercial routes . . . .

[There is no contention that any of the members of the crew(s) were citizens of Maine. In short, the inescapable conclusion to be drawn is that this court is not compelled to refer to any part of the law of Maine in this case. But this does not mean that the deaths and injuries in Maine did not give rise to the causes of action for wrongful death and personal injury asserted by the plaintiffs since all of the states with more significant relationships to B-52 bombers in general and B-406 in particular allow for such actions, to wit, California, Kansas, Massachusetts, Nebraska, Ohio, Oklahoma and Washington.\textsuperscript{141}

Thus, upon a policy analysis, the court found that of all the states which might be concerned, the state of injury was the least relevant. But

\textsuperscript{136} 11 Ohio App. 2d at 181, 229 N.E.2d at 109.
\textsuperscript{137} 424 F.2d 427 (2d Cir. 1970), cert. denied, 400 U.S. 829 (1970).
\textsuperscript{138} \textit{Id.} at 431.
\textsuperscript{139} 335 F. Supp. 1104 (S.D.N.Y. 1971).
\textsuperscript{140} 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965).
\textsuperscript{141} 335 F. Supp. at 1111.
what then should the reference be? Under the New York borrowing statute, should the claim be held to “arise” in every state the court mentioned? The plaintiffs alleged “18 ways” in which the defendant had been negligent. “Two of these” the court said, “relate ultimately to activities in California. Eleven of the alleged acts of commission or omission appear to relate to the defendant’s activities at the Air Force bases in California, Nebraska, Ohio and Oklahoma and at the defendant’s facility at Wichita, as well as possibly to Westover in Massachusetts.”

Does a cause “arise” in each of these places?

The court resolved the matter by looking to the law of Washington. Relying upon George it chose the state where the plane was “designed, manufactured, sold and delivered,” and held that “[a]lmost all of the alleged acts of negligence . . . are referable, directly or indirectly, to Washington . . . .” The result was that “for purposes of applying the New York borrowing statute the plaintiffs’ causes of action accrued in Washington as a result of the crash in Maine.”

So the court rejects the traditional theory and the last act doctrine with it. In its place we have a policy analysis. Indeed, it would have been indefensible on the facts presented to decide the case in any other way. If we now assume, however, that we do have a policy analysis, what can we say about how it works? In O’Keefe, for example, how do the policies of the forum or the state of Washington explain the court’s result? The period of the forum, New York, had not expired, so no forum policy of stale claims stood in the way, as it had in Braniff. The court found Maine policy irrelevant. The question, then, was whether borrowing Washington law advanced some Washington policy. The most the O’Keefe plaintiffs can claim on the facts, absent an allegation of Washington residence, is a Washington policy of deterrence. An unexpired period in Washington could serve to discourage Washington negligence by allowing plaintiffs who are injured by it a longer time to sue. When no other state has a relevant policy, this rationale may be enough. If Washington’s period had run, the Washington period would not express a plaintiff-protecting policy, and so the fact that the negligence occurred there would be irrelevant. In fact, the shorter Washington period would express the contrary policy of repose for its resident defendant. The New York court would then have to weigh this de-

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142. Id. at 1112 (footnotes omitted).
143. Id.
144. Id.
145. Id. at 1113.
fendant-protecting Washington policy against that of any other concerned state whose period had not run.

Enough has been said to show the general direction of the law. Other cases might also be discussed, but *George, Thigpen, Braniff* and *O'Keefe* show the basic approach. In sum, it is fair to say that some respectable courts have broken away from the older view of borrowing statutes and, as it becomes more apparent that the older theory is self-defeating and arbitrary, more courts should follow suit. There is certainly no reason in policy for treating the older theory any differently in the law of limitations than it has been treated elsewhere. Courts following interest analysis should be urged, therefore, to interpret the "arising" language in a way which advances the policies which underlie the statutes.

Precisely how would such an interpretative method work? It is suggested that a court should interpret a borrowing statute according to the same "rules" as those set out above for applying interest analysis generally to a statute of limitations. Since a borrowing statute is really a choice of law rule, it should not shock anyone if it is interpreted so as to implement what the court has found—by interest analysis—to be the choice of law policy of the state. The contrary would seem more shocking. Since borrowing statutes were designed to combat the notion—the territorialist notion—that limitations are "procedural," the statutes should not be interpreted so as to perpetuate the error, and the system, they were meant to overcome.

How would these "rules" be applied? It will be recalled that Rule I stated that forum law would apply whenever the forum's period was shorter. In effect, this Rule has already been adopted, because the courts have construed borrowing statutes so as to be inapplicable whenever the forum's period has run. The reason for this interpretation is the same as the reason given above for Rule I itself: to advance the forum policy

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146. In a New York case, the court applied interest analysis to the issue of accrual in a suit for conversion of jewelry mistakenly delivered to a New Yorker in Pennsylvania. Under Pennsylvania law the action accrued in Pennsylvania; under New York law the action accrued in New York. The court applied the New York law of accrual and ignored the New York borrowing statute. *Federal Ins. Co. v. Fries*, 78 Misc. 2d 805, 355 N.Y.S.2d 741 (N.Y. City Civ. Ct. 1974). In a Seventh Circuit case a California witness sued to recover his fees in connection with an antitrust suit pending in Illinois. The services were rendered in both California and Illinois. The court held that since Illinois was the state of "the most significant relationship to [the] contract," the claim "arose" there and the Illinois borrowing statute did not apply. *Hamilton v. General Motors Corp.*, 490 F.2d 223, 225-26 n.1 (7th Cir. 1973).


148. See note 95 *supra*. 
of judicial economy. Thus interest analysis seems already to find support in traditional practice. Indeed, interest analysis gives the best explanation for the traditional interpretation, because, if the purpose of borrowing statute is simply to characterize limitations as "substantive," then it would follow under the territorial theory that the foreign period should be borrowed even if it is longer. Of course, this result did not occur, because the courts advanced the forum's policy of judicial economy.

Rule II stated that the shorter foreign period would apply when it was designed to benefit the defendant and no policy of the forum or any other state was designed to benefit the plaintiff. This is surely the classic "false conflict" for which borrowing statutes were designed. By referring to foreign law the statute avoids the senseless reference to forum law of the traditional theory, which characterized limitations as "procedural." To apply forum law to such a case would frustrate the foreign state's policy of repose without advancing any policy of the forum. The statute produces a better result and, again, must have been intended to do so for the same reasons as those given above for Rule II itself. In the case in which the conflict is between two foreign states, as in Gross v. McDonald, the shorter period of the defendant's residence would be applied if the other state were disinterested. The perverse result in Gross, therefore, would not be reached under this Rule.

Rule III is the converse of Rule II. It states that the shorter foreign period should not apply whenever it is not intended to benefit the defendant and the longer forum period is intended to benefit the plaintiff. To apply foreign law frustrates the plaintiff-protecting policy of the forum without advancing any policy of the foreign state. It is definitely not a solution to this false conflict to defeat the policy of the only concerned state by referring to a state which is disinterested. To do so produces the perverse results of McIndoo v. Burnett and Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co., criticized above. It was to prevent just such results that the borrowing statutes of so many states exempted local plaintiffs. In this exemption

149. Id.
150. See Ester, supra note 35, at 66. For a strange case characterizing the longer foreign period as "substantive" and then applying it see Marine Const. & Design Co. v. Vessel Tim, 434 P.2d 683 (Alas. 1967).
152. 494 F.2d 1311 (8th Cir. 1974).
154. See note 98 & accompanying text supra.
155. See Ester, supra note 35, at 80, listing twenty-four jurisdictions in which the
we again find a precedent in traditional practice for the results advocated under interest analysis. The local plaintiff exemption and Rule III have exactly the same basis in policy: to implement the plaintiff-protecting effect of the forum's longer period. In practice, these exemptions make the cause "arise" in the forum because the plaintiff's right to bring suit there is absolute until the forum's period expires. By assuring local plaintiffs the benefit of the local period, the legislature has declared a forum interest in having its own period govern its own citizens in its own courts. If a state does not have such an exemption, there is nothing to prevent a court from using the widespread practice of adopting these exemptions as a guide to the best interpretation of its own statute. Surely one should not presume that the legislature actually intended the results of McIndoo and Mack Trucks.

Rule IV stated that the shorter foreign period would not be applied when it was not intended to benefit the defendant and the longer period of some state other than the forum was intended to benefit the plaintiff. This situation is similar to that in Rule III, and the false conflict should be resolved in the same manner, the only difference being that here the interested state is not the forum. O'Keefe v. Boeing Company, discussed above, is the example of how this Rule would be applied.

Rule V declared that the shorter foreign period may or may not be applied either when a true conflict exists or when all states are disinterested. George v. Douglas Aircraft Co., discussed above, is the closest example of a true conflict, if it can be assumed that Florida had a plaintiff-protecting policy in that case. An example of a case in which all states are disinterested could be made by taking Cornwell v. C.I.T. Corp. of New York, also discussed above, and adding a hypothetical borrowing statute in the District of Columbia. In both these examples, one could expect the court to search beyond the policies directly involved for some method of evaluating the mutually conflicting or irrelevant policies. George indicates that the impact of tolling would tip the scale when tolling could be a factor. Otherwise, the court should under-

borrowing statute is not applicable if the plaintiff is a citizen or resident of the forum. The scope of the exception for local plaintiffs is sometimes difficult to measure. See Jones v. Greyhound Bus Lines, 73 Misc. 2d 109, 341 N.Y.S.2d 159 (Sup. Ct. 1973).

156. See Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973), in which the New Jersey court reinterpreted the common law in such a way as to recharacterize the statute of limitations as substantive. The New Jersey court did so despite the absence of a borrowing statute in New Jersey. See text accompanying notes 28-29 supra.


158. 332 F.2d 73 (2d Cir. 1964); see text accompanying notes 124-33 supra.

take the weighing described in the discussion of Part (a) of Rule V above, or perhaps revert to the older methods of decision described in the discussion of Part (b) of Rule V.

Thus far, tolling has not been considered in the application of these Rules to borrowing statutes. It will be recalled, however, that one purpose of borrowing is to mitigate the effects of tolling. When legislatures passed borrowing statutes, they were mindful of cases in which a foreign obligor on a foreign claim moved into the forum and became suable there because of the forum's tolling statute, which would have suspended the forum period because of the obligor's absence. The reason the obligor became suable in the forum, of course, was the mechanical reference to forum law under the territorial theory, which characterized limitations as "procedural." This method of analysis had the effect of making the ambulatory defendant perpetually liable in every state with this type of tolling legislation. The sensible thing would have been to consider limitations as substantive and apply the foreign period under interest analysis. This approach, however, would not be possible under the territorial theory, and so legislatures enacted borrowing statutes to avoid a perverse result. As interest analysis becomes accepted, however, this function of the borrowing statute will become obsolete. A court following Rule II, for example, would interpret its borrowing statute so as to refer to the shorter period of the interested foreign state when the claim is wholly foreign. Courts in states which do not have borrowing statutes should realize that by switching to interest analysis they solve this aspect of the tolling problem.

The above refers only to the situation in Rule II, which presents a particular type of false conflict. As we have seen, tolling considerations offer an additional inducement for the adoption of Rule II. But what of the other Rules? How does tolling affect the impact of the other Rules

160. "The prevailing interpretation of tolling statutes based on defendant's absence from the enacting jurisdiction, coupled with the rule requiring the forum to apply its own period of limitation, has resulted in the possibility of perpetual liability for an ambulatory defendant." Ester, supra note 35, at 42. The tolling problem in the context of borrowing statutes is illustrated by an Idaho case. The defendant, who executed promissory notes in Kansas which were payable there, left that state before its period had run. He then resided in Washington for its full period. The action was brought eighteen years later when he moved to Idaho. The Idaho court said the Idaho borrowing statute, referring to Kansas, did not help the defendant because the Kansas period was tolled by the defendant's absence from Kansas, and that Idaho's period did not help him either because it did not begin to run until he arrived in Idaho. Under this interpretation, the defendant would have been liable in Idaho no matter how long it had been before he moved there. West v. Theis, 15 Idaho 167, 96 P. 932 (1908).

161. This was the interpretation in West v. Theis, 15 Idaho 167, 96 P. 932 (1908).
on the "arising" language of borrowing statutes? Rule I is not affected by tolling considerations because no borrowing occurs when the forum's period is shorter. Rule III is not affected, either, because no borrowing occurs when the interested forum's plaintiff-protecting policy deems the cause to have "arisen" in the forum. Rule IV, in which a disinterested forum decides a false conflict between the periods of foreign states, might be affected. That Rule suggested that the state having the longer period should be preferred when the facts generated a plaintiff-protecting policy in that state and no defendant-protecting policy in the state having the shorter period. Should the Rule be altered if the interested state has tolling legislation and the defendant is not present there? If the plaintiff-protecting policy were one of deterrence of negligent conduct within the interested state's boundaries, then a "long-arm" statute would probably solve the problem by exposing the defendant to process in the interested state. Long-arm statutes are another component of a state's overall policy of protecting plaintiffs. Absent sufficient contact for long arm jurisdiction, however, the only justification for borrowing would probably be the compensatory interest generated by the plaintiff's domicile. A possible solution in such a case would be to construe the tolling statute of the interested state so as not to apply when all aspects of the transaction occurred abroad. Otherwise, the defendant would be perpetually liable in the interested state and probably also in the forum unless the forum's tolling statute were given a similar interpretation.\footnote{162. This was the result in West v. Theis, 15 Idaho 167, 96 P. 932 (1908). It could have been avoided by interpreting the forum's tolling legislation so as not to apply to transactions occurring wholly outside the state. Under the court's approach, however, there was perpetual liability despite the forum's borrowing statute.}

The influence of tolling on Rule V is illustrated by the \textit{George} case, in which a disinterested forum was confronted with a true conflict between the periods of foreign states (assuming again that Florida law expressed a plaintiff-protecting policy under the facts). If the defendant manufacturer had not been suable in Florida, perpetual liability would have resulted from borrowing its tolling legislation. In the case of a true conflict, or a "conflict" in which no state's policy can be advanced, tolling considerations are probably as good a method as any for deciding cases in which they are relevant.

\textbf{Limits on the Power of Choice}

Would it have made any difference, then, in \textit{Henry} whether or not New Jersey had a borrowing statute? A drug put into commerce by a New Jersey manufacturer deforms a child in Quebec. The New Jersey
forum has the longer period, and the New Jersey court applying interest analysis must decide whether New Jersey policy requires a recovery. Under a borrowing statute, should not the court make exactly the interpretation of forum policy as it has already made without one? If the court decides under interest analysis that New Jersey policy calls for the application of New Jersey law, hasn't the court decided also that the claim arises “in” New Jersey in the sense that New Jersey and not Quebec law should govern it? Conversely, if it decides that New Jersey policy does not call for the application of New Jersey law, hasn't it decided that the claim does not arise in New Jersey? The issue under interest analysis seems the same whether or not there is a borrowing statute.

The more difficult question in Henry is whether the longer New Jersey period expresses a plaintiff-protecting policy under the facts alleged. The Third Circuit said it did not. Nevertheless, one may argue that an important objective of New Jersey's municipal law would have been advanced by affording the Quebec plaintiff a longer time in which to sue. The lower court in Henry noted that the claim was not “stale” under New Jersey law\(^\text{163}\) and rested its holding on the defendant's act of “testing and manufacturing harmful drugs in New Jersey, and placing these drugs in the stream of interstate and international commerce . . .”\(^\text{164}\) New Jersey was the “primary manufacturing and distribution site for [defendant's] thalidomide operations in North America,”\(^\text{165}\) and “the standard of care defendant exercised in conducting its clinical testing activity in New Jersey could . . . [relate] to defendant's alleged negligence in deciding to market an unsafe drug.”\(^\text{166}\) Thus, the lower court found that a New Jersey policy of deterrence applied to these facts, and also found that it would advance such a policy to apply New Jersey's longer period, a result supported by the cases already discussed. In Air Products & Chemicals, Inc. v. Fairbanks Morse Inc.,\(^\text{167}\) Meyers v. Dunlop Tire and Rubber Corp.,\(^\text{168}\) and O'Keefe v. Boeing Co.,\(^\text{169}\) for example, the courts all applied the longer period of the place of manufacture.


\[^{164}\] Id.

\[^{165}\] Id. at 1205.

\[^{166}\] Id.

\[^{167}\] 58 Wis. 2d 193, 206 N.W.2d 414 (1973).


Why, then, did the Third Circuit find no New Jersey interest? The court began by ruling that New Jersey's longer period expressed the usual tort policies of compensation and deterrence, and it disposed of the compensation policy by noting that the plaintiff was not a New Jersey resident.170 Obviously, it was the deterrence policy that was crucial. In addressing it, the court assumed first that New Jersey "would posit an interest in deterring misconduct because of defective manufacture within the state."171 Despite this assumption, however, the court then dismissed the place of manufacture as irrelevant:

It is undisputed that New Jersey's contacts with the drug began long after the design stages and that the raw thalidomide manufactured in New Jersey did not deviate from the specifications set by the German developer and the Ohio laboratories of defendant Richardson-Merrell. Thus, any possible New Jersey policy of enforcing a duty, owed because of tortious misconduct in New Jersey, is inapplicable; the plaintiff has specifically stated that there is nothing improper about the way the drug was manufactured.172

The same argument applied to the New Jersey testing.173

Thus, the court seems to have held that a forum policy of preventing injuries from unsafe drugs cannot be advanced simply by applying it

170. Henry v. Richardson-Merrell, Inc., 508 F.2d 28, 35 (3d Cir. 1975). The court relied upon the cases of Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973) and Pfau v. Trent Aluminum Co., 55 N.J. 511, 263 A.2d 129 (1970). In Uniroyal, New Jersey expressed no interest in a North Carolina plaintiff injured at home by a product purchased there, and in Pfau New Jersey expressed no compensatory interest in a Connecticut plaintiff injured in Iowa by a New Jersey defendant. The New Jersey court did, however, reserve in Uniroyal the right to apply New Jersey law to "situations involving significant interests of this state." 63 N.J. at 141, 305 A.2d at 418. And in Pfau the New Jersey court said: "We are not certain that a defendant's domicile lacks an interest in seeing that its domiciliaries are held to the full measure of damages or the standard of care which that state's law provide [sic] for." 55 N.J. at 524, 263 A.2d at 136.

171. 508 F.2d at 36.

172. Id. at 36-37.

173. "There is no allegation that the testing in New Jersey was improperly conducted. Any charge of insufficient testing would seem to relate to the place where testing decisions were made, Richardson-Merrell's National Laboratories in Ohio. New Jersey was merely one of forty-one states in which clinical testing of the drug was conducted." Id. at 37 (footnote omitted). All may not be lost, however, for the Henrys. The Third Circuit suggested that Ohio, the state where the testing decisions were made, or New York, the state of the defendant's corporate headquarters, would have an interest in deterring the conduct. Id. at 34 n.14. Since Ohio has repealed its borrowing statute (OHIO REV. CODE ANN. § 2305.20 (Page 1953) (repealed 1965)) and tolls its statute of limitations for minors (OHIO REV. CODE ANN. § 2305.16 (Page Supp. 1975)) the Henrys may still have an opportunity for suit there. Ohio could apply its own law under a "procedural" characterization of the statute of limitations, or by using interest analysis. See Thigpen v. Greyhound Lines, Inc., 11 Ohio App. 179, 229 N.E.2d 107 (1967); see text accompanying notes 134-36 supra.
to drugs manufactured and tested within the forum; it is also necessary that the decisions to manufacture and distribute the drug be made there. This conclusion, of course, requires some study. First, one should recall that the place of manufacture or design is normally thought irrelevant for at least one common deterrence policy. Persons not resident in the forum are universally allowed to recover under forum law for injuries caused by products purchased within the forum. The “warranty” is “breached” at the place of sale regardless of the place of manufacture, design, or eventual injury. A New Yorker on a cross-country trip who buys a defective product in the Midwest can recover in the state of sale for injuries caused by the product in California. The danger to forum residents posed by unsafe products sold in the forum is thought sufficient to justify liability, and it is therefore assumed, since no forum policy of compensation is at stake, that liability in the place of sale affects the foreign manufacturer’s foreign conduct. The question in Henry, in which the product was not on sale in the forum, is whether a comparable effect is produced by the threat of liability in the state of manufacture. Suppose New Jersey now declares that its more protective law applies in favor of anyone injured by a product made in New Jersey. Wouldn't this decision produce a far greater deterrent effect on New Jersey manufacturers than is now produced on non-New Jersey manufacturers by the application of New Jersey law only to the portion of the latters’ products sold in New Jersey?\footnote{174} If Michigan adopts a strict code of product liability and applies it to all persons injured by products manufactured in Michigan, one can expect autos to be safer, no matter where they are designed. The issue is not whether applying forum law would achieve a deterrent effect, but whether the state of manufacture should apply its own law. The latter point seems clear, and it seems independent of where the manufacturer causes the product to be designed.

Should New Jersey force its own industries to pay judgments to strangers unprotected by other law in order to encourage compliance with the higher standards by which New Jersey hopes to protect its own citizens? What interest does New Jersey advance by allowing recovery under New Jersey law to persons injured in Quebec by New Jersey

\footnote{174} See, e.g., Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968). In Gaither the District of Columbia held a District auto owner to the District’s higher standard of vicarious liability when the owner left the keys to his station wagon in its tailgate in the District. The thief who stole the car injured a Maryland resident in Maryland, where the owner would not be liable, but the court allowed recovery under District law on a deterrence theory.
products? Could recovery be based upon the theory that a hypothetical New Jersey citizen might have ingested thalidomide on a trip to Quebec? In Heavner v. Uniroyal, Inc., recovery under New Jersey's longer period was denied to a North Carolina citizen injured in North Carolina by a product which was also on the market in New Jersey. There was obviously a danger to New Jersey citizens if defective tires of that brand were sold in New Jersey, and the danger was probably as high as the danger that a New Jersey resident might ingest thalidomide by buying it outside the United States. There remains, however, a difference. One can assume that a certain percentage of tires of a certain brand will be defective, and that the danger to citizens of a given state will bear some proportion to the presence of those tires within that state. This assumption is only a matter of statistics, however. It is entirely possible that all the defective tires will go elsewhere and never in fact create a danger to forum citizens. The maker of the tires can therefore argue that his liability under the law of a state into which his products come should be limited to compensation for injuries occurring there or to compensation for injuries occurring elsewhere as a result of local sales from which he receives a benefit. For injuries occurring elsewhere from sales occurring elsewhere to persons not resident in the forum, the manufacturer can say the forum should not impose forum law because the degree of risk to forum residents cannot be shown. Is this rationale also true for thalidomide? What percentage of sleeping pills containing thalidomide poses a threat to human life? The answer is one hundred percent, because Kevadon was specifically recommended for pregnant women. This situation differs from the sale within a certain state of Uniroyal tires, a certain percentage of which may be defective. When every pill is defective, the human risk is so extraordinarily high that the product can be placed in a separate class.

One now comes to the fact that thalidomide was actually given to thirty-four women of childbearing age during the New Jersey testing program, and the fact that an application was pending for permission to market the drug in New Jersey as well as the rest of the United States. What was the total danger to New Jersey citizens posed by these facts? Was it sufficient to outweigh Quebec's possible interest in granting repose under its shorter period to foreign corporations doing business in

175. 63 N.J. 130, 305 A.2d 412 (1973).
Quebec? The risk to New Jersey families under the testing program is obvious; the court's statement that families of forty other states were subjected to the same risk does not diminish the risk in New Jersey. More important, perhaps, is Merrell's pending application. If the government had approved it as rapidly as Merrell expected, there would have been a major disaster throughout the United States as well as in New Jersey. The defendant could have used the results of the New Jersey testing in support of the application, and the adequacy of testing would have been an important trial issue. We have seen that the state of manufacture has more deterrent power than any other because its law can reach every product the manufacturer makes. When one hundred percent of a local product endangers human life, perhaps it should use this power. If it does, it surely advances its policy of protecting people, including forum residents, from harm. Moreover, there is a strong chance that product safety would increase everywhere if all states so applied their more protective laws. Does anyone know how many dangerous products are now being designed, tested and manufactured? It should not seem far-fetched to ask the state of manufacture, as well as the state where manufacturing decisions are made, to accept responsibility commensurate with its power. One is guided by language from a court recently faced with a suit by children from ten states who were injured by blastings caps. Their New York suit alleged that the several manufacturers of the caps had agreed in New York to refrain from placing any warning of danger on them. The court said:

When decisions of a tortious nature to act—or to refrain from acting—are formulated in New York, this state's interest in the regulation of these decisions is . . . legitimate . . . . A state has some interest in developing substantive laws insuring that it is not turned into a den of iniquity from which wrongdoers sally forth to do mischief in the land.\(^\text{177}\)

There is other recent authority for basing a deterrent policy on conduct in the forum. In \textit{Hurtado v. Superior Court},\(^\text{178}\) the California

\(^{177}\) Chance v. E.I. DuPont De Nemours & Co., 371 F. Supp. 439, 445 (E.D.N.Y. 1974). This language was used in discussing the issue of joint liability. The standard of care and measure of damages, said the court, would have been governed by the place of injury. The court did not really explain why it treated these issues differently. If limitations had been at issue, one wonders whether the court would have found that New York's deterrence interest varied under its borrowing statute according to the period at each place where a child was injured. If New York has a legitimate interest in deterring this conduct, then New York should apply all the plaintiff-protecting elements in its own law which carry that interest into effect. If it does not have such an interest, then it should apply none of them.

\(^{178}\) 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 112 (1974).
court applied California's more generous measure of damages in behalf of a Mexican citizen wrongfully killed in California by a California defendant. The court held:

It is manifest that one of the primary purposes of a state in creating a cause of action in the heirs for the wrongful death of the decedent is to deter the kind of conduct within its borders which wrongfully takes life. It is also abundantly clear that a cause of action for wrongful death without any limitation as to the amount of recoverable damages strengthens the deterrent aspect of the civil sanction. . . . Therefore when the defendant is a resident of California and the tortious conduct giving rise to the wrongful death action occurs here, California's deterrent policy of full compensation is clearly advanced by application of its own law. 179

A longer period of limitation should be treated the same under this approach as a higher measure of damages; both "strengthen the deterrent aspect of the civil sanction." Hurtado lends considerable support to the application of New Jersey law in Henry. 180

Before leaving the question posed by Henry, it is necessary to ask whether there are limits beyond which a state should not go in the application of its deterrence policies. New Jersey has partially answered that question in Uniroyal because it refused to apply its own law when the product had not been locally manufactured. A clear, but common, example of overreaching, however, is provided by Bournias v. Atlantic Maritime Co., 181 mentioned above, in which the Second Circuit applied the forum's longer period to a claim—barred under Panamanian law—by a Panamanian seaman against a Panamanian shipowner under the Panama labor code. The forum in Bournias had no contact beyond its status as the forum. Based on such a contact, the forum's only conceivable policy would have been that of judicial economy. Only a shorter period, however, expresses such a policy. A longer local period

179. Id. at 583-84, 522 F.2d at 672, 114 Cal. Rptr. at 112 (citations omitted).
180. The lower court opinion in Henry has also been discussed in a note appearing at 49 N.Y.L. Rev. 299 (1964). The author proposes four rules for applying interest analysis to the statute of limitations which, in Henry, would have caused the court to apply New York's period. The rationale is that New York was the defendant's principal place of business. The note does not discuss the deterrence policy expressed by New Jersey's longer period, though this rationale has been cited frequently as a basis for applying forum law. See also Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C. Cir. 1965); Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973); Schmidt v. Driscoll Hotel, 249 Minn. 376, 82 N.W.2d 365 (1957); Kell v. Henderson, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (Sup. Ct. 1965), aff'd, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966).
181. 220 F.2d 152 (2d Cir. 1955); cf. Headrick v. Atchison, T. & S.F. Ry., 182 F.2d 305 (10th Cir. 1950) (New Mexico applied its longer local period to a claim by a Missouri plaintiff injured in California by a Kansas corporation).
expresses a plaintiff-protecting policy and could not possibly be relevant when the parties, the conduct, and the relationship are all foreign. This is "an intolerable affectation of superior virtue" by a court which has no reason whatever to ignore the only relevant policy—that of repose—expressed by the only interested state—Panama.

As one might expect, Bournias also raises questions of due process. In Home Insurance Co. v. Dick, the Supreme Court denied Texas the power to apply its own longer period to a contract claim in which the only Texas contact was its status as the forum. The contract was an insurance policy issued in Mexico by a Mexican company to a Mexican resident for coverage of a vessel only in Mexican waters. The policy was expressly made subject to Mexican law and contained a limitation on time for suit which was valid in Mexico. When Texas allowed suit after the agreed period had expired, the Supreme Court ruled that due process was denied to the company. The only distinction between Bournias and Dick seems to be that in Dick the shorter period was established by the agreement, whereas in Bournias it was part of foreign law. It is difficult to see any real difference between a shorter period which is part of the foreign law and a shorter period which is agreed to in a contract which depends upon foreign law for its legal effect. If Texas denied due process to the defendant in Dick, the Second Circuit was equally guilty in Bournias.

One can conclude, then, that there are limits on the forum's power to apply its own longer period. No conceivable deterrent policy of the forum could have been applied to the facts in Bournias; the court was able to decide the case the way it did only because it used the territorial theory. The court was locked in the grip of the substance-procedure distinction, which required a forum reference unless Panama's bar was "substantive." Since Panama failed the "specificity test," the court was left with an irrational result. The Rules suggested above would avoid this result. Rule II requires the forum to defer to the shorter period of the interested foreign state unless some local policy is involved. Since an irrational forum reference is frequently required by the "procedural" doctrine of the older theory, Rule II limits considerably the forum's power to apply its own law. The suggested approach does, therefore,

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182. Beach, Uniform Interstate Enforcement of Vested Rights, 27 Yale L.J. 656, 662 (1918).
183. 281 U.S. 397 (1930).
have definite boundaries. In fact, if it is followed fully one could expect even fewer local references than under the territorial theory.

**Conclusion**

In conflicts between limitations, there is as much choice between competing policies as in other types of conflicts. A court which decides a limitations case without weighing these policies does not do so rationally, and therefore does not do so justly. The idea that limitations are "procedural," and hence outside the choice of law process, has no basis in fact or reason and is irreconcilable with interest analysis. There is no real difference between characterizing a problem as "procedural" and the discredited method of characterizing it as one of "contracts" rather than "torts." Once a court adopts interest analysis, conflicts should be solved according to the policies which the conflicting laws express.

Borrowing statutes, which were designed to combat the procedural characterization of limitations, are relics from the territorialist past. They were intended to correct an abuse within the older choice of law system, a system wholly created and maintained by the courts. As the courts now abandon this system, they should reinterpret the statutes so as to fit the new system of choice of law the courts are now creating. In many states, where the statutes refer to "the place where the cause of action arises," this result can be reached simply by giving this language a functional definition.