

Choice of Law for Products Liability: Whither Ohio?

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The movement to reform tort and insurance law at the state level, principally by reducing and rationalizing the distribution of the amounts payable to the victims of injury or death and by expediting the processing of claims, has been in full swing nationwide and has made it to Ohio¹ and includes special provisions on products liability which mostly clarifies and codifies existing law rather than changing it.²

As is typical in these situations, all this legislation lacks choice-of-law provisions. Torts and insurance people have enough trouble coming to terms with the substantive provisions of their proposals to bother with the conflicts problems even though it is generally recognized now that the best time to deal with the choice-of-law issue is when the substantive rule is adopted. Furthermore, there is an uneasy perception that conflicts is or has become so esoteric and convoluted a subject that it is beyond rational appraisal by the various interest groups and defies legislative resolution.

The legislative silence on the territorial and personal reach of the law shifts the conflicts dilemmas to the courts as if they were not already overburdened with the multiplicity and complexity of the substantive issues themselves. When they plead for guidance from the conflicts experts, from eccentric professors like myself who revel in the unusual and in the exceptional, the courts are often told to go back and search for the legislative intent on conflicts reach on an issue-by-issue basis. If such intent is not there, they have to reconstruct it on the assumption that the policies embodied in the substantive rules would somehow give clues on how far a state is interested in their application!³ No wonder that the courts are clamoring for help. The difficulties encountered in the past with the relatively simple guest statutes and with limitations of damages in wrongful death cases will be dwarfed by the oncoming avalanche of the conflicts complications inherent in the current broad and diverse tort reform and in the continuing major differences in state products liability law. It is, therefore, important to articulate and evaluate the pertinent considerations in order to help the Ohio courts in their future attempts to develop a reasonable conflicts regime for the codified Ohio products liability law, especially for personal injury and death claims.

In conflicts matters, Ohio has generally been a middle-of-the-road state—both during the heyday of the traditional rules and now with the onslaught of the so-called conflicts “revolution.” In a nutshell, traditional conflicts lumped together most tort issues and relegated them to the law of the place of injury or death. Contract-type claims, e.g., for breach of warranty, were normally subjected to the law of the place

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1. The text of the new Ohio provisions appears in AM. SUB. H.B. 1 (1987).

2. The text of the new Ohio products liability provisions appears in OHIO REV. CODE ANN. §§ 2307.71–.80, 2315.20 (1987).

3. This is the basic methodology advocated by the theory of “interest analysis” which has exerted a major influence on the present-day conflicts. See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 183–84, 606, 727 (1963); Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and Reformulation*, 25 *UCLA L. REV.* 181, 182, 194–202 (1977).

of the making or of the performance of the contract. But serious questions arose as to whether these contacts should be the only or the principal ones to determine the applicable law and as to whether the process of contact-counting should not be replaced by or supplemented with some sort of policy or interest analysis and evaluation.

As a result, Ohio, like most other states, moved away from the traditional conflicts rules and now uses in torts a mixture of the new approaches,⁴ especially the most significant relationship test of the *Restatement (Second) of Conflict of Laws*, interest analysis, and choice-influencing considerations.⁵ In a recent case, *Morgan v. Biro Manufacturing Co.*,⁶ actually involving a products liability design-defect and failure-to-warn claim for injury caused in Kentucky by a meat grinder made in Ohio, the Ohio Supreme Court adopted as the preferred method the *Restatement (Second) of Conflict of Laws*, calling it "more reflective of our past decisions and also provid[ing] sufficient guidelines for future litigation."⁷ The court then proceeded to apply Kentucky rather than Ohio substantive law to the claim.

The trouble with the *Restatement* is that it does not deal with product liability claims separately. We are thus relegated to the general rules governing torts and contracts, which favor respectively the law of the place of injury⁸ or of negotiating and performance,⁹ unless another state has a more significant relationship. This approach is not only too general but also particularly burdensome in the product liability field because it necessitates splitting the issues into tort and contract, which bifurcates the conflicts inquiry, unnecessarily complicating and derailing the search for a practical solution.

Products that cause harm fall mostly into five categories: (a) consumer goods, including automobiles, appliances, clothing, and housewares; (b) foods and drugs, including medicines and vaccines; (c) houses, structures, and other fixtures; (d) machines, tools, and other items used in industry or in the trade; and (e) public conveyances such as airplanes, buses, railroad cars, trucks, and ships. Most products in the first three categories are acquired by the user from the manufacturer or supplier in the state of the user's habitual residence and any harm caused to the purchaser or a third party usually occurs there. Products of the fourth category (machines, tools) are normally put to use in the state of the original purchaser's place of production or business and cause injury to persons residing there. Finally, public conveyances are often intended for interstate use.

Products liability law seeks to achieve two basic objectives: improving the safety of products and repairing the damage caused by products. But since neither safety nor compensation come for free, the key question becomes cost-benefit optimality: in

4. This trend started with *Fox v. Morrison Motor Freight, Inc.*, 25 Ohio St. 2d 193, 267 N.E.2d 405, cert. denied, 403 U.S. 931 (1971) and carried over in most subsequent decisions. See Note, *Ohio Choice-of-Law Rules: A Guide to the Labyrinth*, 44 OHIO ST. L.J. 239 (1983).

5. On the main features of these conflicts approaches, see E. SCOLES & P. HAY, *CONFLICT OF LAWS* 16-20 (interest analysis), 27-28 (choice-influencing considerations), and 34-42 (*RESTATEMENT (SECOND)*) (1982).

6. 15 Ohio St. 3d 339, 474 N.E.2d 286 (1984).

7. *Id.* at 341-42, 474 N.E.2d at 288-89.

8. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 146 (1971).

9. *Id.* § 188(3).

other words, how much safety and who bears the losses of injury and death. In our current system, these substantive objectives are implemented mostly through private remedies: the victims are given rights against the manufacturers which they assert in court. Depending on whether or not the victim had some direct or indirect contractual relationship with the manufacturer, the claims may sound in tort and contract or in tort only.

In this factual and policy context, which conflicts approach is likely to best advance these objectives in a private, liability-based reparations system? Over the years, a number of ideas and concepts have been percolating. In 1985, the *Ohio State Law Journal* published a set of articles dealing with recent developments in conflicts, especially as they relate to product liability, and the reader is referred there for more detailed discussion of the various alternatives.¹⁰ It is my view that ways do exist to delineate the proper reach of Ohio law through reasonably precise, custom-made rules that are congruent with the basic policies of products liability legislation, rules which are sufficiently definite and clear to produce predictable and workable results, yet flexible enough to avoid mechanical jurisprudence. Such rules would lighten the burdens of litigation, facilitate settlements, and reduce haphazard choices.¹¹

In this Article, the contemporary conflicts doctrine will be synthesized and condensed into five propositions for products liability, three negative and two positive, to shepard the choice-of-law decision.

PROPOSITION ONE: DOWNGRADE THE "PLACE OF HARM" FACTOR

If there is one area of consensus in modern conflicts doctrine and practice, it is that the "place of the harm," especially if standing alone, should not be automatically applied as the exclusive or even the principal choice-of-law factor in tort matters.¹² Ohio has joined this trend and no longer adheres to an imperative *lex loci delicti*.¹³

In the few recent Ohio product liability cases where a choice of law had to be made, the place of harm was not given controlling weight.¹⁴ In *Morgan v. Biro Manufacturing Co.*,¹⁵ the Ohio Supreme Court held that while the *lex loci delicti* is

10. See Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of That Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493 (1985); Juenger, *What Now?*, 46 OHIO ST. L.J. 509 (1985); Zaphiriou, *State or Country Interest as Analytical Framework for Choice of Law*, 46 OHIO ST. L.J. 537 (1985); and Kozyris, *Interest Analysis Facing its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L.J. 569 (1985).

11. Many courts and commentators recognize the importance of moving from abstract notions and open-ended methodologies to crystallized formulations whenever practicable, incorporating the best elements of modern choice-of-law thinking. See, e.g., *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 20-23 (1965)(quoting E. GRISWOLD); E. SCOLES & P. HAY, *supra* note 5, at 44-46; Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946 (1981); Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?*, 46 OHIO ST. L.J. 549, 551-52 (1985). Cf. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 424-26 & nn.100-08 (1980).

12. See, e.g., E. SCOLES & P. HAY, *supra* note 5, at 559-62.

13. Since *Fox v. Morrison Motor Freight, Inc.*, 25 Ohio St. 2d 193, 267 N.E.2d 405, *cert. denied*, 403 U.S. 931 (1971), not one Ohio case has used the place of the harm as the exclusive or even an independently sufficient connecting factor in choice-of-law for torts. See also Note, *supra* note 4.

14. See *infra* cases cited in notes 20 & 24.

15. 15 Ohio St. 3d 339, 474 N.E.2d 286 (1984).

still viable in Ohio for tort claims, it is no longer used automatically. The key query is, "what specific factors should our courts consider in making an equitable choice-of-law determination" in the context of the interests of the various states involved.¹⁶ The law of Kentucky, where the injury had occurred, was applied to deny recovery because the victim resided there, because he was employed and received workmen's compensation there, and because the inspection of the defective machine was to have been made under Kentucky law.¹⁷

The place of the harm is not a useful connector in the products liability field. The principal substantive policy here is compensation, which accentuates the predominance of the personal over the territorial contacts. Even where an incidental admonitory safety policy may be involved, the place of the conduct rather than of the effects would be the better connector. The place of harm may be fortuitous and, in any event, reliance on it can produce overinclusive or underinclusive results. There is no good reason why the claim of a motorist passing through Ohio who consumes an unwholesome Illinois-made product that he bought at his home in Indiana should generally be governed by Ohio law. Conversely, a person injured out-of-state by a product acquired in Ohio or for use in Ohio should be entitled to the benefits of Ohio law regardless of the place where the injury occurred. Thus, the general presumption of section 146 of the *Restatement* in favor of the law of the place of harm for torts should apply with minimum force to products liability claims.

PROPOSITION TWO: DO NOT GIVE WEIGHT TO THE PLACE OF DECISIONMAKING
OR MANUFACTURING

In our national and international economies, most products are made in various locations and distributed in many markets. Does it make conflicts sense to focus on the state where the particular item which caused injury was in fact made and apply its stricter law against the manufacturer? Since no "expectation" or "compensation" interests of the victims are connected to that state, choosing the law of the place of manufacturing would make sense only if the making of a product, rather than its being placed on the market, is characterized as the "wrongful conduct" and if a deterrent purpose is found in the law there which imposes a greater liability on the manufacturer than the otherwise applicable law.

But treating the manufacturing itself as the wrongful conduct is not plausible. Merely making a defective product is neither dangerous nor unlawful. What is wrongful is placing it on the market, that is, putting it in a position to cause harm. In fact, the applicable law is to decide even the initial question of what constitutes a defect. In addition, it is highly doubtful that the deterrent policy of a state would extend to its manufacturers for harm caused out-of-state to out-of-state persons by products distributed in out-of-state markets.¹⁸

16. *Id.* at 341, 474 N.E.2d at 288.

17. *Id.* at 342-43, 474 N.E.2d at 289.

18. *Cf. Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260-61 (1981) (the benefits to local people of the incremental deterrence produced by applying the stricter law of place of manufacturing are likely to be insignificant).

For example, if a contraceptive is made in Ohio for exclusive distribution and use in India, it will be presumptuous and unwise to impose on the manufacturer the higher safety-compensation Ohio standards rather than have him comply with the Indian standards. If we were to apply Ohio law to give Indian victims greater protection than that provided by their local law, we would be increasing the cost of the product and either be making it more expensive for Indian users to acquire it contrary to the Indian cost-benefit judgments of where the safety line ought to be drawn or be transferring wealth from Ohio to India without a good reason.¹⁹ Similarly, the manufacturer's domiciliary state (headquarters, principal place of business), where the decisions on testing, production, and marketing are made, is not normally concerned with the out-of-state activities of its businesses resulting in effects on out-of-staters unless major moral issues are involved.

In Ohio, the choice-of-law issue in products liability was addressed recently also in certain federal cases in the context of motions to dismiss for forum non conveniens. The case of *In re Richardson-Merrell, Inc.*²⁰ involved a product (Debendox) made and distributed and causing harm in England to English persons by a wholly-owned subsidiary of the United States defendant. In dismissing the action on forum non conveniens grounds, the court stated that, under the applicable New York's conflicts standards, the interests of England were "overwhelmingly apparent," whereas those of New York or Ohio (where the products were developed and tested) were "minimal."²¹ Significantly, the court used lengthy quotes from the opinion in *Harrison v. Wyeth Laboratories*,²² nationally the best-reasoned case on product liability conflicts, against using the stricter law of the place of manufacturing and in favor of applying to questions of safety the law of the place of marketing and use.²³ In *Michell v. General Motors Corp.*,²⁴ the court similarly rejected a Canadian plaintiff's contention that the place where the infant seat which caused injury in Canada had been designed and manufactured should apply its pro-plaintiff law to the related claim.

A different approach was taken in *Lake v. Richardson-Merrell, Inc.*²⁵ where Judge Battisti was of the opinion that Ohio, where the manufacturer was headquartered and made all important decisions and where the product (thalidomide) had been made, would have a deterrent interest in applying its pro-plaintiff law to products liability claims arising in all other respects in Canada. After the modification of *In re Richardson-Merrell, Inc.* in *Dowling v. Richardson-Merrell, Inc.*,²⁶ leaving undisturbed the lower court's holding on the conflicts question, the *Lake* court reconsid-

19. Cf. *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 862-66 (S.D.N.Y. 1986).

20. 545 F. Supp. 1130 (S.D. Ohio 1982), *modified*, *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984).

21. *Id.* at 1135.

22. 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd*, 676 F.2d 685 (3d Cir. 1982).

23. *In re Richardson-Merrell, Inc.*, 545 F. Supp. 1130, 1136 (S.D. Ohio 1982), *modified*, *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984).

24. 439 F. Supp. 24 (N.D. Ohio 1977).

25. 538 F. Supp. 262, 274-75 (N.D. Ohio 1982). For a similar view, see *Johnson v. Spider Staging Corp.*, 87 Wash. 2d 577, 555 P.2d 997 (1976).

26. 727 F.2d 608 (6th Cir. 1984), *modifying In re Richardson-Merrell, Inc.*, 545 F. Supp. 1130 (S.D. Ohio 1982).

ered this issue but held firm to its original position distinguishing *Dowling* on the ground that in that case the product had also been manufactured in England.²⁷

The position taken in *In re Richardson-Merrell, Dowling, Harrison, and Michell* received a boost in *Morgan v. Biro Manufacturing Co.*²⁸ where the Ohio Supreme Court refused to apply Ohio's pro-plaintiff law to the claim of a Kentuckian injured in Kentucky on the sole grounds that the product had been made in Ohio by an Ohio manufacturer.²⁹

No cases have been found nationwide where the manufacturer was allowed to invoke the law of the place of manufacturing to escape liability. This lack of precedent is understandable in view of the improbability of a plaintiff choosing the place-of-making forum if its law does not favor him, since the manufacturer is normally amenable to suit on long-arm or doing-business grounds in so many other jurisdictions. In any event, enabling the manufacturer to hide behind the law of the place of production, where the other contacts are elsewhere, does not appear sound in a conflicts sense.³⁰

PROPOSITION THREE: OHIO LAW AS SUCH SHOULD NOT BE GIVEN PREFERENCE IN LITIGATION BEFORE THE OHIO COURTS

Ohio cannot and should not decide to apply Ohio law in all disputes that come before its courts. Ohio *cannot* do that because, under the United States Constitution, a state may apply its law only if it has significant contacts with the parties or the transactions and those contacts generate substantial state interests.³¹ Ohio *should not* apply Ohio law to disputes that are only remotely related to the state. In such cases, Ohio courts should defer to the law of the state of the dominant connections and interests. We may love and trust Ohio law but it should not become manna for the world.

Despite its turn toward the new conflicts methodologies, Ohio has not demonstrated any conscious or determined forum-law preference. There have been some casual references to Ohio having an interest, as a justice-administering state, in

27. *Haddad v. Richardson-Merrell, Inc.*, 588 F. Supp. 1158, 1160-62 (N.D. Ohio 1984).

28. 15 Ohio St. 3d 339, 474 N.E.2d 286 (1984).

29. *Id.* at 343, 474 N.E.2d at 289. Justices C. Brown, J. Celebrezze, and Chief Justice F. Celebrezze dissented, arguing that the wrongful conduct is located "at the site of manufacture" and that the product in any event had been "sold from Ohio." *Id.* at 344-45, 474 N.E.2d at 291. See also *Deemer v. Silk City Textile Machinery Co.*, 193 N.J. Super. 643, 651-52, 475 A.2d 648, 653 (1984), where it was emphasized that holding a manufacturer to the pro-plaintiff standards of the place of making of a product in favor of out-of-state persons and events is bound to discourage the location of manufacturing operations in the state and would lead to forum-shopping.

30. Professor Perlman, in the article he contributed to this symposium, suggests that federal law perhaps should allow a manufacturer to designate the law applicable to its products just as corporations are permitted to incorporate in their state of choice. Unless, however, we are persuaded that the marketplace would provide enough meaningful choices to consumers to deter arbitrary results, which is very doubtful in this instance, we should not support this kind of pro-defendant option. Professor Weintraub goes in the opposite direction: whenever the applicable law is not that of plaintiff's residence, the plaintiff is given the option of invoking the law of the place of manufacture, design, or maintenance of the product. Weintraub, *supra* note 10, at 508. For the reasons explained in the text, this is an equally imbalanced alternative.

31. See *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981) and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

applying its legislative policies to a plaintiff who chose to sue here.³² The emphasis, however, belongs to the second rather than to the first part of this proposition and even then it is questionable: the plaintiff sued here because he was confident that Ohio would apply proper choice-of-law standards.

The tendency of the courts to apply their own law whenever they get a chance is well known. In addition, the parties sometimes do not raise the conflicts question either because they do not know better or because it would involve added expense and litigation, so the law of the forum becomes the fall-back or residual law. Beyond that, the *Restatement* position that comity and good reason require us to search for the properly applicable law, rather than give local law as such great weight, constitutes the right approach.

PROPOSITION FOUR: THE PLACE OF THE INTENDED USE OF THE PRODUCT SHOULD
BECOME THE PRINCIPAL CONNECTION

It appears quite sensible to subject the manufacturer or supplier to the law of the place where he deliberately marketed the product for local use, and a claimant who knowingly acquired it there may not plausibly complain that such law is unrelated to him or to the transaction.³³ If place of intended use is not made explicit, it should be presumed that it coincides with the place of actual delivery, where the parties actually meet and transfer the product. A second-best choice would be to presume that the product is intended to be used at the buyer's mutually known residence.

Choosing the law of the place of intended use takes into account the mixed tort-contract nature of the product liability claim. The victim is often the person who acquired the product from the manufacturer or its chain of distribution. The place of intended use is typically known and determinable in advance, and the applicability of that law enables both the manufacturer and the purchaser to plan and control their transactions more precisely. Needless to say, if the parties do not like such law, they may bargain another choice. Such an agreement would be enforceable without difficulty.

Furthermore, in the typical products liability case, the plaintiff buys the product in his home state for use there and the injury or death occurs there. In that situation, it is not disputed that the law of the plaintiff's home state should apply regardless of the place of decisionmaking or of manufacturing. Its law should normally govern not only compensation but also deterrence, including punitive damages.

32. *Schiltz v. Meyer*, 29 Ohio St. 2d 169, 171-72, 280 N.E.2d 925, 927 (1972); *Moats v. Metropolitan Bank of Lima*, 40 Ohio St. 2d 47, 49, 319 N.E.2d 603, 604 (1974). *But see* *Michell v. General Motors Corp.*, 439 F. Supp. 24 (N.D. Ohio 1977), where the fact that the forum was Ohio was not treated as significant in determining the applicable law.

33. For a fuller discussion of the importance of the "place of distribution" and for an explanation why, despite the formal difference in the various formulations, in fact it plays a major role under other conflicts proposals in this field, see *Kozyris*, *supra* note 10, at 583-85. The place of intended use, presumably where the product is delivered, as articulated in Proposition Four, above, is a more concrete reformulation of the place of distribution. Perlman appears favorably inclined toward using a similar connector, that is, the place of the original sale of the product. *See* Perlman's article elsewhere in this symposium.

But what if the plaintiff had gone to another state to buy such a product? Should this change the result? The answer should be in the negative, provided that the producer and his chain of distribution had reason to know of the intended out-of-state use. Place of intended use is where the harm is most likely to be suffered by that state's residents, and it is fair to hold the manufacturer to that state's law if he had notice of the out-of-state use.

What if the plaintiff later moves to another state, either permanently or temporarily, where he takes the product, and the injury occurs there? This post-sale variation in the combination of contacts by itself should not be enough to make another law applicable. It would be unfair to subject the manufacturer to the law of a state which at the time of sale is totally unrelated. A claimant should not be allowed to vary the applicable law unilaterally by just moving the product or his habitual residence to another state.

Where the place-of-intended-use connector is used, an Ohio manufacturer who distributed for use or delivered a product in Ohio will generally be protected by Ohio law, regardless of where the injury occurred or where the product had been in fact made. Thus, planning by the manufacturer (and his distribution chain) is facilitated because he usually knows and can take into account the place of intended use and/or delivery. A person injured by a product acquired in Ohio or for use in Ohio will be entitled to claim the benefits of Ohio law again wherever the injury occurred or the product was made. As a consequence, most Ohio residents who normally acquire products locally will be able to invoke Ohio law against out-of-state manufacturers.

Where a product by its nature is intended to be used in many states (e.g., public conveyances), the law of the state that coincides with the victim's residence may be preferred. For example, in the absence of federal law governing liability arising from airplane crashes, the best we can do is select among the many places of intended use the one that coincides with the personal law of the victim, since the other possible connections, e.g., where the trip originated or was destined, where the ticket was bought and the like, appear less significant. Because the law of the victim's residence is chosen only where it coincides with a state of intended use, neither the manufacturer nor the airline can claim unfair surprise or arbitrariness. Also, the victim's rights are measured by his personal law, which is quite appropriate for him. If there is no coincidence of these two states, we should fall back to the place of harm for reasons of expediency and simplicity since no other choice can make a superior claim.

PROPOSITION FIVE: THE PLACE OF INTENDED USE SHOULD BE OVERRIDDEN AT THE CHOICE OF THE VICTIM ONLY WHERE MOST OTHER SIGNIFICANT CONTACTS ARE CONCENTRATED IN ANOTHER STATE

This proposition is intended principally to allow incidental victims such as employees, bystanders, and others to choose their own personal law if the harm occurred in their home state and if the same product of the same manufacturer was then available there through commercial channels. These persons are not transactionally connected to the manufacturer, and the presence of the product in their home

state and the occurrence of the harm there are sufficient connections where reinforced by the commercial distribution of the product there. This latter qualification is important because only a manufacturer who is serving the local market is subjected to its law, and only with regard to local people and events. The strength of all these connections concentrated in one state suggests that this option should also be extended even to those who are transactionally connected with the manufacturer. In other words, all victims may be allowed to select the law of the state where all these contacts are clustered, thus "trumping" the law of the state of the original intended use. The technique of allowing a party to choose among two or more potentially applicable laws is used in most of the recent proposals on products liability conflicts³⁴ and, when employed judiciously and carefully, could lead to good results.

CONCLUSION

The continuing and expanding variations in state products liability laws aggravate the problem of choice-of-law in the all-too-frequent multistate and multinational situations. Conflicts cannot cure the anomaly of subjecting what are in reality national and international markets to local legislative authority, but at least it should facilitate the process of choice by providing clearer guidance and workable solutions within the parameters of acceptable doctrine.

Ohio's recent embrace of the *Restatement (Second) of Conflict of Laws* should not be viewed as an automatic solution but, in view of the generality and ambiguity of its provisions in this area, as an invitation to develop a particularized system of conflicts for products liability either for legislative or for judicial adoption. In the present Article, the author reviewed recent developments and concluded that the place of intended use or original delivery of the product should be the primary connecting factor to be overridden at plaintiff's option in certain limited contexts, when all the other significant contacts are clustered elsewhere. Place of the harm, place of decisionmaking or manufacturing, and place where the action is brought should be downgraded because they are not congruent with the proper reach of the basic substantive policies of modern products liability law.

34. Professor Weintraub would give the plaintiff a wide array of choices: whenever the law of his habitual residence where the product is commercially available is not chosen, the plaintiff may select the pro-plaintiff law of either (a) the defendant's principal place of business, (b) the state where the product was acquired if the commercial availability there was foreseeable, or (c) the place where the defendant designed, manufactured, or maintained the product. For punitive damages, these choices are always available regardless of the otherwise applicable law. Defendant gets only one limited option: to insist on the law of the plaintiff's habitual residence, where the product was commercially available, for issues other than punitive damages. Weintraub, *supra* note 10, at 508. Professor Cavers goes even further in granting options to plaintiffs: under his proposal, the plaintiff could choose the law of either (a) the place of design or production, (b) his habitual residence where the product was acquired or caused harm, or (c) the state where the product was acquired and caused harm. These choices are limited only by the unforeseeability of the presence of the product in the state whose law is to be applied. See Kozyris, *supra* note 10, at 592. For manufacturers serving the national or international markets, this limitation is minimal and certainly less protective than one based on commercial availability.

In the author's view, the Weintraub choices favor unduly the law of the state of decisionmaking and manufacturing, and Cavers' options not only present the same problem but also dilute the importance of distribution through commercial channels. The limited "trump" exercisable by the plaintiff where all major connections other than place of intended use or delivery are located elsewhere, as proposed in the text, reflects a better balance of the applicable considerations.

