

A NEU *NEUMEIER*: THE NEED FOR A MORE FLEXIBLE
FRAMEWORK FOR CHOICE OF LAW IN THE STATE OF NEW
YORK

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“The only way to create a foundational document that could stand the test of time was to build in enough flexibility that later generations would be able to adapt it to their own needs and uses.”¹

INTRODUCTION

During the second half of the twentieth century, choice of law principles in the United States came under heavy criticism.² Choice of law disputes arise in cases that involve “facts connected to different jurisdictions,” and require courts to determine which jurisdiction’s law should apply.³ Initially, the increasing complexities surrounding this field of law led the majority of jurisdictions in the United States to follow the “traditional” choice of law rule in tort actions (also commonly referred to as *lex loci delicti*)⁴ embodied in the original Restatement of Conflict of Laws: “the substantive rights and liabilities arising out of a tortious occurrence are determinable by the law of the place of the tort.”⁵

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¹ Diane P. Wood, *Our 18th Century Constitution in the 21st Century World*, 80 N.Y.U. L. REV. 1079, 1099 (2005). Judge Diane P. Wood sits on the United States Court of Appeals for the Seventh Circuit. *Id.* at 1079 n.*. She originally delivered this essay for the James Madison Lecture, on October 18, 2004, at the New York University School of Law. *Id.*

² See MICHAEL H. HOFFHEIMER, CONFLICT OF LAWS 173 (2010).

³ DAVID P. CURRIE ET AL., CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 2 (8th ed. 2010).

⁴ EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 69–70 (4th ed. 2004).

⁵ *Babcock v. Jackson*, 12 N.Y.2d 473, 477, 191 N.E.2d 279, 281, 240 N.Y.S.2d 743, 746 (1963); see RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 384 (1934) (articulating the *lex loci delicti* rule).

This theory posited “that a right to recover for a foreign tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law.”⁶ However, the doctrine—once praised for its ease of application and predictability—soon became discredited for its rigidity and ignorance of other interested jurisdictions.⁷ Thus, the traditional rule was abandoned by the majority of jurisdictions, in search of a rule that was less mechanical and allowed for greater flexibility in its application.⁸

New York “played a major role in the evolution of modern choice of law theories,” and its jurisprudence and case law are still given considerable attention by conflicts theorists.⁹ The New York Court of Appeals led the charge against the traditional approach, and became the first jurisdiction to openly abandon it as its rule.¹⁰ However, while New York was once a respected leader in the field of conflict of laws, its influence in the field has decreased over the last several decades.¹¹ This is a direct result of the Court of Appeals’ pronouncement to be the first jurisdiction to adopt a rigidly applied mechanical framework for a set of rules that would govern all future tort conflict situations, which has come to be known as the *Neumeier* rules.¹² Since the adoption of these rules, not a single jurisdiction has followed suit; the majority have instead elected to adopt alternative conflicts approaches, primarily that of the Second Restatement of Conflict of Laws.¹³ These other jurisdictional approaches differ from the approach adopted in New York, primarily in their fluidity and ability to adapt to the particular circumstances involved on a case-by-case basis.

In June 2011, the Court of Appeals was presented with a question of first impression—a unique case that had never before reached its courtroom—involving questions of choice of law concerning “nondomiciliary defendants [who were] jointly and severally liable to nondomiciliary plaintiffs in a tort action arising out of a single incident within the State of New York.”¹⁴ The case, *Edwards v. Erie*

⁶ *Babcock*, 12 N.Y.2d at 477–78, 191 N.E.2d at 281, 240 N.Y.S.2d at 746.

⁷ *Id.* at 478, 191 N.E.2d at 281, 240 N.Y.S.2d at 746–47.

⁸ *See id.* at 478–79, 191 N.E.2d at 281–82, 240 N.Y.S.2d at 746–47.

⁹ *See* HOFFHEIMER, *supra* note 2, at 173.

¹⁰ SCOLES ET AL., *supra* note 4, at 69–70.

¹¹ *See* HOFFHEIMER, *supra* note 2, at 173.

¹² *See infra* Part I.

¹³ *See infra* Part IV.

¹⁴ *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 331, 952 N.E.2d 1033, 1044, 929

Coach Lines Co., involved multiple defendants, domiciled in Ontario and Pennsylvania, who were in a car accident in the State of New York.¹⁵ The majority's holding in the case, and the application of New York's choice of law rule, highlighted the deficiencies in the *Neumeier* rules: their rigid nature and inability, at times, to render a fair and equitable result.

Moreover, the court's decision in *Edwards* brings to the forefront the reason that New York has fallen behind in the conflicts field and is no longer the major and esteemed player it once was: its choice of law framework is inadequate to deal with the wide range of cases and circumstances that arise in the multistate and international system that exists today. While a set of mechanical rules can be useful, goals of uniformity and predictability should not be accentuated at the expense of bedrock principles such as fairness, justice, and equity. The court must develop a more workable approach to the *Neumeier* framework that embraces all of these important judicial goals and principles and has the ability to adapt to unique or rare circumstances.¹⁶

Part I of this paper will focus on the evolution of choice of law rules in the State of New York and the development and subsequent adoption of New York's current choice of law rule: the *Neumeier* framework. Part II will discuss the Court of Appeals' misapplication of important choice of law principles in *Edwards*, particularly its decision to use *dépeçage*—the application of two separate legal analyses for the different sets of defendants involved in the accident. Part III will critique the majority's logic in *Edwards*, which is incompatible with Court of Appeals jurisprudence. Part IV will then turn to alternative choice of law approaches used by other jurisdictions, virtually all of which would have rendered a fair and equitable result under the unique circumstances of the *Edwards* case. Finally, Part V will briefly examine the implication the decision will have on future liability settlements in the State of New York, in that it will likely discourage parties from resolving questions of liability prior to the final determination on questions of substantive law, thus prolonging the already lengthy legal process.

N.Y.S.2d 41, 52 (2011) (Ciparick, J., dissenting in part).

¹⁵ *Id.* at 381, 325, 952 N.E.2d at 1034, 1039–40, 929 N.Y.S.2d at 42, 47–48 (majority opinion).

¹⁶ See, for example, Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577–80 (1988), where the author discusses the defects inherent in American property law jurisprudence, which “has always been heavily laden with hard-edged doctrines.”

I. THE EVOLUTION OF CHOICE OF LAW RULES IN NEW YORK

Former New York Court of Appeals Chief Judge Charles S. Desmond once described the rule of *lex loci delicti* as both “unjust and anomalous” in a nation that is essentially borderless, as it often leads to situations where the place of the accident is a result of merely fortuitous circumstances.¹⁷ In such cases, the place of the wrong does not have a compelling interest in the plaintiff’s recovery, or in protecting the defendant, as compared to the interests of the places of domicile of the parties involved in the dispute.¹⁸ The New York Court of Appeals led the insurgence against *lex loci delicti*, beginning with *Babcock v. Jackson*¹⁹ in 1963, when it became the first court to explicitly abandon the traditional rule.²⁰ Eighteen jurisdictions would follow New York’s lead in the next seven years, and by 2003, virtually every jurisdiction had abandoned the traditional rule.²¹

At around the same time that the rule of *lex loci delicti* was eroding in torts cases, the rule of *lex loci contractus*²²—dealing with contracts cases—was undergoing similar changes.²³ This shift, too, was led by the State of New York, and was most predominantly established by the Court of Appeals in *Auten v. Auten*.²⁴ This famous case jumpstarted the revolution in contracts conflicts cases, establishing a “center of gravity” approach that the majority of states would adopt—following New York’s lead—over the course of the next forty years.²⁵ While nearly every jurisdiction followed in New York’s footsteps in the abandonment of the old traditional approaches to conflicts cases, few continued to follow New York

¹⁷ *Kilberg v. Ne. Airlines, Inc.*, 9 N.Y.2d 34, 39, 172 N.E.2d 526, 527–28, 211 N.Y.S.2d 133, 135 (1961).

¹⁸ *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

¹⁹ *See id.* at 479, 191 N.E.2d at 282, 240 N.Y.S.2d at 747.

²⁰ SCOLES ET AL., *supra* note 4, at 69–70.

²¹ *Id.* at 70, 72. A total of forty-two jurisdictions have abandoned the rule of *lex loci delicti*, while just eleven jurisdictions appear to continue to adhere to it. *See id.* at 86. The only American jurisdictions that still use the traditional approach of *lex loci delicti* are Alabama, Georgia, Kansas, Maryland, Montana, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming. *Id.*

²² This phrase means “the law of the place of the contract.” *Pritchard v. Norton*, 106 U.S. 124, 135 (1882).

²³ *See* SCOLES ET AL., *supra* note 4, at 74–75, 76 tbl.2.

²⁴ *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954).

²⁵ *See* SCOLES ET AL., *supra* note 4, at 74–78 (“[B]y the end of 2003, a total of 41 jurisdictions had abandoned the *lex loci contractus* rule, while eleven continued to adhere to it.”).

when selecting their new jurisdictional rule.²⁶

In *Babcock v. Jackson*, the Court of Appeals, in an opinion authored by former Chief Judge Stanley H. Fuld, adopted the center of gravity approach for conflicts cases involving loss-allocating rules,²⁷ an approach already used by the court in conflicts cases involving contracts.²⁸ This doctrine, also commonly referred to as the “grouping of contacts” doctrine,²⁹ was favored for its recognition of the competing jurisdictional interests in tort claims, as it achieved both justice and fairness, and ultimately the best practical result,³⁰ by giving “controlling effect to the law of the jurisdiction which . . . ha[d] the greatest concern with the specific issue raised in the litigation.”³¹ Additionally, this approach, which over time developed into a kind of “interest analysis,” differed from that of the traditional rule of *lex loci delicti*, since it focused primarily on the end-result, rather than on a mechanical framework of a workable and predictable rule.³²

Over nine years later, after deciding *Babcock*, the Court of Appeals abandoned the center of gravity approach due to its inconsistency and difficulty in its application.³³ Uncovering the various jurisdictional interests and the purposes of their respective guest statutes proved to be incredibly challenging and overly burdensome to the court.³⁴ The court sought a set of rules that would “assure a greater degree of predictability and uniformity,”³⁵ and adopted former Chief Judge Fuld’s three principles developed in his *Tooker v. Lopez*³⁶ concurrence—now commonly referred to as the

²⁶ See HOFFHEIMER, *supra* note 2, at 173.

²⁷ Loss-allocating rules “prohibit, assign, or limit liability after the tort occurs, such as . . . guest statutes.” *Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 522, 644 N.E.2d 1001, 1003, 620 N.Y.S.2d 310, 312 (1994).

²⁸ See *Babcock v. Jackson*, 12 N.Y.2d 473, 481, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749 (1963).

²⁹ *Id.*

³⁰ See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 275, 282, 295–304 (1966).

³¹ *Babcock*, 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749. In addition, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971), which states that the place of the wrong is presumptively the controlling law, unless another “state has a more significant relationship . . . to the occurrence and the parties.”

³² See *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72, 612 N.E.2d 277, 280, 595 N.Y.S.2d 919, 922 (1993).

³³ See *Neumeier v. Kuehner*, 31 N.Y.2d 121, 127, 286 N.E.2d 454, 457, 335 N.Y.S.2d 64, 69 (1972).

³⁴ See *id.*

³⁵ *Id.*

³⁶ See *Tooker v. Lopez*, 24 N.Y.2d 569, 585, 249 N.E.2d 394, 404, 301 N.Y.S.2d 519, 532–33

“*Neumeier* rules”—to govern conflicts cases involving guest statutes.³⁷

This court-created set of rules is set out as follows: first, when both parties “are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.”³⁸ Second, when the defendant’s conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, the defendant shall not be held liable.³⁹ When the plaintiff is injured in the state of his own domicile, and its law permits recovery, the defendant who has come into that state, should not be permitted to interject the law of his state.⁴⁰ Where a plaintiff is injured in the state of their domicile, and the statutory purpose is to protect plaintiffs, the law of the plaintiff’s domicile will govern. Where neither of these first two rules is applicable to the situation, then the third *Neumeier* “catch-all” rule will apply.⁴¹

The third *Neumeier* rule is less rigid. The presumption is that the law of the state of the accident will apply, unless “it can be shown that displacing th[e] normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.”⁴² Thus, the third rule, in fact, essentially re-

(1969) (Fuld, C.J., concurring).

³⁷ See *Neumeier*, 31 N.Y.2d at 128, 286 N.E.2d at 457–58, 335 N.Y.S.2d at 70.

³⁸ *Id.* at 128, 286 N.E.2d at 457, 335 N.Y.S.2d at 70.

³⁹ See *id.* at 128, 286 N.E.2d at 457–58, 335 N.Y.S.2d at 70; Michael J. Hutter, Professor of Law, Albany Law School, Conflict of Laws Lecture (Mar. 4, 2013) (lecture notes on file with author) [hereinafter Hutter, Conflict of Laws Lecture (Mar. 4, 2013)]. For instance, *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 200, 480 N.E.2d 679, 686, 491 N.Y.S.2d 90, 97 (1985), was partially a rule one case, since although the *locus* was New York, both plaintiffs and defendant Boy Scouts shared a common domicile in New Jersey, thus, New Jersey law was applied. The court, however, in a separate choice-of-law analysis in a separate cause of action, applied New Jersey law in the suit against defendant Franciscan Brothers under rule three, since the parties were domiciled in different jurisdictions, and the court opted to shift away from the presumption that New York, as the place of the wrong, had the most significant interest in the dispute. See *id.* at 201, 480 N.E.2d at 687, 491 N.Y.S.2d at 98.

⁴⁰ *Neumeier*, 31 N.Y.2d at 128, 286 N.E.2d at 457–58, 335 N.Y.S.2d at 70; Hutter, Conflict of Laws Lecture (Mar. 4, 2013), *supra* note 39.

⁴¹ See *Neumeier*, 31 N.Y.2d at 128, 286 N.E.2d at 458, 335 N.Y.S.2d at 70 (explaining that this rule applies “[i]n other situations”); see also William A. Reppy, Jr., *Eclecticism in Methods for Resolving Tort and Contract Conflict of Laws: The United States and the European Union*, 82 TUL. L. REV. 2053, 2066 n.66 (2008) (using the term “catch-all” to describe to the third *Neumeier* rule); Stephen Clark, Professor of Law, Albany Law School, Conflict of Laws Lecture (Nov. 10, 2011) (lecture notes on file with author) (referring to the third *Neumeier* rule as the “catch-all” rule).

⁴² *Neumeier*, 31 N.Y.2d at 128, 286 N.E.2d at 458, 335 N.Y.S.2d at 70. *Neumeier* was a

implements the long-abandoned rule of *lex loci delicti*, which has garnered considerable criticism for New York's *Neumeier* framework.⁴³ The implementation of the *Neumeier* rules made New York one of the first states to set out a rigid, mechanical set of rules for choice of law theory, as few states at the time—and still to this day—rely upon any single choice of law theory, instead combining multiple theories and approaches to produce a sustainable result.⁴⁴

II. THE CASE

A. *Edwards v. Erie Coach Lines Co.*

On January 19, 2005, a “bus carrying members of an Ontario women’s hockey team” crashed into a tractor-trailer parked on the side of the highway near Geneseo, New York.⁴⁵ Three bus passengers were killed, and several others were seriously injured.⁴⁶ The driver of the charter bus and his employer (Erie Coach Lines Company) were all Ontario domiciliaries, as were all of the deceased and injured passengers.⁴⁷ The driver of the tractor-trailer and his employer (J & J Trucking), were both domiciliaries of Pennsylvania.⁴⁸

These six separate lawsuits against the various bus and tractor-trailer defendants presented a choice of law issue because Ontario law caps noneconomic damages in personal injury actions alleging negligence, while no such limit exists under New York law.⁴⁹ The case reached the New York Court of Appeals, and the court’s

rule three case since the plaintiff passenger was a domiciliary of Ontario, Canada, the defendant driver was a New York domiciliary, and the place of the wrong occurred in Ontario. *See id.* at 123, 128, 286 N.E.2d at 455, 458, 335 N.Y.S.2d at 66, 70. The court elected to apply Ontario law, explaining that the plaintiff had failed to meet his burden in rebutting the presumption that *lex loci delicti* should apply. *See id.* at 129, 286 N.E.2d at 458, 335 N.Y.S.2d at 71.

⁴³ *See, e.g.*, Robert A. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 L. & CONTEMP. PROBS. 10, 21 (1977) (arguing that New York’s *Neumeier* framework is “unsatisfactory” and will require further modification to its rigid nature before it is suitable).

⁴⁴ *See id.* at 10.

⁴⁵ *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 318, 952 N.E.2d 1033, 1034, 929 N.Y.S.2d 41, 42 (2011).

⁴⁶ *Id.* at 318, 952 N.E.2d at 1034–35, 17 N.Y.S.2d at 42–43.

⁴⁷ *Id.* at 325, 952 N.E.2d at 1039, 17 N.Y.S.2d at 47.

⁴⁸ *Id.* at 325, 952 N.E.2d at 1039–40, 17 N.Y.S.2d at 47–48.

⁴⁹ *Id.* at 325, 952 N.E.2d at 1040, 17 N.Y.S.2d at 48. “[The] Supreme Court of Canada had capped noneconomic damages at CDN \$100,000 in 1978 dollars, which then equivalent of US \$310,000.” *Id.* at 325–26, 952 N.E.2d at 1040, 17 N.Y.S.2d at 48.

decision was rendered on June 30, 2011.⁵⁰ Although both defendants were jointly and severally liable, and the tort action arose out of a single incident, the court elected to apply two separate *Neumeier* analyses, “consider[ing] each plaintiff vis-à-vis each defendant.”⁵¹

B. *Dépeçage*

The Court of Appeals erred in its analysis in *Edwards* by applying two separate analyses, where only one was warranted. The court contended that two separate analyses ought to be conducted according to the choice of law doctrine called “*dépeçage*.”⁵² The problem with this doctrine lies in its definition: there is no single or generally accepted definition for the term.⁵³ Willis L.M. Reese, a leading figure in the development of choice of law rules,⁵⁴ has defined *dépeçage* in its broadest form, “to cover all situations where the rules of different states are applied to govern different issues in the same case.”⁵⁵

Under the center of gravity approach adopted in *Babcock*, the use of *dépeçage* ought to have been far more common, since the purpose of the rule was to “giv[e] controlling effect to the law of the jurisdiction which . . . ha[d] the greatest concern with the specific issue raised in the litigation.”⁵⁶ Reese explains that the application of *dépeçage* is appropriate only when the application of different jurisdictional rules (1) would “result in the application to each issue of the rule of the state with the greatest concern in the determination of that issue;” (2) would carry out the policy of the applicable rules; and (3) would not frustrate the expectations of the parties.⁵⁷

The majority opinion in *Edwards*, in applying *dépeçage*, supported its decision by explaining that it was simply following

⁵⁰ *Id.* at 306, 952 N.E.2d at 1033, 17 N.Y.S.2d at 41.

⁵¹ *Id.* at 329, 952 N.E.2d at 1042–43, 17 N.Y.S.2d at 50–51.

⁵² *See id.* at 329 n.10, 952 N.E.2d at 1043 n.10, 17 N.Y.S.2d at 51 n.10. *Dépeçage* is an issue-by-issue conflicts analysis that looks at the rule in conflict in isolation. *See* BLACK’S LAW DICTIONARY 503 (9th ed. 2009).

⁵³ *See* Willis L. M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 58 (1973).

⁵⁴ *See id.* at 58 n.*.

⁵⁵ *Id.* at 58.

⁵⁶ *Babcock v. Jackson*, 12 N.Y.2d 473, 481, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749 (1963).

⁵⁷ Reese, *supra* note 53, at 60.

already-established New York law, since the Court of Appeals had conducted two separate choice of law analyses in *Schultz v. Boy Scouts of America, Inc.*,⁵⁸ resulting in the application of different *Neumeier* rules for the liability of each defendant.⁵⁹ However, as Judge Ciparick noted in her dissent in *Edwards*, and the Appellate Division for the Second Department pointed out in *King v. Car Rentals, Inc.*,⁶⁰ *Schultz* was not analogous to the case at hand.⁶¹

In *Schultz*, plaintiffs sought damages for personal injuries sustained as a result of sexual abuse they suffered by defendant Coakeley.⁶² Coakeley was a Brother in the Franciscan Order, and was the boys' schoolteacher as well as the leader of their scout troop.⁶³ "Plaintiffs allege[d] that the sexual abuse occurred while Coakeley was acting in those capacities," and therefore sued the Franciscan Brothers of Poor, Inc., and Boy Scouts of America, Inc., for negligent hiring and supervision of Coakeley.⁶⁴ Thus, "although the plaintiff was injured by a single tortfeasor, the liability of the two defendants in issue was predicated not merely on their vicarious responsibility for the acts of the tortfeasor, but on their own separate, allegedly negligent, acts of hiring the tortfeasor."⁶⁵

In *King*, however, where the lawsuits were against defendant Car Rentals, Inc., a corporation that did business as a licensee of defendant Avis Rent A Car, the court explained that both defendants, if liable, were liable "solely vicariously," since their liability was entirely interrelated.⁶⁶ The appellate division concluded that the application of multiple jurisdictional laws might "lead to unanticipated complications" and an unfair and inequitable result.⁶⁷ The logic underlying *King* is relevant to the situation in *Edwards*, since, as the dissent notes, the liability of both defendants was interrelated in the sense that both causes of action (against the

⁵⁸ *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 198–202, 480 N.E.2d 679, 685–87, 491 N.Y.S.2d 90, 96–98 (1985).

⁵⁹ *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 329, 952 N.E.2d 1033, 1042–43, 929 N.Y.S.2d 41, 50–51 (2011).

⁶⁰ *King v. Car Rentals, Inc.*, 29 A.D.3d 205, 212–13, 813 N.Y.S.2d 448, 454 (App. Div. 2d Dep't 2006).

⁶¹ *Edwards*, 17 N.Y.3d at 332–33, 952 N.E.2d at 1045, 929 N.Y.S.2d at 53 (Ciparick, J., dissenting in part).

⁶² *Schultz*, 65 N.Y.2d at 192, 480 N.E.2d at 680–81, 491 N.Y.S.2d at 92.

⁶³ *Id.* at 192, 480 N.E.2d at 681, 491 N.Y.S.2d at 92.

⁶⁴ *Id.*

⁶⁵ *King*, 29 A.D.3d at 212–13, 813 N.Y.S.2d at 454.

⁶⁶ *See id.* at 213, 813 N.Y.S.2d at 454.

⁶⁷ *Id.*

bus company and the owner of the tractor-trailer) arose out of a single incident (the bus crash).⁶⁸ Thus, the dissent states that a single *Neumeier* analysis ought to have been used.⁶⁹

Additionally, the *American Law of Products Liability Third Treatise*⁷⁰ states that dépeçage is not to be used where “the issues . . . are inextricably intertwined.”⁷¹ This principle is closely related to the well-established torts principle of concurrent causal conditions.⁷² In a negligence action, concurrent causal conditions exist where two separate acts of negligence combine to produce a single injury.⁷³ However, two distinct theories of liability exist under the scope of this doctrine.

The first is where neither act on its own is sufficient to produce the injury, but where both acts of negligence are necessary in order for the accident to occur.⁷⁴ In other words, concurrent causal conditions are present where the injury would not have occurred without both acts of negligence—each on their own, without the other, would not have caused the accident.⁷⁵ As the New York Court of Appeals has explained, “[w]here concurrence in causes are charged the test is, simply, could the accident have happened without their co-operation?”⁷⁶ If the answer is yes, then a different multiple tortfeasor rule is used:

Where two causes, each attributable to the negligence of a

⁶⁸ See *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 333, 952 N.E.2d 1033, 1045, 929 N.Y.S.2d 41, 53 (2011) (Ciparick, J., dissenting in part).

⁶⁹ See *id.* at 333, 952 N.E.2d at 1045–46, 929 N.Y.S.2d at 53–54.

⁷⁰ Products liability has its origins in tort and contract law, allowing an injured plaintiff to hold manufacturers liable for defective products. See AM. L. PRODS. LIAB. § 1:8 (3d ed. supp. 2012) (citing *Cova v. Harley Davidson Motor Co.*, 182 N.W.2d 800 (Mich. 1970); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916)).

⁷¹ AM. L. PRODS. LIAB., *supra* note 70, § 46:5.

⁷² See generally *Hill v. Edmonds*, 26 A.D.2d 554, 554–55, 270 N.Y.S.2d 1020, 1020–21 (App. Div. 2d Dep’t 1966) (explaining that each tortfeasor is responsible for the entire result of an accident that occurs due to separate acts of negligence).

⁷³ See 57A AM. JUR. 2D *Negligence* § 549 (2004).

⁷⁴ See *id.*

⁷⁵ See, for example, *Hill*, 26 A.D.2d at 554–55, 270 N.Y.S.2d at 1021, which illustrates a case of multiple causation where a woman’s car slammed into a tractor-trailer parked on the shoulder of the highway. The Second Department held that:

Assuming, *arguendo*, that she was negligent, the accident could not have happened had not the truck owner allowed his unlighted vehicle to stand in the middle of the highway.

Where separate acts of negligence combine to produce directly a single injury each tortfeasor is responsible for the entire result, even though his act alone might not have caused it.

Id. (citations omitted).

⁷⁶ *Sweet v. Perkins*, 196 N.Y. 482, 485, 90 N.E. 50, 51 (1909).

responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other, it is reasonable to say that there is a joint and several liability, because, whether the concurrence be intentional, actual or constructive, each wrongdoer, in effect, adopts the conduct of his co-actor, and for the further reason that it is impossible to apportion the damage or to say that either perpetrated any distinct injury that can be separated from the whole. The whole loss must necessarily be considered and treated as an entirety.⁷⁷

In other words, neither act on its own was necessary, but each sufficient, to produce the occurring harm.⁷⁸

Edwards is a classic case of the first line of concurrent causal conditions, since, but for the bus driver's negligence, the accident would not have occurred, and but for the tractor-trailer being negligently parked on the shoulder of the highway, the bus would not have crashed. Thus, both defendants' acts of negligence are "inextricably intertwined."⁷⁹ Both acts together were necessary in order to cause the bus to crash. If one was taken away, the bus accident could not have occurred.

Consequently, in *Edwards*, the rigid application of the *Neumeier* framework and the use of dépeçage created the exact type of situation against which the court in *King* had cautioned.⁸⁰ During a jury trial on liability, prior to the Court of Appeals rendering its decision, defendants agreed that they were 100% jointly and severally liable, and "agreed to apportion such liability between themselves at 90% to the bus [company] defendants and the remaining 10% to the tractor-trailer defendants."⁸¹

Thus, the decision to conduct separate choice of law analyses for both defendants that consequently resulted in the application of different jurisdictional rules to different defendants, created a potential situation where, as a result of the Ontario cap on non-economic damages, the 10% liable tractor-trailer defendants could

⁷⁷ *Cook v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 74 N.W. 561, 566 (Wis. 1898).

⁷⁸ *See, e.g., Kingston v. Chi. & N.W. Ry. Co.*, 211 N.W. 913, 915 (Wis. 1927) (holding that both fires were a cause-in-fact of plaintiff's harm, since each on their own could have caused plaintiff's injuries).

⁷⁹ *See* AM. L. PRODS. LIAB., *supra* note 70, § 1:8.

⁸⁰ *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 333, 952 N.E.2d 1033, 1046, 929 N.Y.S.2d 41, 54 (2011) (Ciparick, J., dissenting in part).

⁸¹ *See Edwards*, 17 N.Y.3d at 333, 952 N.E.2d at 1046, 929 N.Y.S.2d at 54 (Ciparick, J., dissenting in part).

pay more than the bus defendants, who were 90% liable.⁸² Such a result is not only “patently absurd,”⁸³ but also unfair and inequitable.

The *American Law of Products Liability Third Treatise* further explains that the doctrine of *dépeçage* should not be applied where its use “would work an injustice against one of the parties.”⁸⁴ The situation in *Edwards* fits perfectly within the type of scenario that was contemplated. It is the very use of *dépeçage* and the inevitable application of two separate jurisdictional rules which creates this injustice toward the tractor-trailer defendants: the potential that they will likely pay a greater amount in damages than the bus company defendants who were found to have 80% greater liability.

The United States District Court for the Eastern District of Wisconsin has addressed similar choice of law issues that the New York Court of Appeals faced in *Edwards* on a number of occasions.⁸⁵ In *Boomsma v. Star Transport, Inc.*, a factually similar case to *Edwards*, the court faced a choice of law issue involving lawsuits against multiple negligent non-domiciliary defendants.⁸⁶ The court acknowledged the potential of inequity which might result in a party paying a greater amount of damages than its co-defendant whose apportionment of negligence was greater if two separate jurisdictional rules were applied⁸⁷: “‘Dépeçage’ notwithstanding, the claims and third-party claims in this action are, as the defendants note, ‘inextricably intertwined.’ Applying Illinois law to the underlying claims, and Wisconsin law to the third-party claims, would be both unworkable and unfair.”⁸⁸

The majority in *Edwards* opined in a footnote that applying a single choice of law analysis “would not guarantee ‘predictability and uniformity,’” since this would encourage forum shopping and create a difficulty in determining which of the interested jurisdictions’ rules should apply.⁸⁹ However, the *Boomsma* and

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See AM. L. PRODS. LIAB., *supra* note 70, § 46:5.

⁸⁵ See, e.g., *Stupak v. Hoffman-La Roche, Inc.*, 287 F. Supp. 2d 968 (E.D. Wis. 2003); *Boomsma v. Star Transp., Inc.*, 202 F. Supp. 2d 869 (E.D. Wis. 2002).

⁸⁶ *Boomsma*, 202 F. Supp. 2d at 872.

⁸⁷ See *id.* at 878.

⁸⁸ *Id.*

⁸⁹ See *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 329 n.10, 952 N.E.2d 1033, 1043 n.10, 929 N.Y.S.2d 41, 51 n.10 (quoting *id.* at 333, 952 N.E.2d at 1046, 929 N.Y.S.2d at 54 (Ciparick, J., dissenting)).

Stupak decisions demonstrate that a single *Neumeier* analysis would be a workable and manageable approach. The State of Wisconsin, having adopted Robert A. Leflar's choice-influencing considerations approach, holds that "the law of the forum should presumptively apply unless it becomes clear that nonforum contacts are of the greater significance."⁹⁰

While the New York Court of Appeals tries to mask its rejection of such an approach under the cloak of *Babcock*, where New York abandoned the rule of *lex loci delicti* for a more complex rule that more adequately considered the various jurisdictional interests involved in a lawsuit,⁹¹ this approach—to presumptively use the law of the *locus*—or in the case of the Restatement (Second) of Conflict of Laws⁹²—to presumptively use the place of the wrong—is essentially identical to that of the third catch-all *Neumeier* rule used in New York.⁹³ Under a single *Neumeier* analysis, because both plaintiffs and defendants are differently domiciled, the law of the *locus*—New York—should presumptively apply to both defendants.⁹⁴ Applying a single *Neumeier* analysis conforms to the values of uniformity and predictability embraced by the court, when it elected to adopt the *Neumeier* framework nearly forty years ago.⁹⁵

In *Tooker*, where both the plaintiff and defendant were New York domiciliaries, there was a second passenger—a Michigan resident—who was not a party to the action.⁹⁶ Judge Burke and Judge Breitel, in separate opinions, addressed the issue of what would have happened had this second, nondomiciliary plaintiff filed a

⁹⁰ *Stupak*, 287 F. Supp. 2d at 970 (quoting *State Farm Mut. Auto. Ins. Co. v. Gillette*, 641 N.W.2d 662, 676 (2002)) (internal quotation marks omitted); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 31, § 146 ("In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and the parties, in which event the local law of the other state will be applied."). For an in-depth discussion on Robert A. Leflar's choice-influencing considerations approach, see *infra* Part IV.

⁹¹ See *Edwards*, 17 N.Y.3d at 329 n. 10, 952 N.E.2d at 1043 n.10, 929 N.Y.S.2d at 51 n.10.

⁹² For a more in-depth discussion on the Second Restatement's approach to dealing with conflict situations in tort cases, see *infra* Part IV.D.

⁹³ *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 73–74, 612 N.E.2d 277, 281, 595 N.Y.S.2d 919, 923 (1993) (stating the third *Neumeier* rule).

⁹⁴ See *Edwards*, 17 N.Y.3d at 333, 952 N.E.2d at 1046, 929 N.Y.S.2d at 54 (Ciparick, J., dissenting in part).

⁹⁵ See *Neumeier v. Kuehner*, 31 N.Y.2d 121, 127, 286 N.E.2d 454, 457, 335 N.Y.S.2d 64, 69 (1972).

⁹⁶ See *Tooker v. Lopez*, 24 N.Y.2d 569, 571, 249 N.E.2d 394, 395, 301 N.Y.S.2d 519, 520 (1969); *id.* at 597, 249 N.E.2d at 411, 301 N.Y.S.2d at 543 (Breitel, J., dissenting).

separate action against the New York driver.⁹⁷ Judge Breitel speculated that if separate choice of law analyses were conducted, the New York passenger's recovery would have remained untouched, since New York law would have applied, but the Michigan resident's recovery would have been barred because Michigan law would have ultimately applied under the current New York choice of law framework.⁹⁸

These different outcomes—for different passengers in the same car, arising out of the same accident—as a result of attempting to give deference to the interests of different states and the application of different jurisdictional rules, troubled Judge Breitel:

[T]here is no total escape from considering the policies of other States. But this necessity should not be extended to produce anomalies of results out of the same accident, with unpredictability, and lack of consistency in determinations. Thus, it is hard to accept the implicit consequence that Miss Silk, the Michigan resident injured in the accident, should not be able to recover in Michigan (and presumably in New York) but a recovery can be had for her deceased fellow-passenger in the very same accident.

. . . Inevitably, the goals of uniformity, let alone predictability, in conflict rules would be frustrated, and the arbitrary results produced by forum-selection would be proliferated beyond tolerable limits.⁹⁹

As Judge Breitel would later point out, any rule “is unsoundly applied if it is done indiscriminately and without exception.”¹⁰⁰

What the court is essentially deciding is that in an automobile accident on its roads involving multiple individuals from different states, New York might have an interest in protecting only some of the passengers from certain defendants, while it has no such interest in the protection of other individuals involved in the very same accident on its roads. This is an unacceptable distinction.

⁹⁷ *See id.* at 591, 249 N.E.2d at 408, 301 N.Y.S.2d at 538 (Burke, J., concurring); *see id.* at 597, 249 N.E.2d at 411, 301 N.Y.S.2d at 543 (Breitel, J., dissenting).

⁹⁸ *See id.* at 597, 249 N.E.2d at 411, 301 N.Y.S.2d at 543. If Michigan law were applied, it would have barred recovery entirely in this case, because Michigan's guest statute permitted recovery by guests only where there was a showing of willful misconduct or gross negligence by the driver. *See id.* at 571, 249 N.E.2d at 395, 301 N.Y.S.2d at 520–21 (majority opinion).

⁹⁹ *Id.* at 597, 249 N.E.2d at 411–12, 301 N.Y.S.2d at 543 (Breitel, J., dissenting).

¹⁰⁰ *Neumeier*, 31 N.Y.2d at 131, 286 N.E.2d at 459, 335 N.Y.S.2d at 72 (Breitel, J., concurring).

The implications of such a decision are that guest passengers and drivers are “somehow less entitled to the protections” of New York law depending primarily on the domicile of the injurer or injured, creating an entirely arbitrary result.¹⁰¹ The reality is that New York’s interest in the accident arises out of the accident itself, *not* out of the purely fortuitous domiciles of the parties involved. Thus, New York’s interest—whether its law should govern the relevant litigation arising out of the accident—should be equal to all parties involved in the same, single accident.

Additionally, as the dissent points out in *Edwards*, “New York has a strong interest in the conduct of business enterprises on its highways and in properly compensating the victims of torts, whether New York or foreign domiciliaries, committed by business enterprises on its highways.”¹⁰² Furthermore, one can hardly say that this is a case where the place of the wrong “can be discounted as purely fortuitous or adventitious,” since the bus passengers were traveling to New York to stay at a ski resort.¹⁰³ The bus company, although domiciled in Ontario, had been hired for travel to and within the State of New York, and would reasonably have expected that New York law would govern its conduct within the state’s borders.¹⁰⁴ Additionally, it is the only common jurisdiction to which all of the parties purposefully availed themselves.¹⁰⁵ Therefore, New York has the greatest interest in the case, and its rules ought to have been applied to all of the defendants.

III. THE COURT’S JURISPRUDENCE AND CHOICE OF LAW PRINCIPLES

The court, in selecting the *Neumeier* framework, sought a rule, or set of rules, that would “assure a greater degree of predictability

¹⁰¹ See *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 207, 480 N.E.2d 679, 691, 491 N.Y.S.2d 90, 102 (1985) (Jasen, J., dissenting).

¹⁰² *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 334, 952 N.E.2d 1033, 1046, 929 N.Y.S.2d 41, 54 (2011) (Ciparick, J., dissenting in part).

¹⁰³ See *Schultz*, 65 N.Y.2d at 210, 480 N.E.2d at 693, 491 N.Y.S.2d at 104 (Jasen, J., dissenting) (citations omitted); *At Least 4 Die After Bus Hits Truck Upstate*, N.Y. TIMES, Jan. 30, 2005, at 34.

¹⁰⁴ See *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 76, 612 N.E.2d 277, 283, 595 N.Y.S.2d 919, 925 (1993); *Schultz*, 65 N.Y.2d at 210, 480 N.E.2d at 693, 491 N.Y.S.2d at 104 (Jasen, J., dissenting); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 31, § 6 (listing the protection of parties’ reasonable expectations as a factor in determining which state’s should apply).

¹⁰⁵ See *Edwards*, 17 N.Y.3d at 334, 952 N.E.2d at 1047, 929 N.Y.S.2d at 55 (citing *Cooney*, 81 N.Y.2d at 74, 612 N.E.2d at 281, 595 N.Y.S.2d at 923).

and uniformity” in choice of law analysis.¹⁰⁶ However, Court of Appeals choice of law jurisprudence appears to be irreconcilable with the court’s decision in *Edwards*, as the application of the *Neumeier* rules marks a major departure from the court’s history and tradition.

In *Tooker*, the court rejected Judge Breitel’s dissenting view that the proper rule that ought to be applied was that of the jurisdiction to which all of the parties purposefully availed themselves, rather than applying a jurisdictional rule because the parties had some relationship based solely on adventitious or extrinsic facts.¹⁰⁷ The court “reject[ed] the rule for the same reason [it] rejected the *lex loci delictus* rule [because it was] concerned with rational and just rules and not merely simple rules.”¹⁰⁸

In *Dym v. Gordon*,¹⁰⁹ the Court of Appeals explained that it “looks to reason and justice in its selection of which law should apply and which fits the needs of today’s world where long and frequent travel is no longer reserved to a few.”¹¹⁰ The court, in both *Tooker* and *Dym* stressed the importance of a rule that achieved a fair result;¹¹¹ a goal it believed ought to take precedence over a rule that was overly mechanical and simplistic in application. However, in *Edwards*, the court ignores entirely these valuable principles it once historically embraced,¹¹² as it defends its decision to conduct a separate *Neumeier* analysis for each defendant by acknowledging that the very nature of the *Neumeier* framework requires such an analysis.¹¹³ This rigidity in application suggests that the current

¹⁰⁶ See *supra* notes 35–37 and accompanying text.

¹⁰⁷ See *Tooker v. Lopez*, 24 N.Y.2d 569, 594, 249 N.E.2d 394, 409, 301 N.Y.S.2d 519, 540 (1969) (Breitel, J., dissenting).

¹⁰⁸ *Id.* at 579, 249 N.E.2d at 400, 301 N.Y.S. at 527 (majority opinion).

¹⁰⁹ *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

¹¹⁰ *Id.* at 123, 209 N.E.2d at 794, 262 N.Y.S.2d at 466 (citing *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Kilberg v. Ne. Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936)).

¹¹¹ See *Tooker*, 24 N.Y.2d at 581, 249 N.E.2d at 401, 301 N.Y.S.2d at 529; *Dym*, 16 N.Y.2d at 125, 209 N.E.2d at 795, 262 N.Y.S.2d at 467.

¹¹² These same principles are stressed by the court in their construct of a number of other important legal principles in the State of New York, such as *forum non conveniens*, which is irreconcilable with the court’s construct of the *Neumeier* choice of law rules. See, e.g., *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479, 467 N.E.2d 245, 248, 478 N.Y.S.2d 597, 600 (1984) (“The great advantage of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case. The rule rests upon justice, fairness and convenience and we have held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by this court.”).

¹¹³ See *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 329, 952 N.E.2d 1033, 1043, 929 N.Y.S.2d 41, 51 (2011).

Neumeier framework is overly simplistic—the very simplicity and defectiveness in the former New York choice of law framework that the court scoffed at in *Tooker* and *Dym*—and which former Chief Judge Fuld warned against in his concurrence in *Tooker*, as he set out what would later become the three *Neumeier* principles.¹¹⁴ It is this simplicity and mechanical application—one of the primary reasons for which the rule of *lex loci delicti* was abandoned by the court in the first place¹¹⁵—of a series of hard and fast rules that creates the possibility of an inexorably unjust and irrational result; a result that could be easily avoided if the court were to pay deference to its history and past choice of law precedent. One can only assume that the outcome in *Edwards* was exactly that which former Chief Judge Fuld cautioned against: the product of a rule that is “unreasonable” or “destructive” due to its “unruly reasonableness.”¹¹⁶

The adoption of the *Neumeier* rules by the New York Court of Appeals was a clear response by the court, recognizing the longstanding need for a bright-line rule that would finally create a significant degree of predictability and uniformity in choice of law litigation, and guarantee the effective coordination of a multistate system.¹¹⁷ However, what the *Edwards* decision highlights is the rigidity of the *Neumeier* rules, and the inability of a mechanical framework to adapt to unforeseen or unusual circumstances—a necessary ingredient for a strong and sustainable choice of law rule.

In 1969, when the Court of Appeals heard *Tooker*, it was the fourth guest-host statute case that New York’s highest court had heard in six years, and this development of the three rigid principles to govern future choice of law conflicts in New York, in

¹¹⁴ Judge Fuld warned that “[w]e should attempt . . . to avoid ‘both unreasonable rules and an unruly reasonableness that is destructive of many of the values of law and that loses sight of the need for coordinating a multistate system.’” *Tooker*, 24 N.Y.2d at 584–85, 249 N.E.2d at 403, 301 N.Y.S.2d at 532 (Fuld, C.J., concurring) (quoting Maurice Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 464 (1967) [hereinafter Rosenberg, *Two Views on Kell v. Henderson*]).

¹¹⁵ In Judge Breitel’s dissent in *Tooker*, he criticized the former rule of *lex loci delicti* because it was “too mechanically applied.” *Tooker*, 24 N.Y.2d at 595, 249 N.E.2d at 410, 301 N.Y.S.2d at 541 (Breitel, J., dissenting).

¹¹⁶ *Id.* at 584–85, 249 N.E.2d at 403, 301 N.Y.S. at 532 (Fuld, C.J., concurring) (quoting Rosenberg, *Two Views on Kell v. Henderson*, *supra* note 114, at 464).

¹¹⁷ See *Neumeier v. Kuehner*, 31 N.Y.2d 121, 127, 286 N.E.2d 454, 457, 335 N.Y.S.2d 64, 69 (1972); *Tooker*, 24 N.Y.2d at 585, 249 N.E.2d at 403, 301 N.Y.S.2d at 532 (Fuld, C.J., concurring); Maurice Rosenberg, *A Comment on Neumeier*, 34 ARK. L. REV. 231, 234 (1980) [hereinafter Rosenberg, *A Comment on Neumeier*]; see also Rosenberg, *Two Views on Kell v. Henderson*, *supra* note 114 (stressing the need for coordination in a multistate system).

Chief Judge Fuld's concurrence, was an attempt to reduce guest-statute litigation in the state.¹¹⁸ Chief Judge Fuld sought to create a systematic approach that could be easily administered by the lower courts, to supplant the New York center of gravity rule, which essentially required ad hoc judiciary decision-making on a case-by-case basis.¹¹⁹ However, Chief Judge Fuld further noted in his concurrence that his proposed set of rules "will not always be easy of application, nor will they furnish guidance to litigants and lower courts in all cases. They are proffered as a beginning, not as an end, to the problems of sound and fair adjudication in the troubled world of the automobile guest statute."¹²⁰ Such language ought to be given greater credence by the court, as this clearly signifies Chief Judge Fuld's recognition that the *Neumeier* rules were by no means finite, nor perfected at the time of their implementation.

While a firm set of rules seems unquestionably necessary in choice of law theory, New York has long recognized the need for fluidity, and the dangers accompanied by a rigid rule.¹²¹ Ironically enough, the *Neumeier* rules, over a half-century since the abandonment of the traditional approach,¹²² share similar shortcomings with the abandoned rule for which it was criticized and ultimately abandoned. The *Edwards* decision provides some support for the assertion that "all aspects of choice of law [cannot] be handled satisfactorily by a relatively small number of simple rules."¹²³ However, given the success the *Neumeier* rules have had in reducing the flood of automobile guest-host statute cases being heard by New York's highest court,¹²⁴ a wiser approach would be a

¹¹⁸ See Rosenberg, *A Comment on Neumeier*, *supra* note 117, at 235.

¹¹⁹ *Id.* at 236.

¹²⁰ *Tooker*, 24 N.Y.2d at 585, 249 N.E.2d at 404, 301 N.Y.S.2d at 533 (Fuld, C.J., concurring).

¹²¹ The New York Court of Appeals abandoned the rule of *lex loci delicti* in 1961 in *Kilberg* due to its arbitrariness. See *Kilberg v. Ne. Airlines, Inc.*, 9 N.Y.2d 34, 40, 172 N.E.2d 526, 528, 211 N.Y.S.2d 133, 136 (1961). A rule that the law of the place of the wrong will always apply is, naturally, a bright-line rule; one that is easily administrable by the courts. However, the advantages of simplicity and certainty were its very undoing, in that it was unable to adjust to the borderless nature of the multistate system and account for the reality that multiple states might have an interest in applying their laws to a case. See Elliott E. Cheatham & Willis L. M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 960 (1952).

¹²² *Edwards v. Erie Coach Lines, Inc.*, 17 N.Y.3d 306, 318, 952 N.E.2d 1033, 1034, 929 N.Y.S.2d 41, 42 (citing *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963)).

¹²³ Cheatham & Reese, *supra* note 120, at 959.

¹²⁴ See Rosenberg, *A Comment on Neumeier*, *supra* note 117, at 237.

modification of the already existing *Neumeier* framework.

IV. ALTERNATIVE CHOICE OF LAW APPROACHES

While the *Neumeier* rules have proven useful, they have also highlighted the fact that the Court of Appeals sought uniformity and predictability at the expense of fairness, equity, and common sense.¹²⁵ In order to achieve a greater balance between both, the rules demand that a greater degree of flexibility be worked into them. The court's decision in *Edwards* signified that when New York's law is applied so rigidly, without taking into consideration the surrounding circumstances and the unique conditions of the particular case, undesirable results are created.¹²⁶ There are a number of approaches that other jurisdictions have adopted to deal with choice of law conflicts, virtually all of which would have rendered the same result: applying New York law for the claims against both the bus and tractor-trailer defendants, regardless of whether separate analyses were used.¹²⁷

A. *Second Restatement of Conflict of Laws*

One approach that the court could look toward for guidance is the Second Restatement of Conflict of Laws.¹²⁸ Since the wave of abandonment of the traditional approach, no choice of law rule has garnered more support and attention than the Second Restatement's approach.¹²⁹ Twenty-two states have adopted this approach for resolving torts conflicts cases, including the federal government.¹³⁰ The Second Restatement's approach is basically identical to the third *Neumeier* provision.¹³¹

The Second Restatement applies the law of the place of the wrong

¹²⁵ See *Edwards*, 17 N.Y.3d at 329 n.10, 952 N.E.2d at 1043 n.10, 929 N.Y.S.2d at 51 n.10. In a footnote, the *Edwards* majority acknowledges that in *Babcock*, the court "knowingly sacrificed a degree of certainty so as to honor [New York's] sister states' interests in enforcing their own loss-allocation rules with respect to their own domiciliaries." *Id.* (citing *Babcock*, 12 N.Y.2d at 478, 191 N.E.2d at 281, 240 N.Y.S.2d at 746-47).

¹²⁶ See *id.* at 333, 952 N.E.2d at 1045-46, 929 N.Y.S.2d at 53-54 (Ciparick, J., dissenting in part) (highlighting the "potential for grossly inequitable results").

¹²⁷ See *infra* Part IV.

¹²⁸ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 31, § 146 (discussing conflict of laws in personal injury situations).

¹²⁹ See HOFFHEIMER, *supra* note 2, at 240.

¹³⁰ *Id.*

¹³¹ For a discussion of the three *Neumeier* provisions, see *supra* Part I.

to any personal injury action, unless “some other state has a more significant relationship.”¹³² Such an analysis requires the court to conduct an interest analysis, much like the rule once adopted in *Babcock*.¹³³ The logic behind the Second Restatement rule is that it is highly unlikely that a state other than that where the injury occurred is the state of the most significant relationship.¹³⁴ In those rare situations where there is another state with a greater or more significant relationship or interest in the litigation, then the presumption will ultimately shift to that state.¹³⁵

The primary considerations of the drafters of the Second Restatement when designing the rule were very similar to those contemplated by the New York Court of Appeals when it elected to adopt former Chief Judge Fuld’s *Neumeier* framework: to produce a greater degree of uniformity and predictability in choice of law litigation by providing a firm set of rules to guide the courts, while at the same time, providing the courts with a rule that was easily administrable.¹³⁶ However, where the Second Restatement rule differs from New York’s rule, is that the drafters of the Second Restatement purposefully formulated the rule with which a sufficient degree of flexibility, so that the law of the jurisdiction with the most significant relationship would apply in any given case.¹³⁷

In contrast to New York’s mechanical *Neumeier* framework, the Second Restatement purposefully moved away from a mechanical set of rules that resulted in a more predictable set of outcomes.¹³⁸ Its framers wisely embraced the notion that “[i]n a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules.”¹³⁹ The ultimate implication of this shift was that it requires

¹³² RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 31, § 146.

¹³³ *See* *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 196, 480 N.E.2d 679, 683, 491 N.Y.S.2d 90, 94 (1985) (discussing *Babcock*).

¹³⁴ *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 31, § 146 cmt. c.

¹³⁵ *Id.*

¹³⁶ *See* *Tooker v. Lopez*, 24 N.Y.2d 569, 584–85, 249 N.E.2d 394, 403–04, 301 N.Y.S.2d 519, 532–33 (detailing Chief Judge Fuld’s guidelines); HOFFHEIMER, *supra* note 2, at 240.

¹³⁷ HOFFHEIMER, *supra* note 2, at 240.

¹³⁸ *Id.* at 241. The early version of the Second Restatement resembled more closely to that of the *Neumeier* framework, but was changed after influential choice of law theorists such as Professor Brainerd Currie, among others, “protested against the territorial bias of the early draft and the omission of consideration of governmental interests or policies.” *Id.* at 240–41.

¹³⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 31, § 6 cmt. i.

courts to actually consider the legal issues and particular circumstances surrounding each case, rather than blindly applying a mechanical set of rules, in ignorance of the actual underlying issues or intricacies that makes each and every case unique.¹⁴⁰ In making the determination of whether the presumptive rule of *lex loci delicti* should be displaced, the Second Restatement lists seven “non-prioritized” factors (hereinafter “section 6 factors”) that are relevant to making such a determination¹⁴¹:

(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.¹⁴²

However, by default, it appears that three of the seven section 6 factors are to be given considerably more weight than the others: state interests, ease in determination and application, and systemic needs.¹⁴³ The two “state interests” factors are most likely to arise in tort cases involving guest statutes.¹⁴⁴ Their purpose is to protect victims by ensuring that they are adequately compensated for their injuries.¹⁴⁵ A secondary purpose is that of deterrence.¹⁴⁶ The Second Restatement says that for the issue of deterrence, the court must look at the place of the tortious conduct—where the tortfeasor

¹⁴⁰ See HOFFHEIMER, *supra* note 2, at 241.

¹⁴¹ These factors are not listed in any particular order—thus there is no official hierarchy. *See id.* at 241.

¹⁴² RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 31, § 6.

¹⁴³ Stephen Clark, Professor of Law, Albany Law School, Conflict of Laws Lecture (Oct. 20, 2011) (lecture notes on file with author) [hereinafter Clark, Conflict of Laws Lecture (Oct. 20, 2011)]. The “parties’ expectations” factor is generally given less weight due to the unexpected nature of a tort. *See* Stephen Clark, Professor of Law, Albany Law School, Conflict of Laws Lecture (Oct. 25, 2011) (lecture notes on file with author). Furthermore, the basic policies underlying the particular field of law carry less weight since they are relevant only where the competing policy concerns’ differences are insignificant. *See id.* This is because it is not possible to compare two completely different underlying purposes and determine whether one is furthered more than the other. You cannot compare apples with oranges. Additionally, the goal of uniformity seems hypocritical since the very purpose of the section 6 factors is to determine whether to shift the away from the presumption of applying the law of the place of the wrong to another interested jurisdiction, which in its very nature is non-uniform. *See id.*

¹⁴⁴ *See* Clark, Conflict of Laws Lecture (Oct. 20, 2011), *supra* note 143.

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

actually acted—rather than the place of the injury.¹⁴⁷ Its approach is essentially to test the presumption of *lex loci delicti*, and if it does not provide the soundest solution, then it should shift to the rule of the jurisdiction that would provide the soundest solution—the state with the most significant interests.¹⁴⁸

In torts cases, however, a number of the Second Restatement's section 6 factors are less relevant, such as the reasonable expectations of the parties.¹⁴⁹ This factor is less relevant in torts because parties generally do not already have a developed plan for legal ramifications in tort actions, due to the inherently unexpected nature of accidental harm. While not entirely irrelevant, its utility and designated weight is far less than in a contracts case, for example.¹⁵⁰ The Second Restatement furthers all of the key goals courts (including New York's) have generally pursued in adopting a workable rule for choice of law: the achievement of certainty, predictability, uniformity, and the ease in administration by the courts.¹⁵¹

Edwards, under the Second Restatement's approach, even using two separate analyses, would likely have been decided differently. The default presumption would have remained in effect with no shift, and New York law would have applied, since New York had the most significant relationship.

New York has “a strong interest in regulating the conduct of commercial vehicles on its highways, [and] it also has an even stronger interest in having commercial vehicles that use its highways maintain insurance to compensate victims of torts committed by said vehicles.”¹⁵² As Judge Ciparick explained, “[i]n contrast, Ontario's primary interest in having its law applied and capping nonpecuniary losses is to keep motor vehicle insurance costs low”—an interest that should not be “extend[ed] to commercial

¹⁴⁷ *Id.* This nuance is not particularly relevant to the *Edwards* decision, but is a notable and important distinction of which to be aware. For example, in *Escola v. Coca Cola Bottling Co. of Fresno*, while plaintiff waitress was injured when a bottle of Coca-Cola broke in her hand, the tortious conduct actually occurred at the time and place of bottling and manufacturing of the particular bottle. See *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 437–40 (Cal. 1944).

¹⁴⁸ See HOFFHEIMER, *supra* note 2, at 244.

¹⁴⁹ *Id.* at 242.

¹⁵⁰ See *id.* at 242.

¹⁵¹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 31, § 146 cmt. c.

¹⁵² *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 334, 952 N.E.2d 1033, 1046–47, 929 N.Y.S.2d 41, 54–55 (2011) (Ciparick, J., dissenting in part).

vehicles operating outside of Ontario and subject to the loss-allocation laws of those states.”¹⁵³

The commentary to the Second Restatement explains that while “choice-of-law rules should be simple and easy to apply,” they should also “lead to desirable results.”¹⁵⁴ In this case, involving multiple tortfeasors with multiple domiciles, applying the rule of *lex loci delicti* and, additionally, the law of the forum state,¹⁵⁵ is the easiest to administer and apply, especially given the fact that a jury had already apportioned liability amongst the defendants.¹⁵⁶ Furthermore, given the determination made about liability amongst the defendants, applying a pro-defendant law to the party who was found to be 90% liable, while applying a pro-plaintiff law to the party found to be 10% liable, would not lead to a desirable result, as the Second Restatement rule strives for.¹⁵⁷

Finally, applying the presumptive law will best serve the maintenance and order of a smooth-working multistate and international system. Applying New York law to an accident that occurred in New York, involving parties from both Ontario and Pennsylvania, can hardly be said to impair the inner-workings of the international system between Canada and the United States, and Ontario’s interest is hardly significant enough to displace the presumptive rule, which has such a high threshold.¹⁵⁸

Even the other section 6 factors weigh in favor of applying the presumptive rule: New York is also the forum state, and New York is the only common jurisdiction of which all of the parties purposefully availed themselves.¹⁵⁹ Additionally, both the bus defendants and plaintiffs embarked on a trip through New York, purposefully “mold[ing] [their] conduct to conform to the requirements of [New York],”¹⁶⁰ and applying New York law—the

¹⁵³ *Id.*, 952 N.E.2d at 1047, 929 N.Y.S.2d at 55.

¹⁵⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 31, § 6 cmt. j.

¹⁵⁵ The forum state is the state in which the lawsuit is filed and being litigated. See BLACK’S LAW DICTIONARY 726 (9th ed. 2009).

¹⁵⁶ See *Edwards*, 17 N.Y.3d at 333, 952 N.E.2d at 1046, 929 N.Y.S.2d at 54 (Ciparick, J., dissenting in part).

¹⁵⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 31, § 6 cmt. j.

¹⁵⁸ See *Edwards*, 17 N.Y.3d at 334, 952 N.E.2d at 1046, 929 N.Y.S.2d at 54 (Ciparick, J., dissenting in part).

¹⁵⁹ See *Tooker v. Lopez*, 24 N.Y.2d 569, 593, 249 N.E.2d 394, 409, 301 N.Y.S.2d 519, 540 (1969) (Breitel, J., dissenting) (“[T]he law of a territory governs the conduct and qualifiedly the status of persons, resident and nonresident, within it except in the extraordinary situation where the localization of persons and conduct is adventitious.”).

¹⁶⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 31, § 6 cmt. g. For instance,

place of the accident—would further the primary goals of “certainty, predictability and uniformity of result,”¹⁶¹ since the court would be applying one rule of law to all of the claims arising out of a single accident.

B. Currie’s “Interest Analysis”

Another useful approach is that offered by conflict of laws scholar and professor, Brainerd Currie, who theorized that courts should generally apply the law of the state that created its jurisdiction, even in conflicts situations involving foreign elements, unless the forum state has no interest in the litigation.¹⁶² This approach’s influence on conflicts theory in the United States should not be overlooked by the fact that it has been officially adopted by just three jurisdictions.¹⁶³

The question for Currie was not whether the foreign jurisdiction had a greater interest, or whether its interest significantly outweighed that of the forum, but rather, simply, whether the forum had any interest at all in applying its law.¹⁶⁴ Currie rejected choice of law rules in general, believing that “[w]e would be better off without choice-of-law rules.”¹⁶⁵ Under Currie’s “interest analysis,” the law of a foreign jurisdiction would be applied only where the policy of the forum state would not be furthered by the application of its law in the case at-hand.¹⁶⁶ He explained that where a false conflict exists—where only one state has an interest in the litigation of the case—then its law should be applied.¹⁶⁷ However, where a true conflict exists—where both the forum state and another state have an interest in having their laws applied—then the default rule should prevail, and no shift will occur, and

once the bus defendants crossed the border and entered the State of New York, they presumably adhered to the changed speed limits from that which they obeyed in Ontario.

¹⁶¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 31, § 6(2)(f).

¹⁶² See Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178 [hereinafter Currie, *Notes on Methods*].

¹⁶³ SCOLES ET AL., *supra* note 4, at 86. California, the District of Columbia, and New Jersey have all adopted a form of Currie’s interest analysis as their choice of law rule for resolving tort conflicts. *Id.* New York’s *Neumeier* framework was also heavily influenced by Currie’s interest analysis. HOFFHEIMER, *supra* note 2, at 187.

¹⁶⁴ See Currie, *Notes on Methods*, *supra* note 162, at 176.

¹⁶⁵ SCOLES ET AL., *supra* note 4, at 26 (quoting BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 183 (1963)).

¹⁶⁶ HOFFHEIMER, *supra* note 2, at 189.

¹⁶⁷ See *id.*

thus, the law of the forum state will apply.¹⁶⁸

Although Currie's interest analysis has been criticized as being overly simplistic and parochial,¹⁶⁹ his approach is undoubtedly predictable and uniform, thus generally meeting the expectations of the parties.¹⁷⁰ It is not overly burdensome on the courts to administer either, since the only way to displace the application of the forum's law is to show that the forum state has absolutely no interest in the application of its law, while at the same time, moving away from the mechanical approach of a rule such as the *Neumeier* rules used in New York.¹⁷¹ Furthermore, "interest analysis recognizes that states always have an interest in regulating conduct within their territory."¹⁷² Thus, under Currie's interest analysis, in the case of *Edwards*, New York law would have applied to both defendants, since New York was the forum state, and unquestionably had an interest in applying its own law in this case.

C. California's "Comparative Impairment" Approach

California, an often-revered leader in the legal field like New York, utilizes a comparative impairment approach, which is essentially a modified version of Currie's interest analysis.¹⁷³ Where a true conflicts case arises, the court's job is to apply what is referred to as "comparative impairment"—apply the law of the state whose governmental policies would be most impaired if that jurisdiction's law was not selected.¹⁷⁴ In the unusual case where the selection of the other interested law would result in equal impairment of the other jurisdiction's policy, only then will the court select the application of the forum law.¹⁷⁵

Unsurprisingly, California's law is often criticized and discredited for its lack of uniformity and predictability.¹⁷⁶ This is because the determination of "comparative impairment" is incredibly subjective, leaving a great deal of discretion to the individual judge.¹⁷⁷ For

¹⁶⁸ *See id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See* CURRIE ET AL., *supra* note 3, at 128.

¹⁷¹ *See* HOFFHEIMER, *supra* note 2, at 188.

¹⁷² *Id.* at 191.

¹⁷³ *Bernhard v. Harrah's Club*, 546 P.2d 719, 723 (Cal. 1976).

¹⁷⁴ *Id.*

¹⁷⁵ Clark, Conflict of Laws Lecture (Oct. 20, 2011), *supra* note 143.

¹⁷⁶ *See* HOFFHEIMER, *supra* note 2, at 192–93.

¹⁷⁷ *See id.*

instance, in *Bernhard v. Harrah's Club*, the Supreme Court of California was faced with a true conflict after a driver left defendant's gambling and drinking club in Nevada, visibly intoxicated, drove home to California, and collided with motorcyclist plaintiff, a resident of California.¹⁷⁸ California imposed liability on tavern keepers, while Nevada refused to recognize the existence of such liability.¹⁷⁹ Each state had a clear interest in the application of its respective law.¹⁸⁰ The court ultimately held "that California has an important and abiding interest in applying its rule of decision to the case at bench, that the policy of [California] would be more significantly impaired if such rule were not applied and that the trial court erred in not applying California law."¹⁸¹

What the decision and application of the comparative impairment rule highlighted, however, was that the judges appeared to be working backwards. While they appeared to give preference to the law of their own state, they also applied the law that rendered the most desirable and fair result.¹⁸²

There are most certainly deficiencies with this approach, as with any conflicts law; the California rule of comparative impairment affords the courts a great deal of flexibility and discretion, which in cases of unusual or extreme circumstances, rather than rigidly applying a mechanical rule which yields an unfavorable result, should always render a just and equitable result. Their rule, in true conflicts situations, while unpredictable, sacrifices this concern in favor of what ought to be the courts' primary goal of fairness.

D. Leflar's "Choice-Influencing Considerations" Approach

Another approach that could provide some insight and aid into a more workable rule for New York is Robert A. Leflar's "choice-influencing considerations" or "better law" approach.¹⁸³ Leflar's better law approach has gained great notoriety and has been

¹⁷⁸ See *Bernhard*, 546 P.2d at 720.

¹⁷⁹ *Id.* at 721.

¹⁸⁰ *Id.* at 722. California had an interest in protecting one of its own citizens injured in its state, while Nevada had an interest in protecting a resident tavern keeper. *Id.*

¹⁸¹ *Id.* at 725-26.

¹⁸² This approach taken by the California Supreme Court appears very similar to Leflar's "better law" approach. See *infra* Part IV.D.

¹⁸³ See HOFFHEIMER, *supra* note 2, at 225; Shirley A. Wiegand, *Officious Intermeddling, Interloping Chauvinism, Restatement (Second), and Leflar: Wisconsin's Choice of Law Melting Pot*, 81 MARQ. L. REV. 761, 768 (1998).

adopted by several states, namely Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin.¹⁸⁴ Leflar shied away from creating a series of rules, as prescribed by the First Conflicts Restatement and Professor Beale,¹⁸⁵ electing instead to put emphasis on an approach that focused primarily on achieving the most fair and equitable result on a case-by-case basis—a rule “consistent with actual judicial practice.”¹⁸⁶

Leflar’s better law theory gives considerable weight to the actual content and subsequent outcome of the conflicting laws.¹⁸⁷ He suggests that states are shifting towards a primary concern of achieving the most desirable result, which has developed into a “new law of conflict[s].”¹⁸⁸ This “new law of conflict[s],” he explains, is not a rule *per se*, but rather a “conglomerate” of different rules and theoretical approaches by which the courts are influenced, and that they find to have persuasive values.¹⁸⁹

While such a rule would appear to inevitably favor the law of the *locus*, Leflar contended that judges could appreciate that another jurisdiction’s law was “better” than theirs, or rather, would be more appropriately applied in a given case.¹⁹⁰ He explains that courts “prefer rules of law which make good socio-economic sense for the time when the court speaks,” and therefore will apply a non-forum law in order to achieve justice in a particular case.¹⁹¹ However, he

¹⁸⁴ See Wiegand, *supra* note 183, at 809–11, 814.

¹⁸⁵ Professor Joseph Henry Beale, former professor at Harvard Law School and the first Dean of the University of Chicago Law School, was a major proponent of the *lex loci delicti* rule. See Erwin N. Griswold, *Mr. Beale and the Conflict of Laws*, 56 HARV. L. REV. 690, 693–94 (1943); Samuel Williston, *Joseph Henry Beale: A Biographical Sketch*, 56 HARV. L. REV. 685, 686–87 (1943). Beale, who focused primarily, at first, on the conflict of laws relating to contracts, contended that:

[A] contract gives rise to legal obligations, because in the place where the act of contract takes place a legal obligation is created by that act. When two men shake hands in Boston, the law of England is incapable of attaching any legal consequence to their act. There is no law of England where the act is done. . . . It seems clear, therefore, on principle, that, whether a legally binding contract has been made can be judged only by the *lex loci contractus*.

J. H. Beale, Jr., *Dicey’s “Conflict of Laws.”*, 10 HARV. L. REV. 168, 170 (1896).

¹⁸⁶ See *Choice of Law: A Well-Watered Plateau*, *supra* note 43, at 26; HOFFHEIMER, *supra* note 2, at 225.

¹⁸⁷ HOFFHEIMER, *supra* note 2, at 225.

¹⁸⁸ See *Choice of Law: A Well-Watered Plateau*, *supra* note 43, at 26.

¹⁸⁹ See *id.*

¹⁹⁰ See *id.* But see Currie, *Notes on Methods*, *supra* note 162, at 176 (arguing that when a court holds that a foreign law is applicable in a conflict setting, it is holding that its law is inferior to that of the foreign jurisdiction—a situation a court should never be placed in).

¹⁹¹ HOFFHEIMER, *supra* note 2, at 227 (quoting Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1588 (1966)).

argued that any preference for a better law must be objective and based on rational criteria in order to protect the expectations of parties and preserve predictability in the results.¹⁹²

What Leflar's better law approach indicates is that states, in selecting their choice of law rules, must make a determination as to whether they would prefer a rule that is territorially-based, or one that is consequence-based.¹⁹³ A rule that is territorial "is one that selects a state's law without regard to the law's content but based on some contact that state has with the parties or the transaction."¹⁹⁴ The First Restatement, which embraced the rule of *lex loci delicti*, would be an example of such a rule.¹⁹⁵

A consequences-based rule, on the other hand, "is one that chooses the law of a state with knowledge of the content of that law and to advance the policies underlying that law."¹⁹⁶ Furthermore, Leflar's emphasis on fairness and equity are principles that New York must work into its mechanical rules. An approach embracing a greater relaxation of the reliance on *Neumeier* would have allowed the court to take into account the underlying complexities surrounding the *Edwards* case, such as that liability for both parties had already been determined, that the defendants were all jointly and severally liable, and that New York law would unquestionably be applied to the suit against the tractor-trailer defendants who were only 10% liable.¹⁹⁷

While the law of the State of New York cannot quite be pigeonholed into either of these two categories (one that is territorially-based, or one that is consequence-based), the *Neumeier* framework's flaws are certainly noticeable in *Edwards* when considered with the question as to whether it is a rule that is territorial or consequence-based in nature. The rigidity of the rules places it far closer on the scale to a rule that is territorial. The first *Neumeier* rule ignores

¹⁹² See HOFFHEIMER, *supra* note 2, at 227. This rational criterion resembles the same considerations listed by the New York Court of Appeals: (1) the predictability of results, (2) the "maintenance of interstate and international order," (3) ease of administration, and (4) advancement of the forum state's interest in resolving the case. *Id.* at 226.

¹⁹³ See Russell J. Weintraub, *The Restatement Third of Conflict of Laws: An Idea Whose Time Has Not Come*, 75 IND. L.J. 679, 683 (2000) (discussing the difference between territorial rules and consequence-based rules).

¹⁹⁴ *Id.*

¹⁹⁵ See RESTATEMENT (FIRST) OF CONFLICT OF LAWS, *supra* note 5, § 384.

¹⁹⁶ Weintraub, *supra* note 193, at 683.

¹⁹⁷ See *supra* note 81 and accompanying text.

the content of the applicable law entirely.¹⁹⁸ It is not until you reach the second rule that it considers the content of the relevant and interested states' statutes.¹⁹⁹ While the underlying logic for the first rule is generally sound, rigidly applied rules will inevitably be applied at times when they ought not to be, such as in *Edwards*. The majority in applying the first *Neumeier* rule justified the application of the rule as follows:

Ontario has weighed the interests of tortfeasors and their victims in cases of catastrophic personal injury, and has elected to safeguard its domiciliaries from large awards for nonpecuniary damages. In lawsuits brought in New York by Ontario-domiciled plaintiffs against Ontario-domiciled defendants, New York courts should respect Ontario's decision, which differs from but certainly does not offend New York's public policy.²⁰⁰

The majority entirely ignores the interest that the State of New York has in maintaining the safety of its streets and highways,²⁰¹ and protecting those persons traveling within the confines of its borders. Most notably, however, is that it ignores the inequity created in the result, which is highlighted by the dissent.²⁰² A set of rules that were less "territorial," with a greater emphasis on the consequences of its application, as suggested, would create a more just result. This is not a call for a new set of rules by any means, but rather that where there are unusual or extreme circumstances, the rules should have the ability to be modified or applied in a different manner.²⁰³ Doing so would not frustrate the goals of uniformity and predictability.

This is only the second time any such case has reached any level of the New York court system since the *Neumeier* rules were adopted by the New York Court of Appeals over forty years ago.²⁰⁴

¹⁹⁸ See *supra* note 38 and accompanying text.

¹⁹⁹ See *supra* notes 39–42 and accompanying text.

²⁰⁰ *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 330, 952 N.E.2d 1033, 1043, 929 N.Y.S.2d 41, 51 (2011).

²⁰¹ *Id.* at 334, 952 N.E.2d at 1046, 929 N.Y.S.2d at 54 (Ciparick, J., dissenting in part).

²⁰² *Id.* at 333, 952 N.E.2d at 1046, 929 N.Y.S.2d at 54.

²⁰³ For example, in a case "where nondomiciliary defendants are jointly and severally liable to nondomiciliary plaintiffs in a tort action arising out of a single incident within the State of New York," the mechanical nature of the *Neumeier* rules should be altered or applied in a different manner. *Id.* at 331, 952 N.E.2d at 1044, 929 N.Y.S.2d at 52.

²⁰⁴ The only other factually similar case to reach the courts since the adoption of the *Neumeier* rules was *King v. Car Rentals, Inc.*, 29 A.D.3d 205, 813 N.Y.S.2d 448 (App. Div. 2d Dep't 2006).

Furthermore, in tracing back guest statute cases heard by New York's highest court, as far back as *Babcock* in 1963, no such case had ever reached the bench.²⁰⁵ Anthony Wynne's *The Toll House Murder* put it best: "[t]hese circumstances are wholly exceptional. Desperate diseases, they say, call for desperate remedies."²⁰⁶

V. EDWARDS' IMPLICATION ON FUTURE LIABILITY SETTLEMENTS

In light of the inequitable result created by the court in *Edwards*, Thomas F. Gleason, an adjunct professor at Albany Law School and expert in insurance law,²⁰⁷ posits that the decision will affect future settlements on liability.²⁰⁸ Now knowing how the choice of law questions might turn out—in *Edwards*, a different jurisdictional rule and pro-plaintiff law were applied to the 10% liable tractor-trailer defendants, while a pro-defendant rule was applied to the claim against the 90% liable bus defendants²⁰⁹—Gleason suggests that one implication will be that parties will be far more hesitant to enter into similar liability settlements or stipulations where they are all jointly and severally liable to plaintiffs, due to the uncertainty surrounding the result and potential for the parties to bear a greater burden of dollar damages relative to their actual apportioned liability.²¹⁰

In *Edwards*, the settlement on liability occurred before the final determination on which substantive law would apply to the claims against all defendants.²¹¹ What would the result have been had the

²⁰⁵ See *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 612 N.E.2d 277, 595 N.Y.S.2d 919 (1993); *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985); *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). The only mere mention of such a scenario by the court, indicating the court's lack of appreciation that such a situation might arise and the subsequent implications of such a paradox, can be found in Judge Burke and Judge Breitel's separate opinions in *Tooker v. Lopez*. See *supra* notes 96–100 and accompanying text.

²⁰⁶ ANTHONY WYNNE, *THE TOLL HOUSE MURDER* ix (1935).

²⁰⁷ See Thomas F. Gleason, *On Choice of Law, Court of Appeals Chooses Substance Over Rigid Pleading*, N.Y.L.J., July 18, 2011, at 3; Thomas F. Gleason, GLEASON, DUNN, WALSH & O'SHEA, http://www.gdwo.com/biographies/thomas_gleason.php (last visited Feb. 9, 2013).

²⁰⁸ See Gleason, *supra* note 207, at 3 (“[O]ne wonders if the plaintiffs, who do get away from the damage cap for the 10 percent liable Pennsylvania defendants, would like to revisit the settlement on liability, now knowing how the choice-of-law questions turn out.”).

²⁰⁹ See *Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306, 333, 952 N.E.2d 1033, 1046, 929 N.Y.S.2d 41, 54 (2011) (Ciparick, J., dissenting in part).

²¹⁰ See Gleason, *supra* note 207, at 3.

²¹¹ *Id.*

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parties not settled and opted to allow the jury to apportion liability after questions of substantive law had been resolved? It would seem appropriate to speculate that the tractor-trailer defendants' apportioned liability would have been significantly less than the 10% originally agreed upon, thus incentivizing the tractor-trailer defendants to not settle and go to trial over the question of apportionment.

At the very least, *Edwards* will likely result in the prolongation of what is already an incredibly lengthy and drawn-out process that bogs down the court system, discouraging parties from working together and settling matters out of court, and coming to a quick resolution. Former Utah Supreme Court Chief Justice Christine M. Durham²¹² once described two of the judiciary's uniform primary objectives as reducing judicial costs and improving judicial efficiency.²¹³ These goals are entirely irreconcilable with the result in *Edwards*, as the Court of Appeals' decision will likely have the exact opposite effect on the judicial process, marking instead a substantial regression in judicial efficiency and a corresponding increase in judicial costs.

VI. CONCLUSION

For decades, the State of New York and the New York Court of Appeals were leaders in the field of conflicts of law theory and analysis.²¹⁴ As the leader in this field, New York spearheaded the wave of jurisdictional abandonment of the traditional rule in both torts and contracts cases.²¹⁵ However, while the Court of Appeals once made headway across the country with decisions such as that of *Babcock* in the 1960s, not a single jurisdiction followed the court any further than abandoning the traditional approach.²¹⁶ Instead,

²¹² Justice Durham currently sits on the Utah Supreme Court, after having served as Chief Justice and Chair of the Utah Judicial Council from 2002 to 2012. See Dennis Romboy, *Utah Chief Justice to Step Down*, DESERET NEWS, Jan. 24, 2012, at B1; *Judges' Biographies*, UT. STATE CTS., http://www.utcourts.gov/judgesbios/showGallery.asp?dist=10&ct_type=S#2918 (last visited Feb. 9, 2013).

²¹³ Conversation with Christine M. Durham, Chief Justice, Utah Supreme Court, in Albany, N.Y. (Mar. 8, 2012); see also Symposium, *The State of the State Courts*, 75 ALB. L. REV. 1703, 1705 (2011) (agreeing with Chief Justice John Broderick of New Hampshire that state courts across the nation are inefficient and expensive).

²¹⁴ See *supra* notes 9–11 and accompanying text.

²¹⁵ See *supra* notes 19–26 and accompanying text.

²¹⁶ See *supra* Parts I, IV (detailing the various types of conflicts of law approaches and that no state has followed New York's approach).

the majority of jurisdictions opted to adopt the Second Restatement's approach for dealing with conflict situations in tort cases, or alternative, more flexible approaches, that could adequately adapt to each case's unique circumstances.²¹⁷ Since its adoption of the *Neumeier* rules, New York, thus, has stood alone, with not a single jurisdiction following suit in developing a system of strict mechanical rules requiring an application that is so rigid.

The court's most recent conflicts decision involving a guest statute in *Edwards*, highlights the inadequacies of the *Neumeier* framework, and explains why New York is no longer the leader it once was in the field of conflict of laws. Its misapplication of *dépeçage*—which ultimately resulted in the application of two separate jurisdictional rules to groups of defendants who were both jointly and severally liable and whose liability both arose out of a single accident—is incompatible with past precedent and conflicts of law theory. The unfair and inequitable result produced in *Edwards* exemplifies the weaknesses of New York's rule. Moreover, the majority's logic and support for its decision runs contrary to, and is entirely irreconcilable with, the Court of Appeals' historical precedent and jurisprudence, since the court has always placed a primary emphasis on achieving fairness and substantial justice in conflicts cases.

Professor Brainerd Currie has explained that one of the primary reasons the conflicts system has managed to survive is because courts have the ability to feel²¹⁸ and can avoid the mechanical application of rules “to produce indefensible results.”²¹⁹ While he cautioned that a problem with the system is that this human element is often overly relied upon in order to produce acceptable results, there is no reason why such an element of producing a fair and just result cannot be worked into a set framework of conflicts rules.²²⁰ Virtually every other jurisdictional rule to approaching torts conflicts cases would have applied New York law to the lawsuits against both the tractor-trailer and bus defendants. This same outcome would have been produced in *Edwards* had the *Neumeier* framework had a degree of flexibility worked into it.

Martin Luther King, Jr. once said, “law and order exist for the

²¹⁷ See *supra* Part IV.

²¹⁸ See Currie, *Notes on Methods*, *supra* note 162, at 175 (“A sensitive and ingenious court can detect an absurd result and avoid it . . .”).

²¹⁹ *Id.*

²²⁰ See *id.* at 175–76.

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purpose of establishing justice and that when they fail in this purpose they become the dangerously structured dams that block the flow of social progress.”²²¹ Justice was not served in *Edwards* by New York’s highest court. In seeking to reduce the number of guest statute cases reaching its courtroom, the court sacrificed fairness, equity, reason, and common sense—valuable principles that are deeply rooted in its history and tradition. Until the court can work these important principles into its choice of law rules, New York’s status as a world leader in one of the most complex and crucial areas of law will remain a distant memory.

²²¹ MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in *WHY WE CAN’T WAIT* 77, 88 (1963).