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NO PLACE LIKE HOME: PUBLIC POLICY AND PRUDENT PRACTICE IN THE CONFLICT OF LAWS

JEFFREY JACKSON*

I. INTRODUCTION

Had the West Virginia Supreme Court of Appeals in Paul v. National Life1 applied its traditional choice-of-law rule, lex loci delicti, to the tort claims arising from an automobile accident in Indiana, the plaintiff would have been barred from recovery under the law of the state where the injury occurred. Indiana's guest passenger statute2 allowed recovery only when a plaintiff guest could prove that her defendant host driver had been guilty of gross negligence, a burden of proof which the plaintiff in Paul could not meet.3 To avoid that result, the West Virginia Supreme Court of Appeals refused to apply Indiana law, holding that the guest passenger statute violated the strong public policy of West Virginia.4

By resorting to the "public policy exception" to avoid predictable but unacceptable results, the West Virginia court avoided the traditional lex loci delicti rule while claiming to preserve it. However, the court's broad "public policy exception" may swallow the traditional rule, or at least consume its predictability, consistency and ease of application — the only justifications ever offered by the court for its use of the rule.5 The application of West Virginia law in a case in a West Virginia court involving only West Virginia residents is a good result in Paul. However, the judicial contortions

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2. IND. CODE ANN. § 9-3-3-1 (Burns 1980).
4. Id. at 551.
5. Id. at 555-56.
to produce that result under West Virginia’s current choice-of-law rule are unnecessary. If the Supreme Court of Appeals desires a choice-of-law rule which is fair to litigants, which is easy to apply, and which achieves predictable results, West Virginia needs a new choice-of-law rule in tort actions.

This article reviews West Virginia’s choice-of-law rule for tort actions in light of recent court decisions in *Paul v. National Life* and *Perkins v. Doe*, and considers the consequences of those decisions for the choice-of-law process in West Virginia. In both decisions the Supreme Court of Appeals manipulated choice-of-law rules to achieve specific results for individual plaintiffs. These recent decisions have sacrificed predictability of results and fairness to all litigants, and will increase, rather than decrease, litigation of choice-of-law issues in West Virginia. This article proposes that in tort cases arising from out-of-state accidents, West Virginia law should be applied to determine the right of one West Virginia resident to compensation from another West Virginia resident. Where parties voluntarily associate with a common community, the law of that community (over which the parties have some measure of political control) should determine whether a loss should be shifted from one party to another in a tort action. Choice-of-law rules which choose the law of the parties’ common domicile recognize the importance of a party’s affiliation with his community. Also, such choice-of-law rules will meet all the standards set by the Supreme Court of Appeals for its choice-of-law rules by resolving choice-of-law issues predictably, quickly, cheaply and fairly.

II. THE TRADITIONAL RULE

Prior to the publication of Brainerd Currie’s influential essays which proposed governmental interest analysis as a choice-of-law methodology, the dominant choice-of-law rule for torts was *lex loci*

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7. See infra text accompanying notes 197-205, 217-223.
delicti, or the place of the wrong rule. In spite of a trend to abandon this traditional choice-of-law rule in favor of the modern learning, either in the form of interest analysis or the multipronged tests of the Restatement Second of Conflicts,9 this lex loci delicti rule remains in effect in eighteen states, including West Virginia.10

The place of the wrong rule is based on territorial concepts which posit that a state has the power to determine the legal effect of events occurring within its borders.11 The right of a state to regulate persons and events within its territory was accepted by Justice Story, the first great American conflicts theorist, in his Commentaries on the Conflict of Laws.12 Story suggested that when a state prescribed legal obligations based on events occurring within that state, other states, under a doctrine of comity or reciprocity of states, voluntarily enforced such legal obligations.13

Story's concept of comity, which allowed a state discretion in the enforcement of foreign law, was rejected by Professor Joseph Beale,14 whose conflicts theories are contained in The Restatement

10. Smith, Choice of Law in the United States, 38 HASTINGS L.J. 1041, 1172-74 (1987); see also Kay, Theory into Practice: Choice of Law in the Courts, 34 MERCER L. REV. 521 (1983). According to Mr. Smith's count, the states which retain the traditional lex loci delicti rule are Alabama, Delaware, Georgia, Indiana, Kansas, Maryland, Montana, Nevada, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia and Wyoming.
13. Id.; CRAMPTON, CURRIE & KAY, supra note 11. Story wrote:
From these two maxims or propositions, there flows a third, and that is, that whatever force and obligation the laws of one country have in another, depend solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.
J. STORY, supra note 12, § 23 (footnote omitted).
There is, then, not only no impropriety in the use of the phrase, "comity of nations," but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter; and is inadmissible, when it is contrary to its known policy, or prejudicial to its interests.
Id. § 38 (footnote omitted).
14. CRAMPTON, CURRIE & KAY, supra note 11, at 8; Sutherland & Waxman, supra note 11, at 453-59.
of the Law, Conflict of Laws\textsuperscript{15} and his Treatise on the Conflict of Laws.\textsuperscript{16} In Beale's choice-of-law methodology, the place of the wrong rule in tort was based logically on a theory of vested rights. Under that theory, a state in which harm occurred, and only that state, governed any cause of action for such harm.\textsuperscript{17} If that state created, defined or limited a cause of action for harm occurring in the state, the right was said to vest.\textsuperscript{18} Once vested, the right had to be enforced by other states.\textsuperscript{19} If no cause of action was created by that state, no recovery in tort could be had anywhere.\textsuperscript{20} Although Professor Beale agreed with the territoriality advanced by Story, he rejected any notion that states had discretion in enforcing rights created elsewhere.

Under the Bealian system of vested rights, applicable law was determined by locating territorially the relevant event or thing.\textsuperscript{21} Although the elements of a tort might occur in more than one state, such as in circumstances in which conduct occurring in one state causes injury in another, the relevant event for choice of law purposes was "the place of wrong," which was defined in the First Restatement as "the state where the last event necessary to make an actor liable for an alleged act takes place."\textsuperscript{22} However, the First Restatement recognized an exception to the place of the wrong rule for laws regulating conduct. Where conduct was governed by a specific rule of law in the state where the conduct occurred, the First Restatement stated that, if possible, that state's law should govern the consequences of such conduct.\textsuperscript{23}

\footnotesize
15. Restatement of Conflict of Laws (1934) [hereinafter First Restatement]. Section 6 of the First Restatement provides: "The Rules of Conflict of Laws of a state are not affected by the attitude of another state toward right or other interests created by the former state."
17. Korn, supra note 11, at 803. Section 378 of the First Restatement provides: "The law of the place of wrong determines whether a person has sustained legal injury." Section 384 provides: (1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states. (2) If no cause of action is created at the place of wrong, no recovery can be had in any other state.
18. Korn, supra note 11, at 803; Sutherland & Waxman, supra note 11, at 453-59.
20. Id. § 384(2).
21. Id. § 384(2); Crampton, Currie & Kay, supra note 11, at 15.
23. Id. § 382.
The First Restatement approach created a seemingly simple and straightforward system for finding applicable law, assuming a court could locate a single place of the wrong. Because a single law applied, in theory that law could be used without reference to the content of any other state’s competing laws, including the state in which an action was brought. The place of the wrong rule created a choice-of-law system in which forum shopping was discouraged because different states would apply a single law to a given tort action.24 Under this choice-of-law regimen, predictable and uniform choices of law could be achieved. The Bealian system shunned the concept of comity in favor of a metaphysics that attached precise legal consequences to the places where specific acts happened.25

III. LEX LOCI DELICTI IN WEST VIRGINIA

Predictable choices of applicable law have been achieved in many of the cases decided in West Virginia, where the place of the wrong rule has been followed in twenty reported tort cases.26 However, West Virginia’s experience with the place of the wrong rule also demonstrates that manipulation of the rule produces unpredictable and perhaps unprincipled choices of law in tort actions.27

The lex loci delicti rule was adopted in West Virginia in Owen v. Appalachian Power Co.,28 although Clise v. Prunty29 is most often

24. Sutherland & Waxman, supra note 11, at 457.
27. See infra text accompanying notes 106-138.
cited as the earliest case which announced the rule. The acceptance of the rule in West Virginia in Owen followed the court’s adoption of the *lex loci contractus* rule to govern choice-of-law issues in contract actions.30 The court has generally based its acceptance of the place of the wrong rule on comity,31 although some of the court’s opinions apparently use the vested rights theory as the basis for the adoption of the place of the wrong rule.32 Early cases, citing treatises both by Professor Beale,33 the vested rights theorist, and by Justice Story,34 the proponent of comity, treat the rule as obviously applicable, which it was before alternative choice-of-law methodologies were proposed. Most recently, in *Paul v. National Life*, the court has spoken of its acceptance of the rule only in terms of comity.35

The West Virginia Supreme Court of Appeals has repeatedly stated that, in actions involving personal injury or wrongful death occurring in a foreign jurisdiction, the substantive law of the foreign jurisdiction controls the right of recovery but the adjective law of West Virginia is applied to and controls the remedy.36 The Supreme Court of Appeals has had no difficulty locating the place of the wrong to determine applicable law in tort cases decided in this century. In only two cases has the plaintiff alleged that conduct in West Virginia caused injury in another state. In *Dallas v. Whitney*,37 blasting in West Virginia caused damages across the border in Ohio. Ohio law applied under the *lex loci* rule.38 In *Saena v. Zenith Optical*,39 a product allegedly negligently manufactured in West Virginia caused injury to an Illinois plaintiff.40 Illinois standards for man-

31. See, e.g., *Paul*, 352 S.E.2d at 556; *Dallas v. Whitney*, 118 W. Va. at 109, 188 S.E. at 767.
32. See, e.g., *Poling*, 116 W. Va. at 189, 179 S.E. at 605.
33. See e.g., *Keesee*, 120 W. Va. 201, 197 S.E. 522; *Dallas*, 118 W. Va. 106, 188 S.E. 766.
35. *Paul*, 352 S.E.2d at 556.
38. *Id.* at 109, 188 S.E. at 767.
40. *Id.*
ufacturer's liability were applied. In all other tort cases involving choice-of-law issues decided by the Supreme Court of Appeals, the conduct causing the injury occurred in the same state as the injury.41

Ease of applicability and predictability do not make the rule acceptable in all circumstances to courts which have adopted it. To avoid the undesirable choices of law indicated under the *lex loci* rule, courts resort to various escape devices, such as characterization,42 the substance-procedure distinction,43 and the public policy

41. *Dallas v. Whitney* and *Saena v. Zenith Optical* are two cases where the application of the *lex loci* as opposed to the *lex fori* had no demonstrable effect on the litigation since the *lex loci* was virtually identical to the then existing law of West Virginia. So, too, in *Schade v. Smith* and *Clise v. Prunty*, the choice of the *lex loci* instead of the law of the forum was of no apparent consequence in litigation involving automobile passengers who were injured in states which, like West Virginia, allowed the plaintiff to recover upon proof of the driver's ordinary negligence. In *Schade v. Smith* and *Clise v. Prunty*, where only West Virginia domiciliaries were litigants, the results in those cases would have been the same even if the accidents had occurred in West Virginia. In these cases, unlike more recent ones decided by the court, the plaintiffs' rights of recovery and the defendants' rights of defense were not affected by choosing the locus law over the law of the forum.

42. Before a court applies the *lex loci delicti*, it must first characterize the action as one sounding in tort. If the action is characterized as one sounding in contract or as one involving family law, the court would apply its choice of law rule for contract or family law actions. Characterization is an essential part of the traditional choice of law method. However, some courts have used characterization as a gimmick to avoid the application of *lex loci*, rather than as an initial step in classifying an action in the process of making principled choice of law decisions.

A good example of characterization as an escape device is the case of *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959) which was decided by the Supreme Court of Wisconsin when Wisconsin adhered to the place of the wrong rule. In *Haumschild*, a plaintiff injured in an automobile accident in California, which at the time adhered to the doctrine of interspousal immunity, brought an action against her former husband (and his insurer) in Wisconsin, where the husband was not immune from suit. Although the action was undoubtedly one sounding in tort, the court was able to avoid the law of the place of the wrong on the interspousal immunity issue by characterization. The court characterized the right of the wife to sue her husband in tort as one of family law, and therefore, applied the law of Wisconsin, the marital domicile, to allow the suit to proceed. *Id.* at 138, 95 N.W.2d at 818. This use of characterization to avoid the law of the place of the wrong suggests the Wisconsin court's clear dissatisfaction with its own place of the wrong rule, which the court subsequently abandoned. See generally Sutherland & Waxman, *supra* note 11, at 461-62.

43. Restatement, *supra* note 15, § 585, provided that questions of procedure were governed by the law of the forum, and § 584 provided that whether "a given question is one of substance or procedure" was to be determined by the forum's own conflict of law rules. The First Restatement set out numerous areas which, characterized as procedural, were governed by the law of the forum. These included the capacity of parties (§ 588), whether issues are to be tried by judge or jury (§ 594), presumptions and inferences (§ 595(2)), witness competence (§ 596), and admissibility of evidence (§ 597).

West Virginia has followed the substance-procedure distinction. See e.g., *Thornsbury*, 147 W. Va. at 773, 131 S.E.2d at 715; *Forney*, 144 W. Va. 723, 110 S.E.2d at 841; *Tice*, 144 W. Va. 24,
doctrine. Resort to escape devices allows courts to dodge the application of *lex loci delicti* while claiming to follow the traditional rule.

Of the twenty tort cases involving choice-of-law issues decided by the West Virginia Supreme Court of Appeals, *lex loci delicti* was avoided in four cases by resort to escape devices. Three cases, including *Paul v. National Life*, utilize the doctrine of public policy to avoid the rule. The court first relied on the exception in *Poling* 106 S.E.2d at 109.

The rule that procedural issues should be governed by forum law is justified by considerations of judicial efficiency, since the forum, even one applying the substantive law of the place of the wrong, could not be expected to conduct its judicial business by the rules of another jurisdiction. However, due to the impact which issues characterized as procedural have on the outcome of cases (and on the inherent difficulty in characterizing any issues as substantive or procedural) some commentators have urged courts following the *lex loci delicti* to abandon this rule. For instance, the measure of damages has been characterized as a procedural issue governed by the law of the forum rather than by the substantive law governing the action. A noted example of this characterization is the case of *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). *Kilberg* was an action in a New York court for the wrongful death of a New York decedent who purchased a ticket and boarded an airplane in New York and was killed in an airplane crash in Massachusetts. Massachusetts' law limited recoverable damages in wrongful death actions to $15,000. New York's constitution contained a prohibition against such damage limitations. The court, in addition to refusing to uphold the Massachusetts damage limitation on the grounds of public policy, characterized the measure of damages as pertaining only to the remedy, rather than to the right to be enforced. Having characterized "the measure of damages . . . as being a procedural or remedial question controlled by our own State policies," *Id.* at 42, 172 N.E.2d at 529, 211 N.Y.S.2d at 137, the court rejected the law of the place of the wrong and applied the *lex fori*.


West Virginia’s Supreme Court of Appeals used the substance-procedure distinction to affect the outcome in *Tice*, 144 W. Va. at 24, 106 S.E.2d at 109 which is discussed infra in note 46. 44. See Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956); Lorenzen, Territoriality, Public Policy and the Conflict of Laws, 33 YALE L.J. (1923); See also Comment, Choice of Law: A Fond Farewell to Comity and Public Policy, 74 CALIF. L. REV. 1447 (1986); Simson, The Public Policy Doctrine in Choice of Law: A Reconsideration of Older Themes, 1974 WASH. U.L.Q. 391.


46. *Paul*, 352 S.E.2d 550; *Chase*, 156 W. Va. 444, 195 S.E.2d 810; *Poling*, 116 W. Va. 187, 179 S.E. 604. The court also employed characterization and the distinction between procedural law and substantive law to apply and extend the West Virginia statute of limitations for a tort action arising from an Ohio accident. *Tice*, 144 W. Va. 24, 106 S.E.2d 107. The plaintiff, an employee of
v. Poling$^{47}$ to bar a husband’s action in tort against his wife. The action arose from an automobile accident which occurred in Alabama. Alabama did not recognize spousal immunity, but West Virginia followed the common law rule which barred actions between spouses. Relying on the common law rule, which the court stated could be changed only by the legislature, the court dismissed the action on the ground that West Virginia’s public policy prohibited such actions.$^{48}$ The court noted that:

It is a general rule, applicable to both torts and contracts, that the *lex loci* is determinative of the right of action. It is likewise a general proposition that courts of other jurisdictions will give effect to rights which are created or recognized by the *lex loci*, but there is an exception which is as fundamental as the rule itself, and that is, that the *lex loci* must give way when it comes in conflict with the law or public policy of the *lex fori.*$^{49}$

The court also relied on the public policy exception in *Chase v. Greyhound Lines*$^{50}$ as grounds for dismissing claims of a father against his unemancipated child. The wrongful death action in *Chase* arose from an accident in Pennsylvania when an automobile, driven

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$^{48}$ Id. at 192, 179 S.E. at 607.

$^{49}$ Id. at 189, 179 S.E. at 605.

$^{50}$ Chase, 156 W. Va. 444, 195 S.E.2d 810.
by Stephen Chase, an unemancipated child, collided with a bus. Rosalie Chase, the mother of Stephen Chase, was killed in the accident. An action was filed on behalf of her estate in West Virginia against the bus company, Stephen Chase and others. Pennsylvania law, which controlled the action under the court's traditional choice-of-law rule, allowed a father to recover damages from an unemancipated child. However, the court stated that "[t]his Court has held repeatedly that the substantive law of the \textit{lex loci} shall apply in transitory actions unless contrary to the public policy of the \textit{lex fori}". The court held that West Virginia's public policy prevented Stephen Chase's father, as a beneficiary of his wife's estate, from recovering any damages from his son.

The court's use of the doctrine of public policy in \textit{Poling v. Poling} and \textit{Chase v. Greyhound Bus Lines} barred claims by plaintiffs against defendants. Presumably, when a plaintiff is prevented by the public policy of the forum from prosecuting a claim recognized by the \textit{lex loci delicti}, the plaintiff can still prosecute his action in the jurisdiction where the tort occurred. For example, the father in \textit{Chase} could assert his claim against his unemancipated son in Pennsylvania, which does not bar claims of a parent against an unemancipated child. Liberal rules of personal jurisdiction and the long arm statute of the state where the tort occurred will provide an alternate forum for a plaintiff when the plaintiff's home forum will not enforce rights recognized by the \textit{lex loci delicti}.

51. \textit{Id.} at 450, 195 S.E.2d at 813.
52. \textit{Id.} at 448, 195 S.E.2d at 813.
53. R. \textsc{Weintraub}, \textsc{Commentary on the Conflict of Laws} 85 (3d ed. 1986) \cite{Weintraub}, \textit{hereinafter R. Weintraub, Commentary}.
54. \textit{Id.} Mr. Justice Brandeis distinguished the rejection claims and defenses on the basis of public policy in Bradford Electric Light Co. \textit{v.} Clapper, 286 U.S. 145 (1932) where he appeared to limit on constitutional grounds the use of public policy to bar defenses:

\begin{quote}
A state may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State . . . subjects the defendant to irremediable liability. This may not be done.
\end{quote}

\textit{Id.} at 160.

The view of Justice Brandeis has been ignored in many choice of law cases, including \textit{Paul} where for the first time the West Virginia Supreme Court of Appeals utilized the public policy of the state to bar a defense recognized by the \textit{lex loci delicti}. Defendants do not choose the forum where an
IV. THE MODERN LEARNING IN CHOICE OF LAW

The traditional choice-of-law rule was under attack prior to the publication of the *First Restatement.* Critics attacked the metaphysical notion that rights vest when and where a tort allegedly occurs. Professor Cavers urged a revision in choice-of-law rules and argued that the traditional choice-of-law rule was "jurisdiction-selecting"; that is, that the rule chooses a specific body of law oblivious to the content of competing laws. Such critics, however, did not produce an acceptable alternative to the traditional choice-of-law method during the first half of this century.

Professor Brainerd Currie's influential essays on choice of law did produce such an alternative to the traditional rule — the governmental interest analysis. Professor Currie's system was predicated on his assertion that every rule of law is intended to further some underlying policy which can be determined through the ordinary processes of construction and interpretation. When a court is asked to apply the law of a foreign state which is different from the law of the forum, the court should determine the underlying policies of the respective laws. If the court determines that the policy underlying the substantive law of a state would be advanced by application of that law, the state is said to have an "interest" in the application of its law in the case. Where the forum finds that only one state has an interest in the application of its policy, action is commenced. Liberal rules of personal jurisdiction do not allow the defendant to forum shop. When on the basis of strong public policy a defense recognized by the *lex loci delicti* is barred, the defendant, unlike the plaintiff, cannot take his defense to another forum. When the forum refuses to recognize a defense established by the *lex loci delicti*, the defendant will never receive the benefit of the defense to the plaintiff's claim.

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57. Cavers, supra note 53, at 178; Crampton, Currie & Kay, supra note 11, at 18.
60. Id. at 177, 183-187.
61. Id.
62. Id.
the court should apply only the law of the interested state. 63 Professor Currie described the case in which only one state has an interest in the application of its law as a "false problem" or false conflict. 64

If both the forum state and another state have interest in the application of their respective laws, the court is presented with a true conflict. 65 In such a circumstance, Professor Currie believed that the court should not engage in evaluating the substantive merit of competing laws or weigh the policies of the interested states. 66 Instead, Professor Currie's solution to the true conflict case was for the court to apply forum law when the forum had an interest in the case.67

Several cases decided by the West Virginia Supreme Court of Appeals under the lex loci delicti rule are examples of false conflicts.

63. Id.
65. B. Currie, Selected Essays, supra note 8, at 163-170; Sedler, supra note 64, at 188-89. Professor Currie suggested that where "the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or another may avoid conflict." Currie, Comments on Babcock v. Johnson, supra note 5, at 1243; B. Currie, Selected Essays, supra note 8, at 368; Sedler supra note 64, at 187.
66. B. Currie, Selected Essays, supra note 8, 163-170, 183-187; Sedler, supra note 64, at 188-89.
67. B. Currie, Selected Essays, supra note 8, at 107-108, 163-170, 183-187; Sedler, supra note 64, at 188-89. Currie also identified the "unprovided-case" or "no-interest" case in which no state can be said to have interest in the application of its law. An example of this case is Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106, (1974) in which a Mexican resident was killed in California by a California tortfeasor. The survivors of the decedent, also Mexican residents, filed suit in California which, unlike Mexico, had no limitation on wrongful death damages. Under interest analysis, Mexico's statute protects resident defendants from unreasonable damage awards. Mexico has no interest in applying its law to the case to protect nonresident defendants at the expense of resident plaintiffs. California's interest likewise is only in compensating resident plaintiffs under its unlimited damage provision. It has no interest in protecting nonresident plaintiffs at the expense of resident defendants.

Obviously, the "unprovided-for" case illustrates the impact of an assumption in the Currie system that states are only interested in applying their law to favor their own residents. Having tied a state's interest to protecting residents, interests thus defined gives no indication of what law to choose. Twerski, Neumeir v. Huenner: Where Are the Emperor's Clothes?, 1 Hofstra L. Rev. 125 (1973).

Currie's solution, the application of forum law, was not fully developed; Sedler, supra note 64, at 190. See B. Currie, Selected Essays, supra note 8, at 153, 156. Professor Sedler's choice-of-law solution to the "unprovided-for" case appears in Sedler, Interstate Accidents and the Unprovided for Case: Reflections on Neumeir v. Kuehner, 1 Hofstra L. Rev. 125 (1973). See generally Crampton, Currie & Kay, supra note 11, at 303-09.
False conflict situations include the guest passenger cases, such as *Hopkins v. Grubb* and *Paul v. National Life,* where West Virginia residents were involved in one-car accidents in states which had guest passenger statutes barring recovery by a guest passenger unless he could prove that the host driver had been guilty of gross negligence or wilful or wanton misconduct. Under the Currie analysis, the state where the accident occurred has a policy of protecting resident defendants and their insurers from fraudulent lawsuits by the ungrateful guest. West Virginia, which has no guest passenger statute, has a policy of requiring hosts to compensate guests for negligently inflicted injuries. Cases such as *Hopkins* and *Paul* are false conflicts in the Currie system because the policy of the state where the accident occurred would not be advanced by the application of that state’s law; the state has an interest in protecting only its resident defendants and their insurers. The application of the law of the place of the wrong under the traditional choice-of-law rule for torts would be irrational in these cases, as it would defeat recovery without advancing the interest of any state. West Virginia is the only interested state in these cases, because only its compensatory policy would be advanced by applying West Virginia law.

Currie’s solution to the false conflict, which has gained wide acceptance, is an enduring contribution to the conflict of laws. His resolution of the true conflict case is more controversial and less acceptable. An example of a true conflict is *Bernard v. Harrah’s Club,* in which a California plaintiff was seriously injured in California by a drunken driver who was served liquor when intoxicated at the defendant’s establishment in Nevada. Nevada law would have imposed no civil liability on the defendant for its conduct. Clearly,

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70. Sutherland & Waxman, *supra* note 11, at 477-78.
71. *Id.* at 477.
72. *Id.* at 478.
Nevada had an interest in protecting tavern owners in its territory from potentially ruinous lawsuits.\textsuperscript{75} On the other hand, California imposed civil liability on tavern owners for conduct such as the defendant’s for the purpose of protecting persons and property from damages caused by excessive intoxication.\textsuperscript{76}

\textit{Bernard}, therefore, is a paradigm true conflict where the law of the forum, California, would favor tort recovery by its resident plaintiff, while the law of Nevada would favor its defendant by defeating the plaintiff’s recovery. Under the Currie interest analysis approach, the law of the forum would be applied here.\textsuperscript{77} The problems presented by that solution to the true conflict are made clear by this case. Inherent in the Currie system is the parochialism of a forum bias, which usually translates into a pro-plaintiff bias.\textsuperscript{78} Because the plaintiff has the choice of two possible fora in cases such as \textit{Bernard}, where the defendant is from one state and the injury occurred in another, the plaintiff in a true conflict case obviously would choose to sue in the forum which favors recovery. The Currie forum law solution to true conflicts, coupled with the plaintiff’s right to choose the forum, gives the Currie system a marked bias toward plaintiffs and their recovery.\textsuperscript{79} Basically, the forum law solution to true conflicts prevents courts from choosing any law but that of the forum selected by the plaintiff.\textsuperscript{80} The traditional \textit{lex loci} rule was criticized for attaching precise legal consequences to the place where a plaintiff is injured. Currie’s system merely substituted the place where the plaintiff chooses to sue as the pivotal choice-of-law indicator in true conflict cases. More doubtful is whether interest analysis would retain this forum law bias if defendants had the right to choose the forum.

\footnotesize
75. \textit{Id.} at 318, 546 P.2d at 725, 128 Cal. Rptr. at 221.
76. \textit{Id.}; \textit{R. Weintraub, Commentary, supra note 53}, at 337-339.
77. California law was applied in the case using Professor Baxter’s comparative impairment analysis; \textit{Baxter, supra note 73}.
78. Sutherland & Waxman, \textit{supra note 11}, at 528-30; Brilmayer, \textit{supra note 25}, at 409-17.
79. \textit{Id.}
80. \textit{Id.} Various solutions have been proposed for resolving true conflicts. See \textit{e.g.}, \textit{R. Weintraub, Commentary, supra note 53}, at 359-61 (proposing resolving true conflicts in favor of compensating plaintiff); \textit{Baxter, supra note 73} (comparative impairment as solution). See also \textit{Kay, The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience}, 68 CALIF. L. REV. 577 (1980).
The Currie interest analysis system has had a substantial impact on courts and has gained a following among commentators. However, the system also has been rigorously questioned. Critics have questioned whether the system is based on ordinary principles of construction and have challenged the idea that states are interested in applying their law only to benefit residents. Currie's method rejected the rigidity of the traditional choice-of-law rule, which courts applied blindly, and offered in its place a case-by-case approach in which courts were to analyze policies underlying rules of law. However, Currie's ad hoc approach depreciated the value of neutral choice-of-law rules and the certainty and predictability incumbent in them.

The Currie antagonism toward rules has been repudiated by the Restatement Second, although the system of analyzing the policy underlying rules of law has been incorporated in its general approach to choice-of-law issues in tort cases. The Restatement Second provides general principles for resolving choice-of-law problems. These principles are designed to promote the formulation of rules for certain cases and in many circumstances specify what those rules should be. The Restatement Second approach is a flexible, issue-by-issue approach which requires courts to determine which state has the most significant relationship to particular issues in choice-of-law cases. Section 6 lists seven choice-of-law principles for the selection

81. See generally Sedler, Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack", 46 OHIO ST. L.J. 483 (1985); R. Weintraub, Commentary, supra note 53; Kay, supra note 80.
82. Brilmayer, supra note 25. Professor Sedler has conceded that interest analysis is not premised on "effectuating legislative intent." Sedler, supra note 81, at 487.
of the state with the most significant relationship to an issue.87 Professor Reese, the Reporter for the Restatement Second, has stated that Section 6 contains the values which the American Law Institute perceives are important in the choice-of-law process and has suggested that the viability of the Restatement Second largely depends on the correctness of this perception.88 Section 145, which controls tort actions generally, provides four "contacts" which are to be considered in determining which state has the most significant relationship to a particular issue.89 Unlike the Currie system, the Restatement Second recognizes the importance of the place where injuries occur, although it does not elevate the place of the wrong to an absolute choice-of-law indicator in all tort actions.

V. WEST VIRGINIA REJECTS THE MODERN LEARNING

In Paul v. National Life, the West Virginia Supreme Court of Appeals for the first time considered the modern learning in conflicts

87. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) [hereinafter RESTATEMENT (SECOND)] provides:

Choice-of-Law Principles
(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
(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.

88. Reese, supra note 84, at 518.

89. RESTATEMENT (SECOND), supra note 87, at § 145, provides:

The General Principle
(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.
of law and articulated its reasons for retaining the traditional choice-of-law rule in tort actions.\(^9^0\) The process through which most American courts abandoned the *lex loci delicti* and adopted a modern conflict of laws methodology is reviewed briefly in Justice Neely’s *Paul* opinion. Courts which have adopted modern conflicts methods did so when legal doctrines, such as contributory negligence, family immunity or guest passenger statutes, were prevalent as devices to avoid these doctrines.\(^9^1\) However, now that these doctrines have generally been repudiated in the great majority of jurisdictions in this country, a change in choice-of-law doctrine appeared to be unnecessary to the West Virginia court. Justice Neely wrote:

[N]early half of the state supreme courts of this country have wrought a radical transformation of their procedural law of conflicts in order to sidestep perceived substantive evils only to discover later that those evils had been exorcised from American law by other means. Now these courts are saddled with a cumbrous and unwieldy body of conflicts law that creates confusion, uncertainty and inconsistency, as well as complications of the judicial task.\(^9^2\)

According to the court, the modern learning in conflict of laws was developed to dodge archaic rules of law. Now that those rules of law have virtually disappeared, courts are now forced to dodge the conflict of laws precedents created by the modern learning.

Justice Neely also briefly discussed the modern learning in conflicts, particularly that of the *Restatement Second*, which the court described as having “indeterminate language and lack of concrete guidelines.”\(^9^3\) The court criticized the “manipulability inherent in the Restatement approach” by citing two New York cases, both of which involved guest passenger statutes.\(^9^4\) In *Babcock v. Jackson*,\(^9^5\) perhaps the most discussed conflict of laws case, the New York Court of Appeals refused to apply an Ontario guest passenger statute in a case arising from an accident in Ontario involving only New York residents. In *Kell v. Henderson*,\(^9^6\) which arose from a New

91. *Id.*, at 551-53.
92. *Id.*, at 553.
93. *Id*.
94. *Id.*, at 554.
York accident involving only Ontario residents, the same court again refused to apply Ontario’s guest passenger statute and instead applied New York’s ordinary negligence standard. The Paul court referred to these cases as achieving “gross disparities in result.” Although the court’s disfavor towards the Restatement is clear, its illustration of the approach of the Restatement Second is not. Both Babcock and Kell were decided before the Restatement Second was completed. Although Babcock does cite a Tentative Draft of the Restatement Second, as well as other choice-of-law theories, Kell relies on none of the tentative drafts of the Restatement Second theretofore published. These cases obviously are set up to be knocked down like straw men so that the court can reject the modern conflicts learning.

Prior to Paul v. National Life, the court decided several cases involving guest passenger statutes. Each of those cases arose from accidents occurring in states with guest passenger statutes requiring the injured guest to prove gross negligence to recover from the host driver. Although West Virginia had never adopted a guest passenger statute, and although these cases involved only West Virginia residents and presumably automobile liability insurance contracts issued in West Virginia, the court dutifully applied foreign guest passenger statutes in all of these cases under the lex loci delicti rule. In Wood v. Shrewsbury, in which Virginia’s guest passenger statute was applied, and in White v. Hall, in which the Indiana statute was applied, this choice of the lex loci barred plaintiff’s recovery entirely because the plaintiffs could prove no more than ordinary negligence on the part of the defendant host driver.

Hopkins v. Grubb is the last guest passenger action decided before Paul v. National Life. In Hopkins, the plaintiff guest pas-
senger and defendant host, both domiciliaries of McDowell County, West Virginia, were involved in an automobile accident in Virginia. At the time Virginia had a guest passenger statute that required an injured guest to prove gross negligence on the part of the host to recover in tort. The action was tried by a jury, which found for the plaintiff and the defendant appealed contending that the plaintiff’s evidence was insufficient under the *lex loci*, Virginia law, to allow the plaintiff to recover. The Supreme Court of Appeals affirmed. In the course of the majority opinion, the court reiterated that *lex loci delicti* was the choice-of-law rule in tort actions in West Virginia courts.\(^{103}\)

But for the fact that Justice Neely would later author the majority opinion in *Paul v. National Life*, his dissent in *Hopkins v. Grubb* is unremarkable. In his dissent, Justice Neely completely agreed with the other four members of the court that West Virginia’s choice-of-law rule for tort actions was and should be the *lex loci* and that under this rule Virginia’s guest passenger statute controlled the action. However, in light of the high burden of proof required of the plaintiff under the law of the place of the wrong, Justice Neely believed that, as a matter of law, the plaintiff had failed to meet her burden of proving gross negligence and so should be denied recovery by the court.

Having come this far [by accepting that Virginia’s gross negligence standard controls], the members of the majority do not accept the logical consequences of their analysis. The evidence in this case is clearly insufficient to present a jury question on the issue of defendant’s gross negligence, if the cited Virginia standard is to be honestly observed. Accordingly, the defendant was entitled on proper motion to a directed verdict in his behalf and I would have so held.

While the majority may have been motivated by sympathy for the seriously injured and disabled plaintiff, I cannot commend their failure to apply controlling Virginia law and I cannot concur in their judgment.\(^{104}\)

No mention was made of West Virginia public policy as a consideration in the choice-of-law process by the majority or by Justice

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103. "In view of the evidence adduced at the trial and in consideration of the manner in which the jury was instructed in relation to gross negligence as it relates to this case, we cannot say that the jury was clearly wrong." *Id.* at 75, 230 S.E.2d at 473.

104. *Id.* at 76, 230 S.E.2d at 474.
Neely in dissent. No member of the court viewed the guest statute as violating West Virginia policy. All members of the court, including Justice Neely, agreed that the Virginia guest statute controlled plaintiff’s right to relief.

*Hopkins v. Grubb* illustrates the court’s orthodox adherence to the traditional conflict of law rule for tort actions. *Perkins v. Doe,* the court’s pronouncement nine years later on conflict of laws, demonstrates the court’s changes of attitude. The court changed from rigid adherence to the traditional rule in *Hopkins* to manipulating choice-of-law doctrines to achieve specific results in tort cases in *Perkins.*

VI. **THE PERKINS SOLUTION: MANIPULATING CHOICE-OF-LAW RULES TO AVOID FORUM LAW**

*Perkins v. Doe* arose from an automobile accident in Virginia. The plaintiffs, West Virginia residents, claimed they were run off a Virginia highway and into an embankment by an unidentified motorist. The accident rendered one of the plaintiffs quadriplegic. The plaintiffs carried an automobile insurance policy with State Farm Insurance, which included an uninsured motorist provision as required by West Virginia Code § 33-6-31.

The plaintiffs commenced a tort action against the unidentified motorist as a “John Doe” defendant in West Virginia state court under West Virginia’s uninsured motorist statute. The action was removed to federal court by State Farm, which had the right to defend in the name of the John Doe under the West Virginia statute. By separate action, the insurer, State Farm, later brought a declaratory action in federal court against the insured for declaration of no coverage under the policy. Apparently, State Farm and/or Perkins moved for a summary judgment in one or both of the actions. The federal district court, by certified questions, requested that the West Virginia Supreme Court of Appeals resolve

106. *Id.* at 712.
whether Virginia or West Virginia law would determine the rights and obligations of the insured and the insurer in the cases.\textsuperscript{109}

Although the Supreme Court of Appeals had to choose the law which would govern the rights and obligations of only State Farm and Perkinses, it had before it not one but two cases. In the declaratory action, the Perkinses were defendants in an action brought by the insurer to determine its duty to indemnify under the insurance policy.\textsuperscript{110} The insurer sought to have this action characterized as one in contract, to which West Virginia law would apply because West Virginia applies the law of the place of the contract in contract actions. The place of contract was clearly West Virginia. The Perkins family lived in West Virginia where they had procured their policy, written to comply with West Virginia's uninsured motorist provisions.\textsuperscript{111} For the insurer, the question in the declaratory judgment action was whether the insurance contract required the insurer to indemnify the insureds for the specific acts of the John Doe. In the other action, the Perkinses sued an unidentified defendant under the uninsured motorist statute for personal injury arising from an automobile accident in Virginia. In \textit{Lusk v. Doe},\textsuperscript{112} the Supreme Court of Appeals had previously characterized this action as one in tort; and therefore, the plaintiff contended that Virginia law should apply under the \textit{lex loci delicti} rule.

That two actions were pending to determine the rights of the insured and the insurer is a product of West Virginia's uninsured motorist claims mechanism which\textsuperscript{113} requires that plaintiffs reduce to judgment claims against the John Doe. This system, which is followed in only three other states, is unlike that of states which allow direct actions or arbitrations against the insurer in litigation involving the unknown motorist.\textsuperscript{114} The \textit{Perkins} cases demonstrate

\begin{itemize}
  \item \textsuperscript{109} \textit{Id.} at 713.
  \item \textsuperscript{110} \textit{Id.}
  \item \textsuperscript{111} \textit{Id.}
  \item \textsuperscript{112} \textit{Lusk}, 338 S.E.2d 375.
  \item \textsuperscript{113} W. Va. Code \textsection{} 33-6-31(c)(iii) (1988); Davis v. Robertson, 332 S.E.2d 819, 824-26 (W. Va. 1985).
  \item \textsuperscript{114} Georgia, South Carolina and Virginia also require suits against the uninsured motorist. A. \textit{Widiss}, \textit{UNINSURED AND UNDERINSURED MOTORIST INSURANCE} \textsection{} 29.1 (2d ed. 1985).
\end{itemize}
how awkward the West Virginia procedure can be. Although two cases were pending, there was but one legal controversy: Were the insureds under their insurance policy legally entitled to compensation from their uninsured motorist carrier for the actions of the John Doe? Obviously, whatever judgment the plaintiffs might receive against the unidentified party would be meaningless unless their insurer were required to pay all or part of the judgment. The existence of two actions to which separate choice-of-law rules applied would have complicated the task of the Supreme Court of Appeals had it not chosen to ignore the contract case and to decide choice-of-law issues by its traditional choice-of-law rule for tort actions.  

Under the West Virginia Code all automobile liability policies issued in West Virginia must contain uninsured motorist coverage "undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle." The act defines uninsured motorist to include owners or operators who are unknown or unidentified. Plaintiffs, injured by unidentified motorists in a "hit and run" accident, are required to bring an action against a John Doe defendant to reduce to judgment their claims against the unidentified motorist. However, "in order for the insured to recover under the uninsured motorist endorsement or provision," plaintiffs injured in John Doe actions must demonstrate actual physical contact between the insureds' vehicle and the vehicle of the unidentified motorist. Literally, plaintiffs must prove they have been "hit" in order to maintain an action under West Virginia's "hit and run" provisions.

Plaintiffs in Perkins admitted there had been no physical contact between their vehicle and that of the unidentified motorist. State

115. A general discussion of choice of law issues in uninsured motorist litigation appears in A. Widiss, supra note 114, at § 7.15; see also Sutherland & Waxman, supra note 11, at 501-07.
117. Id. § 33-6-31(c)(iii) (1988).
118. Id. § 33-6-31(e)(iii) (1988).
119. Id. § 33-6-31(e)(iii) (1988).
120. Id. § 33-6-31(e)(iii) (1988).
121. Perkins, 350 S.E.2d at 712.
Farm, therefore, asserted it could not be liable to the plaintiffs under the uninsured motorist endorsement because the plaintiff could not establish the physical contact required. 122

Although suing under West Virginia's uninsured motorist statute in the tort action, the plaintiffs argued that the *lex loci delicti* rule indicated that Virginia's uninsured motorist statute controlled the action because the accident had occurred in Virginia. Like West Virginia's statute, Virginia's uninsured motorist statute required automobile liability policies issued in Virginia to contain an endorsement for uninsured motorist coverage. Unlike the West Virginia statute, however, Virginia's statute did not contain a physical contact requirement. 123 A Virginia insured could maintain an action under the hit and run provisions without proving his vehicle was actually physically hit by the vehicle of the uninsured motorist.

As was pointed out by Justice Brotherton in his dissent, 124 reference to the Virginia statute (Section 38.10381) was problematic because the Virginia uninsured motorist statute applied only to persons insured under policies issued in Virginia. 125 That fact must have been obvious to the plaintiffs because they did not commence their action under the Virginia statute in Virginia (or under the Virginia statute in West Virginia). Had the action been commenced in Virginia, a Virginia court would not have applied its uninsured motorist statute to the plaintiffs' claim. 126

The plaintiffs' quandary was that West Virginia's uninsured motorists statute explicitly barred plaintiffs' recovery because plaintiffs could not demonstrate physical contact between their vehicle and that of the unidentified motorist. The Virginia statute, on the other hand, did not require physical contact but also did not authorize an action by these plaintiffs because these plaintiffs were not in-
sureds within the meaning of the Virginia uninsured motorist act. Thus, the applicable West Virginia statute barred recovery while the Virginia statute allowing recovery was inapplicable.

Using West Virginia’s choice-of-law rule for tort actions and extremely liberal interpretations of both the West Virginia and Virginia statutes, a three-member majority of the court solved this problem by combining the most favorable parts of both statutes to produce a result not achievable under either statute alone.\(^{127}\) The court applied that portion of the Virginia statute which allowed recovery against a Virginia insurer in a John Doe action without a showing of physical contact, allowing plaintiffs to take their case to the jury in the John Doe case.

As to State Farm’s claim that it could not be liable unless the plaintiff proved physical contact with the John Doe vehicle under the West Virginia statute or its endorsement, the court used the choice-of-law rule to read the physical contact requirement out of both the statute and the endorsement in this case. The court did this by stating that the insurer under the endorsement could only require the plaintiffs to establish a “legal liability.”\(^{128}\) The court found this limitation on the insurer’s endorsement by construing broadly the Code’s prohibition on arbitration of claims.\(^{129}\) Even though the statute specifically requires proof of physical contact “in order for the insured to recover under the uninsured motorist endorsement or provision,”\(^{130}\) the court reasoned that State Farm’s inclusion of the physical contact requirement in its endorsement was an attempt to violate West Virginia code § 33-6-3(g), as that section was broadly construed by the court. The court wrote:

Given the facts as alleged, the Perkins may be able to establish legal liability under the relevant Virginia tort law without proving physical contact. In the face

\(^{127}\) Perkins, 350 S.E.2d at 713-14.
\(^{128}\) Id. at 714.
\(^{129}\) W. VA. CODE § 36-6-31(g) (1988) provides:
No such endorsement or provisions shall contain any provision requiring arbitration of any claim arising under any such endorsement or provision, nor may anything be required of the insured except the establishment of legal liability, nor shall the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.
\(^{130}\) Id. §§ 33-6-31(e) and (e)(iii) (1988) (emphasis added).
of established legal liability under Virginia law, and considering the admonition of section 33-6-31(g) that nothing other than the establishment of legal liability shall be required of the insured, the endorsement relied upon by State Farm [i.e., the requirement of physical contact] is of no consequence. A contractual endorsement cannot rise higher than the public policy of West Virginia, explicitly established through statute by the legislature.\textsuperscript{131}

Therefore, by invoking a physical contact requirement established by the legislature, the insurer was violating the public policy of the State of West Virginia which, according to the court, was explicitly established by that legislature. The physical contact requirement not only was inapplicable to the case, but the insurer’s attempt to rely on the endorsement was an effort to circumvent the requirements of West Virginia Code § 33-6-31(s). The plaintiffs thus could avoid summary judgment in both the tort action and the declaratory judgment action. In the John Doe action the insureds needed only to establish a legal liability, which they could do under the Virginia statute without proving physical contact. In the declaratory judgment action the insurer’s claim that the insureds had to meet the physical contact requirements of the endorsement and West Virginia Code § 33-6-31(e)(iii) were without merit because only the establishment of legal liability could be required.

The court’s interpretation of West Virginia Code § 33-6-31(e)(iii), like its interpretation of the Virginia statute, was farfetched. It was achieved despite the West Virginia legislature’s clear statement that “in order to recover” under an uninsured motorist endorsement for claims against an unidentified motorist the insured at trial must establish physical contact with the vehicle of the unidentified motorist. West Virginia Code § 33-6-31(g), which prevents an insurer from setting up uninsured motorist claims procedures other than those set forth in the statute, was interpreted by the court to prevent application of the physical contact requirement in cases arising from out-of-state accidents. In the court’s expansive reading of this section, no effort was made to harmonize it with the limitations explicitly stated by the legislature for actions under West Virginia Code § 33-6-31(e)(iii).

\textsuperscript{131} Perkins, 350 S.E.2d at 714.
The results achieved through this unusual statutory interpretation, which makes a portion of the West Virginia statute inapplicable and a portion of the Virginia statute applicable, are attributable to the hostility of the majority of the court to the legislative policy behind the physical contact requirement of West Virginia’s statute. The court’s opinion states that the most frequently cited legislative policy behind the physical contact requirement in the West Virginia statute was the prevention of fraudulent or collusive lawsuits against the uninsured motorist carrier. Obviously, it is difficult for an insurance company to defend the actions of an unknown party not present in the court. The physical contact requirement prevents persons who, through their own fault, are injured in one-car accidents from defrauding uninsured motorist carriers by claiming an unidentified motorist caused the accident.

To the three-member majority of the Supreme Court of Appeals, such provisions do the unthinkable: they give insurance companies more protection than necessary from collusive lawsuits. Professor Widiss, a leading commentator on uninsured motorist legislation, has noted the unfairness of a rigid application of the physical contact rule, which would not allow recovery by persons whose vehicles have not actually been hit even when disinterested witnesses verify that the insured was injured while trying to avoid the negligent unidentified motorist. Clearly disagreeing with the wisdom of this legislative policy which would bar both fraudulent and meritorious suits, Justice McGraw stated in a footnote that this is not what the policy of the state “should be.” The policy may be set by a majority of the legislature, but it is rejected by a majority of three members of the court.

The interpretation of the West Virginia statute in Perkins is unsound. The statute is definite on the applicability of the physical contact requirement to actions under West Virginia Code 33-6-31(e)(iii), which was the section under which the plaintiffs in Perkins

132. Id. at 714 n.4; see generally A. Widiss, supra note 114, at § 9.2.
133. A. Widiss, supra note 114, at 9.2.
134. Id. at § 9.6, 9.9.
135. Perkins, at 350 S.E.2d 714 n.4.
had commenced their action. The statute makes no exception for cases which have out-of-state connections. The court should recognize what the legislature has made plain: the physical contact requirement is governed by West Virginia law in all actions under West Virginia code § 33-6-31(e)(iii) and no choice of law need be made on that issue in cases arising from out-of-state accidents. The physical contact requirement may be unwise legislative policy, but its judicial repeal in cases with out-of-state contacts is itself unsound judicial policy. Choice-of-law rules should not be manipulated to avoid an obvious statutory limitation on a cause of action created by statute. 136

VII. AN END RUN ON CHOICE-OF-LAW RULES: THE DOCTRINE OF PUBLIC POLICY

Six months after the court’s decision in Perkins v. Doe, Justice Neely, who did not join the majority in Perkins, 137 offered the following description of courts in conflict of laws cases:

In our post-Realist legal world, it is the received wisdom that judges, like their counterparts in the legislative branch, are political agents embodying social policy in law. Nowhere is this received wisdom more accurate than in the domain of conflict of laws.

Conflicts of law has become a veritable playpen for judicial policymakers. 138

136. The impact which Perkins will have on future litigation under W. Va. Code § 33-6-31(e)(iii) arising from out-of-state accidents is unclear. Consideration of a hypothetical case identical to the Perkins case, except that plaintiff is seriously injured in a hit-and-run accident by an unknown motorist in Kentucky, rather than Virginia, demonstrates some of the difficulty caused by the Perkins decision. Kentucky has an uninsured motorist statute, but the statute is silent on hit-and-run actions. Like the insurer in the Perkins case, insurers have included in their uninsured motorist endorsements physical contact requirements for actions arising from accidents with unidentified motorists. These provisions, which are neither authorized nor prohibited by Kentucky's statute, are enforced by Kentucky courts because the insurer, by allowing recovery against the unidentified motorist upon proof of physical contact, is providing the insured with more protection than the Kentucky statute requires. Assuming the West Virginia insured brought an action in West Virginia against the unidentified defendant, under the Perkins decision, Kentucky law, as the lex loci delicti, would control the physical contact requirement in this case. However, because Kentucky, unlike Virginia, has no statutory provision regarding hit-and-run actions, the rationale in the Perkins case for displacing the physical contact requirement under section e(iii) of the West Virginia statute is totally absent. This plaintiff probably would be denied recovery because the physical contact requirement of West Virginia's statute would control. However, if West Virginia law controls the issue of physical contact requirement here, should West Virginia law likewise should have applied in the Perkins case?

137. Perkins, 350 S.E.2d at 715 (Neely, J., dissenting without opinion).
These comments are certainly an accurate description of the court's opinion in *Perkins v. Doe*. In *Perkins* the court used its choice-of-law rule to avoid West Virginia law and to apply foreign law because it disagreed with domestic policy. In *Paul* the court reversed the process and used domestic policy to avoid foreign law and to apply West Virginia law.\(^{139}\)

Like *Hopkins v. Grubb*,\(^{140}\) *Paul v. National Life* arose from a one-car accident, which occurred in Indiana, killing both the driver, Eliza Vickers, and the guest passenger, Aloha Jane Paul. The passenger's estate brought a wrongful death action against the estate of the driver and an insurer.\(^{141}\) Neither the propriety of joining an insurer nor the claims against the insurer were discussed in the opinion, which dealt solely with the applicability of the guest passenger statute. The court also did not discuss whether the Indiana wrongful death statute was applicable.

At the time of the accident Indiana had a guest passenger statute.\(^{142}\) After discovery, the defendants moved for summary judgment. The motion was granted by the circuit court which found no evidence of wanton or wilful misconduct necessary to satisfy the Indiana statute, which was applicable to the case under the *lex loci delicti*. From this adverse ruling the plaintiff appealed to the Supreme Court of Appeals.\(^{143}\)

In a decision from which only Justice Brotherton dissented, the Supreme Court of Appeals reversed the judgment of the circuit court on the choice of law issue. For the first time in a tort case involving an out-of-state accident, the court refused to allow a defendant to rely on a defense established by the law of the jurisdiction where

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142. *IND. CODE ANN.* § 9-3-3-1 (Burns 1980) provided:
The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, while being transported without payment therefor, in or upon such motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle.
143. *Paul*, 352 S.E.2d at 551.
the defendant acted. The court asserted the continued vitality of the *lex loci delicti* rule and rejected the modern learning in conflict of law, but refused to apply the law of the place of the injury in this case because automobile guest passenger statutes violate West Virginia's strong public policy.

Justice Neely stated for the first time the court's reasons for accepting and retaining the *lex loci delicti* rule.

The consistency, predictability, and ease of application provided by the traditional doctrine are not to be discarded lightly, and we are not persuaded that we should discard them today. The appellant contends that the various exceptions that have been engrafted onto the traditional rule have made it manipulable and have undermined the predictability and uniformity that were considered its primary virtues. There is certainly some truth in this, and we generally eschew the more strained escape devices employed to avoid the somewhat harsh effects of the traditional rule. Nevertheless, we remain convinced that the traditional rule, for all its faults, remains superior to any of its modern competitors. Moreover, if we are going to manipulate conflicts doctrine in order to achieve substantive results, we might as well manipulate something we understand.

Apparently, the *lex loci delicti* rule has many virtues not possessed by the modern conflict of laws doctrines. The rule is supported not only by its consistency, predictability and ease of application, but also by how easily it can be manipulated compared to other conflict of laws systems. It is ironic that the court would criticize the "manipulability inherent" in the *Second Restatement* approach only to retain a choice-of-law doctrine which it characterized as easier to manipulate.

In a single paragraph the court ruled that the guest passenger statute would not be enforced in the courts of West Virginia.

We have long recognized that comity does not require the application of the substantive law of a foreign state when that law contravenes the public policy of this State. West Virginia has never had an automobile guest passenger statute. It is the strong public policy of this State that persons injured by the negligence of another should be able to recover in tort.

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144. *See supra*, note 54.
145. *See supra* text accompanying notes 90-100.
146. *Paul*, 352 S.E.2d at 556.
147. *Id.* at 555-56.
148. *See supra* text accompanying notes 90-100.
149. *Paul*, 352 S.E.2d at 556 (citation omitted).
To support this statement of strong public policy, the court cited its abolition of charitable immunity for hospitals in 1965, of governmental immunity for municipal corporations in 1974, of parental immunity in 1976, of interspousal immunity in 1978, and its adoption of comparative negligence in preference to contributory negligence. The court concluded, “Today we declare that automobile guest passenger statutes violate the strong public policy of this State in favor of compensating persons injured by the negligence of others. Accordingly, we will no longer enforce the automobile guest passenger statutes of foreign jurisdictions in our courts.”

Use of the public policy exception to avoid the *lex loci delicti* allowed the West Virginia Supreme Court of Appeals to apply West Virginia law to a wrongful death action between West Virginia residents. Although the application of the *lex fori* in this circumstance is justified, the use of the public policy doctrine to achieve that choice of law will only make the choice-of-law process in West Virginia less certain for litigants in tort actions. The court did not intend this consequence. Justice Neely in *Paul* stated a desire to reduce rather than promote protracted litigation on choice-of-law issues. He also suggested that the court retained its traditional choice-of-law rule because rules, unlike an *ad hoc* approach, “get cases settled quickly and cheaply.” However, the public policy doctrine is so manipulable and its contours so uncertain that trial courts and litigants may find that the court has ruined the *lex loci* rule, without establishing an approach to resolve actual conflicts cases.

A. Formulating or Manipulating Policy: One Compensation Policy or Many?

The judicial formulation of the strong public policy in *Paul* demonstrates that the doctrine is a source of unbridled judicial discretion. Nine years prior to its decision in *Paul v. National Life*, the
court in *Hopkins v. Grubb*\(^{154}\) unanimously enforced a foreign guest passenger statute in a case virtually identical to *Paul* without considering a public policy bar to the *lex loci delicti* rule. Justice Neely, who authored the *Paul* opinion, dissented in *Hopkins*, and only criticized the majority opinion for not dismissing the plaintiff's case entirely for failure to meet the burden of proving gross negligence under the foreign guest passenger statute.\(^{155}\) By the time the court decided *Hopkins*, it had rejected charitable immunity for hospitals,\(^{156}\) governmental immunity for municipalities\(^{157}\) and parental immunity;\(^{158}\) but those decisions were not sufficient to persuade any member of the *Hopkins* court to resort to the public policy doctrine. However, those decisions and two others announced after *Hopkins*\(^{159}\) were sufficient to persuade four members of the court, including Justice Neely, to formulate a single strong public policy doctrine barring application of the *lex loci* required by the *Hopkins* decision.

Although the court historically has conceded the legislature a role in formulating policy,\(^{160}\) in *Paul* it announced that the strong public policy of the state is that persons injured by the negligence of others are entitled to recover in tort without consideration of any legislative act. The court failed to recognize that West Virginia has several conflicting legislative policies on compensation.

Recent legislation in West Virginia has limited rather than expanded rights to compensation of persons injured by the negligence of another. For instance, West Virginia Code § 55-7B-8\(^{161}\) established a limit on recoverable noneconomic damages in medical malpractice actions. The requirement of physical contact with a hit-and-run driver

\(^{154}\) *Hopkins*, 160 W. Va. 71, 230 S.E.2d 470.
\(^{155}\) See *supra* text accompanying notes 102-105.
\(^{161}\) W. VA. CODE § 55-7B-8 (1981) provides: “In any medical professional liability action brought against a health care provider, the maximum amount recoverable as damages for noneconomic loss shall not exceed one million dollars and the jury shall be so instructed.”  

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as a condition precedent to recovery under West Virginia Code § 33-6-31(e), which has been criticized by the court as unsound policy,\(^{162}\) likewise suggests the legislature’s view of compensation policy in specific instances is often unlike that formulated in \textit{Paul}. The existence of the Workers’ Compensation\(^{163}\) system itself, which Justice Neely described as providing “admittedly parsimonious awards”\(^{164}\) for employee injuries, hardly supports the court’s pronouncements of strong public policy. So, too, statutes of limitation, the judicial rejection of pure comparative negligence,\(^{165}\) and the enforcement of defenses such as assumption of risk suggest that West Virginia, like every other state, has several conflicting policies regarding compensation of injured persons.\(^{166}\)

Professor Rosenberg has argued that it is quixotic to suggest that, in light of such conflicting policies, there exists a single strong policy favoring compensation.\(^{167}\) Rather than stating that the strong public policy is to allow recovery for persons negligently injured, the court could have stated with equal veracity that the policy of West Virginia

\(^{162}\) See supra text accompanying notes 106-137.


\(^{164}\) Mandolidis v. Elkis Industries, 161 W. Va. 695, 246 S.E.2d 907, 921 (W. Va. 1978) (Neely, J. concurring). The Mandolidis opinion and the legislative reaction to it is instructive on the differences between the court and the legislature regarding compensation policy. In Mandolidis, the Supreme Court of Appeals construed the § 22-4-2 of the Workers’ Compensation statute which provides that employers are not immune from tort suits for employee injuries which are deliberately caused by the employer. The court construed the term “deliberate intention” to include “willful, wanton and reckless misconduct”, and thereby reduced the scope of employer immunity under the act. The legislature amended the statute to overrule the Mandolidis interpretation. Referring to the employer’s immunity, the amendment provided: “the legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort concept and standard of willful, wanton and reckless misconduct.” W. Va. Code § 23-4-2(c)(1) (1985).

\(^{165}\) Bradley, 163 W. Va. 332, 256 S.E.2d 879. Compare Reiter v. Dyken, 95 Wis. 2d 461, 290 N.W. 510 (1980); Board of Comm’rs v. Ridenour, 623 P.2d 1174 (Wyo. 1981). Professor Cady criticized the West Virginia Supreme Court of Appeals for its rejection of pure comparative negligence in Bradley. He wrote, “the fact remains that the court has left us with an inadequate rule which misrepresents the whole concept of liability based on fault.” Cady, \textit{Alas and A lack, Modified Comparative Negligence Comes to West Virginia}. 82 W. Va. L. Rev. 473, 491 (1980).

\(^{166}\) The court’s own decision in Deller v. Naymick, 342 S.E.2d 73 (W. Va. 1985), which rejected the dual capacity or dual persona doctrine for company physicians thereby extending employer’s Workers’ Compensation immunity to those persons, suggests the court itself recognized conflicting views on compensation in specific situations. Compare Hoffman v. Rogers, 22 Cal. App. 3d 655, 99 Cal. Rptr. 455 (1972); Wright v. District Court, 661 P.2d 1167 (Colo. 1983).

\(^{167}\) Rosenberg, supra note 84, at 957-58.
is to limit or deny recovery unless specifically authorized by some statute or rule of law. Alternatively, the policy might be articulated as follows: West Virginia has a strong public policy in compensating persons injured by the negligence of another, unless such persons suffer work-related injuries, or are victims of medical malpractice, or are injured by unknown drivers whose vehicles do not physically contact the claimant, or assume the risk of their injuries, or are more than fifty percent responsible for their own injuries within the meaning of comparative negligence rules. Some of the state's policies support the compensation policy stated by the court in *Paul*, but others contradict the assertion of a single strong public policy on compensation.

In the choice-of-law context, the court's formulation of public policy is a judicial contrivance. The public policy doctrine affords the court an unprincipled basis for choosing applicable law. The policy was formulated without reference to any source other than the court itself. Grounded in unrestrained judicial discretion, the doctrine, at best, is a vehicle for manipulating the results in choice-of-law cases. Reintroduction of the doctrine will only complicate such cases for trial courts which, like oracles, will have to divine the contours of public policy and determine the circumstances where the doctrine can be used. Even if the legislature and the Supreme Court of Appeals were in complete agreement regarding the strong public policy of West Virginia, the doctrine would only confuse the choice-of-law process in tort cases and increase litigation on choice-of-law issues.

**B. The Court's Restriction on the Doctrine: The Venue Limitation**

The courts in West Virginia, including federal courts sitting in diversity which must apply West Virginia's choice-of-law rules, receive only limited guidance in the *Paul* opinion regarding when, if at all, the public policy doctrine should be considered in choice-of-law cases. That guidance comes in the final footnote of the majority opinion where Justice Neely limited the *Paul* choice of law analysis:

> Although we intend this to be a rule of general application, we do not intend it as an invitation to flagrant forum shopping. For example, were a resident of a
guest statute jurisdiction to sue another resident of a guest statute jurisdiction over an accident occurring in a guest statute jurisdiction, the simple fact that the plaintiff was able to serve process on the defendant within our State borders would not compel us to resist application of any relevant guest statute. This State must have some connection with the controversy above and beyond mere service of process before the rule we announce today will be applied. In other words, venue must be proper under some provision other than W. Va. Code § 56-1-1(a)(4)[1986].

The court did not make clear in its footnote whether the limitation restricted the use of public policy doctrine in all choice-of-law cases, or only those involving guest passenger statutes. Although the "rule" announced in Paul was limited only to guest passenger statute cases, it is reasonable for trial courts to assume that the public policy doctrine should be employed as in Paul only when venue is proper under some provision other than West Virginia Code § 56-1-1(a). The restriction in the footnote is as justified in cases involving foreign contributory negligence rules as it is to foreign guest passenger statutes; and this venue limitation should restrict resort to public policy in all choice-of-law cases, not just those involving guest passenger statutes. If this assumption is unreasonable, then the court has given no guidance on employment of the doctrine in cases other than those involving guest passenger statutes.

The venue limitation will bar consideration of West Virginia public policy only in cases involving nonresident defendants who are served with process under West Virginia Code § 56-1-1(a)(4). As such, the venue limitation in the footnote is hardly a limitation at all. To date the West Virginia supreme court has not considered a tort case involving a choice-of-law issue in which the defendant was served while merely temporarily in the state. Cases in which venue is proper only under West Virginia Code § 56-1-1(a)(4) are rare, so the venue limitation will not be a restriction on the public policy doctrine. Trial courts are more likely to encounter cases arising from out-of-state torts committed by defendants residing in or doing busi-
ness in West Virginia. The venue limitation is not applicable to such cases, as venue would be proper under provisions other than West Virginia Code § 56-1-1(a)(4).

The venue limitation will not restrain trial courts from resorting to the public policy in cases where a resident defendant injures a nonresident in the latter’s home state. As will be discussed below, prudential limitations on the doctrine of public policy may prevent its use in cases involving nonresidents and out-of-state torts. Only prudential limitations can restrict a trial court’s resort to public policy in choice-of-law cases involving defendants residing in or doing business in the state. If the court meant to impose meaningful limitations on use of the doctrine of public policy in tort cases involving choice-of-law issues, it failed to do so in *Paul v. National Life*.

C. Standards for Applying the Doctrine of Public Policy in Choice of Law

Without guidance, trial courts will face the uncertainty of applying a doctrine that has no definite contours. Justice Neely correctly stated that many of the rules of law, such as spousal immunity and guest passenger statutes, which had been at the center of conflict of laws cases, have been abandoned in most states thereby reducing possible interstate conflicts in those areas. However, conflicting laws among states are no less prevalent today than they were when Brainerd Currie suggested his governmental interest analysis as a choice-of-law method.

Maryland, Virginia and Kentucky, which border on West Virginia, maintain the doctrine of contributory negligence. Maryland limits noneconomic damages to $350,000 while West Virginia has

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170. In all of the choice-of-law cases decided by the Supreme Court of Appeals, the defendant resided or did business in West Virginia.

171. *See infra* text accompanying notes 190-194.


no such limitation. Virginia limits all damages in medical malpractice cases to $1,000,000175 while West Virginia limits only noneconomic damages to that amount.176

Interstate conflicts will not go away. An example will illustrate the task facing trial courts. A Maryland plaintiff is injured in Maryland by a West Virginia defendant. The Maryland resident is also negligent and her negligence contributes in part to her substantial injuries. Under Maryland’s long arm statute, the Maryland resident can sue the defendant in Maryland where the accident occurred. However, the Maryland plaintiff chooses to sue in West Virginia where the defendant resides. West Virginia, unlike Maryland, has neither an applicable damage limitation statute nor the absolute bar of contributory negligence which would prevent or limit plaintiff’s recovery. To bring this action in Maryland, where no recovery could be had under the rule of contributory negligence, would be malpractice on the part of plaintiff’s counsel. In the terminology of interest analysis, this is the classic “unprovided-for” or “no-interest” case.177 The law of the plaintiff’s domicile disfavors her claim, while the law of the defendant’s domicile disfavors his defense.

Unlike Paul, the litigants in this example are not both residents of West Virginia. Should the trial court apply the law of the place of the wrong, or should it consider whether West Virginia’s strong public policy would prevent application of the Maryland rules? Paul v. National Life gives no indication as to whether this case should be decided using Maryland law under the traditional choice-of-law rule or West Virginia law under the public policy exception to the rule. Even if we assume that a West Virginia court would refuse to apply the Maryland contributory negligence bar in an action arising from a Maryland accident involving only West Virginia residents,


176. W. VA. CODE § 55-7B-8 (1986); see supra note 161.

177. This is an “unprovided-for” or “no interest” case because neither state has an interest in applying its law to the advantage of the nonresident. See supra note 67.
that would not solve this case. To allow recovery here is to give the Maryland resident that which her own state law and the law of the locus of the tort would deny her. This would give the Maryland resident the benefit of law which could not bind (or burden) her had she sued in her home state. Under principles of fairness and mutuality, the Maryland plaintiff should not be allowed to use West Virginia law in circumstances in which, if West Virginia law were unfavorable to her, the plaintiff could not be bound by that law.\textsuperscript{178}

A reversal of the parties in the example (the West Virginia resident is seriously injured by the Maryland resident in Maryland) reveals that Maryland law would almost certainly govern that action. The West Virginia resident injured in Maryland by a Maryland resident generally has no choice of forum. He must sue in Maryland where the tort occurred and where the defendant resides, subject to Maryland law under Maryland's choice-of-law rule. Whether the Maryland resident in the original example should be treated differently in a West Virginia court than in her own state or differently than her own state would treat the West Virginia plaintiff on the same facts is not answered by the court in \textit{Paul}. The public policy doctrine could be used to manipulate the result in the example, but the court gave no indication whether in situations such as this a trial court should avoid the \textit{lex loci delicti} rule.

Deciding a true conflict case involving an out-of-state defendant, like deciding the "unprovided-for" conflicts case, will also be problematic for trial courts which will find little guidance in \textit{Paul}. An example of such a case is a medical malpractice action by a West Virginia resident against a Virginia physician for injuries which occurred while the West Virginia resident was in a Virginia hospital.\textsuperscript{179} Assume the physician in West Virginia has minimum contacts in West Virginia.
Virginia sufficient for the assertion of personal jurisdiction over the physician by a West Virginia court. The plaintiff, therefore, has a choice of suing the physician in Virginia or West Virginia. Of course, West Virginia will be the forum chosen because its law is more favorable to the plaintiff than Virginia law.

Like so many states, both Virginia and West Virginia have adopted statutes limiting damages recoverable in medical malpractice actions. These statutes are responses to the malpractice insurance "crisis" (whether real or perceived). The purpose of these statutes is to reduce malpractice insurance costs to health care providers by limiting exposure of insurers to high damage awards. Presumably, the availability of lower cost malpractice insurance will reduce health care costs to patients, and make health care more generally available. These statutes, particularly those which set limits on economic as well as noneconomic damages, may also be aimed at requiring patients to procure first-party insurance to compensate them in the event of injury in excess of that compensable under the statutes. As such, the statutes in part shift the responsibility for compensation in the event of injury to the patient.

West Virginia’s statute limits noneconomic damages to one million dollars, while Virginia limits both economic and noneconomic damages to one million dollars. Assume that the Virginia

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180. For a discussion of choice-of-law and jurisdictional issues in medical malpractice cases, see generally Trial & Maney, Jurisdiction Venue and Choice of Law in Medical Malpractice Litigation, 7 J. LEGAL MED. 403 (1986).
186. VA. CODE ANN. § 8.01-581.15 (1983). Virginia’s damage limitation statute was declared unconstitutional by a federal court in Boyd, 672 F. Supp. 915 on the grounds it violates the right
physician, who is sued by the patient in a West Virginia court and who is served under the long arm statute, admits liability in the action. A federal court jury awards the West Virginia plaintiff one million dollars in compensatory damages and two million dollars for pain and suffering. Following the verdict, the defendant requests that the three-million-dollar verdict be reduced by the federal court to one million dollars under the Virginia statute, which controls under the *lex loci* rule. The plaintiff argues that the Virginia statute violates West Virginia's public policy and so the court under the West Virginia statute should only reduce the amount awarded for pain and suffering.

This action between residents of different states obviously presents a true conflict.187 The law of Virginia, where the plaintiff sought care, where the malpractice occurred and where the plaintiff was injured, clearly favors the defendant physician. The law of the forum clearly favors the plaintiff. Under the *lex loci delicti* rule, Virginia law would apply as the injury occurred there.188 Such a solution preserves the certainty and predictability of the rule, which supports the rule's retention, at the expense of plaintiff's compensation. Alternatively, public policy could be interposed to deny the defendant the protection of the law of the state in which he acted.

The West Virginia legislature has established, by its legislation, that West Virginia's policy is to favor malpractice damage limitations rather than to favor full compensation of plaintiffs for non-economic damages. That the Virginia statute allows a different and lesser amount of recoverable damages should be of no moment, unless the policy of West Virginia as set by the legislature is so narrowly construed as to prevent application of any foreign law which is dissimilar to the law of West Virginia.189 If West Virginia public policy is so narrowly construed, then a patient injured in

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187. See *supra* text accompanying notes 65-67, 74-82.
188. Were this action pending in Virginia, Virginia, which follows the *lex loci* rule, would apply Virginia law. McMillan v. McMillan, 219 Va. 1127, 253 S.E.2d 662 (1979).
189. See *infra* text accompanying notes 191-193 regarding the role of similarity of legislation.
Pennsylvania, which has no damage limitation statute, by a Pennsyl-vania physician with minimum contacts in West Virginia, would not be entitled to unlimited recovery of damages in a West Virginia court under the dissimilar Pennsylvania law.

It cannot be said with certainty what role, if any, the public policy doctrine will play in deciding these cases. This is a testament to the confusion engendered by the introduction of the doctrine into the choice-of-law process. As the example above illustrates, depending on the content of the law where the injury occurred, adherence to the *lex loci* rule in true conflict cases will at times defeat or reduce a plaintiff’s recovery. Unless the Supreme Court of Appeals adopts a prorerecovery bias on the assumption that defendants are unworthy of a neutral choice-of-law rule, defendants in some cases, like plaintiffs in others, may get the benefit of the *lex loci* as a consequence of adherence to the traditional choice-of-law rule.

The supreme court retained the choice-of-law rule with the public policy exception baggage and rejected the modern case-by-case approach to choice of law cases because the court wanted a definite rule which would solve cases quickly and cheaply. However, the broad public policy articulated by the court will increase litigation rather than reduce it, as parties injured in out-of-state accidents come to West Virginia to argue that the *lex loci delicti* should be usurped by West Virginia law under the public policy doctrine announced by the Paul court.

Without any principled basis for deciding the choice-of-law issue, litigants injured by West Virginia residents or corporations in states where law is unfavorable to them can do no worse than to test the uncertain public policy waters in West Virginia. Without a rule to decide cases, trial courts will evaluate cases on an *ad hoc* basis to determine whether or not dissimilar foreign laws violate West Virginia’s public policy.

**D. Prudential Limitations on the Doctrine of Public Policy**

The full faith and credit clause of the United States Constitution does not require a state to enforce the laws of another state when

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190. "Perfection is not for this world. The advantages which good rules bring are worth the price of an occasional doubtful result." Reese, *supra* note 84, at 322.
such laws are repugnant to the public policy of the forum state. 191

Because resort to the public policy exception is a constitutionally acceptable prerogative of states and because the United States Supreme Court has not established constitutional limits on states’ rights to invoke public policy to avoid the application of another state’s law, states have been able to determine for themselves the contours of their public policy in the choice-of-law context. Without Supreme Court guidance, use of the doctrine of public policy is limited only by prudential considerations.

Several commentators have suggested that a court should resort to the public policy doctrine in only the most extraordinary circumstances. 192 Use of the doctrine to reject locus law in circumstances where foreign law is merely dissimilar to forum law has never been favored. Judge Cardozo’s opinion in Louks v. Standard Oil Co. of New York, 193 is probably the most praised formulation of the prudential limitations on the public policy doctrine.

Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. . . . We are not so provincial as to say that every solution to a problem is wrong because we deal with it otherwise at home. Similarity of legislation has indeed this importance; its presence shows beyond question that the foreign statute does not offend the local policy. But its absence does not prove the contrary. It is not to be exalted into an indispensable condition. The misleading word 'comity' has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles. [citations omitted.]

The sovereign in its discretion may refuse to aid the foreign right. From this it

191. "It has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy." Pacific Employers Ins. v. Industrial Accident Comm’n, 306 U.S. 493, 502 (1939).

"But this Court’s decision in Pacific Insurance v. Industrial Accident Commission, clearly established that the Full Faith and Credit Clause does not require a State to apply another State’s law in violation of its own legitimate public policy." Nevada v. Hall, 440 U.S. 410 (1979) (citation omitted).

192. Professors Paulsen and Sovern in their influential study of use of the public policy doctrine in choice of law have echoed Judge Cardozo’s limitations on the doctrine. "We urge the courts to take a second look and ask 'In what sense are we applying the public policy doctrine?' If judges honestly put the question whether foreign law is barbarous in its provisions or frightfully unjust in the particular case, few cases will provide an affirmative answer.” Paulson & Sovern, supra note 44, at 1016.

has been an easy step to the conclusion that a like freedom of choice has been
confided in the courts. But that of course is a false view. The courts are not free
to refuse to enforce a foreign right at the pleasure of the judges, to suit the
individual notion of expediency or fairness. They do not close their doors, unless
help would violate some fundamental principle of justice, some prevailing con-
ception of good morals, some deep-rooted tradition of the common weal. 194

Professor Weintraub, who has endorsed Judge Cardozo's state-
ment of prudential limitations on the public policy doctrine, has
argued that rarely, if ever, will a state be justified in resorting to
the doctrine to bar the application of the law of a sister state; and
"[i]n no event should a neutral forum invoke its own public policy
to affect the result on the merits as it would, for example, if it
denied a defense based on obnoxious foreign law." 195 The doctrine
of public policy should not be used in the choice-of-law process
generally; and if used at all, it should be employed only to avoid
the most barbarous and frightfully unjust foreign laws. The unwieldy
doctrine of public policy should not be the centerpiece of a prin-
cipled choice-of-law method.

VIII. A Sound Result and an Unsound Method: Will West
Virginia Have a Choice-of-Law Rule?

Professor Ehrenzweig has argued in his treatise Conflict of Laws
that "we should abandon the 'unruly horse' of public policy when-
ever we can. For 'once you get astride it, you never know where
it will carry you.'" 196 Paul v. National Life left neither trial courts
nor litigants with any basis for determining the contours of public
policy or the circumstances where resort to public policy might be
appropriate. If litigants are to evaluate cases for settlement, as they
have been encouraged to do by the Supreme Court of Appeals, they
need some principled basis for determining applicable law in tort
cases arising from out-of-state accidents. Choice-of-law rules pro-
viding litigants and trial courts with certainty and predictability in
determination of applicable law, and which reduce forum shopping,
are obviously valuable.

194. Id. at 111, 120 N.E. at 201-02.
195. R. Weintraub, Commentary, supra note 53, at 95.
196. A. Ehrenzweig, 1 Conflict of Laws 16 (1959) (quoting Richardson v. Mellish, 2 Bing. 229,
252, 303 Eng. Rep. 294 (1824)).
A. A Rule Based on Domicile?

While the method to achieve the result in *Paul* is fraught with mischievous consequences, the result reached by the court on the choice-of-law issue, *(i.e., the choice of West Virginia law)* is a good one. The court refused to apply the gross negligence standard of the Indiana guest passenger statute and instead chose to apply West Virginia ordinary negligence law to an action in West Virginia courts involving West Virginia residents. *Paul v. National Life*, like six other guest passenger cases decided in West Virginia,197 is, in the language of interest analysis, a false conflict.198 Under any modern choice-of-law approach, all of which were cavalierly rejected by the Supreme Court of Appeals, West Virginia law would be applied in *Paul* as the law of the only interested state, or as the law of the most significant relationship to the issues of liability and compensation in a case involving only West Virginia residents pending in a West Virginia court. The effect of the court's decision is that the *Paul* case is treated as a purely domestic case between West Virginia residents, which it is if the unfortunate fact that the Vickers vehicle ran off the road in Indiana rather than in West Virginia is ignored.

A rule requiring application of West Virginia law to tort cases such as *Paul* involving only West Virginia residents, without regard to where the plaintiff is injured, will produce results which are certain, predictable and fair. Professors Paulsen and Sovern, in a leading study of the public policy doctrine in choice of law cases, noted the reasons courts use the doctrine to avoid the law chosen under the traditional choice-of-law rule. Their comments are as applicable to the decision in *Paul* as they were to the decisions they considered in 1956.

'[P]ublic policy' is one way to avoid the application of a choice-of-law rule which the forum wishes to avoid. The objection of the forum, thus, is not to the content of the foreign law but to its own choice-of-law rule. Rather than to change or modify the supposedly applicable rule the court may refuse on public policy grounds.


198. See supra text accompanying notes 61-64.
to apply the law to which the rule makes reference. The closer the tie between the forum and the facts of a given transaction the more readily we may expect the forum to use its own law to judge the matter before it. In such a view the 'public policy' doctrine becomes a kind of choice of law principle, imprecise, uncertain of application, but nevertheless discharging a choice of law function. It is a way of saying, "In these circumstances this forum makes reference to its internal law rather than to the law of another state to which our 'normal' choice-of-law would direct us." 199

In Paul v. National Life, West Virginia had a close connection with the case because of the common domicile of the parties. In light of the common "home connection" of the parties, the court believed West Virginia law should be applied to shift a loss from one West Virginia resident to another, even though the lex loci would not have shifted the loss to the defendant in these circumstances. The West Virginia Supreme Court of Appeals has never resorted to the public policy doctrine in a case where West Virginia did not have such a close connection. In Poling v. Poling, 200 for instance, the court used the public policy doctrine to bar a wife from suing her husband in tort even though such an action was authorized under the lex loci delicti. West Virginia was the marital domicile of those parties, and the court believed its law should control the immunity issue. In Chase v. Greyhound, Inc., 201 the court resorted to the public policy doctrine to bar a father from recovering damages from his unemancipated son, defendant in a wrongful death action. Again, the only parties affected by the court's use of the public policy doctrine were the father and son who were both residents of West Virginia. In Poling and Chase the court used the doctrine to prevent shifting a loss from one West Virginia resident to another. Conversely, in Paul, where that same close connection of common domicile was present, the court used the doctrine to shift a loss from one resident to another.

The seed of a rule requiring application of the law of the common domicile in tort cases is present, therefore, in the Paul case and in the other cases which have resorted to the doctrine of public policy. A rule requiring application of the law of the common dom-

199. Paulsen & Sovern, supra note 44, at 981.
201. Chase, 156 W. Va. 444, 195 S.E.2d 810.

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icile in cases involving out-of-state torts would not change the results in any of these decisions where the result was reached on public policy. However, adoption of a common domicile rule would require express recognition that it is the state's close connection to these cases by way of the parties' common domicile rather than the offensiveness of legislative judgments made by sister states that support application of West Virginia law therein.

Domicile has long been recognized in West Virginia as a choice-of-law indicator in areas other than tort law, such as family law, real property and succession to movables. Reasons for elevating the home connection to a choice-of-law indicator in tort cases have been articulated by Professor Harold Korn. By voluntarily and deliberately affiliating with a particular state as a domiciliary, a party accepts:

[A] reciprocity of benefits and burdens under that state's laws both (1) regulating the individual's relationships with the state itself; and (2) striking the balances necessary to reconcile conflicts between his private substantive interest and those of other individuals similarly associated with the same state regarding matters such as allocating the burden of economic losses resulting from tortious injury.

Application of the law of the common domicile to judge rights to and duties of compensation is to use the law of the community by which the parties have consented to be governed and over which the parties have some measure of political control. As such, applying the law of common domicile to tort cases arising from a foreign injury recognize the importance of party affiliation and autonomy in choice-of-law.

The Supreme Court of Appeals has articulated a desire to have a choice-of-law rule to reduce litigation and forum shopping. Unlike the public policy doctrine, a rule based on the parties' common home connection would accomplish this. Of the twenty tort cases involving choice-of-law issues which have come before the court, seventeen have involved only parties from West Virginia including all of the


203. Korn, supra note 11, at 964.

204. Id. at 961.
guest passenger statute cases. The public policy decision in *Paul* already would require that West Virginia law control all of the guest passenger statutes. Under the common domicile rule just suggested, all of these cases would have been decided by West Virginia law.

**B. Compensatory, Instead of Regulatory Rules: The Rules of the Road Caveat**

It is important to recognize that in speaking of applying West Virginia law in cases of common party domicile, I do not mean that West Virginia law, as the law of common domicile, should control all aspects of interstate tort cases. Rules regulating a party's conduct, upon which a party relies when acting or by which a state intends to deter a party's conduct, should not be displaced by the law of the common domicile. Such conduct-regulating rules include rules of the road such as speed limits.\(^{205}\) As an illustration, assume that West Virginia's legislature passes a law prohibiting speeds in excess of fifty miles an hour on West Virginia highways. A West Virginia resident while traveling in Maryland at a lawful speed of sixty miles an hour injures another West Virginia resident. In an action commenced in West Virginia on the issue of whether the defendant's conduct was negligence *per se*, the Maryland rule of the road, upon which the defendant would rely in acting, should control.

Rules regulating conduct should not be displaced by the law of the common domicile rule. To judge an actor's primary conduct by different standards other than those upon which he would rely when acting would be fundamentally unfair.\(^{206}\) So, too, when a state seeks to deter or regulate specific conduct occurring in the state, such as deterring speeding by the hypothetical West Virginia statute cited above, conduct occurring in that state should be judged by that standard. It is obvious that where a state requires a person to do an act or prohibits him from doing an act his action or inaction should be judged by the law requiring or prohibiting the same.\(^{207}\)

\(^{205}\) *Id.* at 791.

\(^{206}\) *Id.* Reese, *supra* note 84, at 329.

\(^{207}\) Reese, *supra* note 84, at 329.
Rules of law which are at the center of the greatest number of choice-of-law tort cases, such as damage limitations, guest passenger statutes and intra-family immunity doctrines, are not regulatory.\textsuperscript{208} These rules of law adjust rights and duties after conduct has occurred by allowing or prohibiting compensation for certain persons in certain situations. These rules allow, limit or prevent recovery. Recovery rules are not ones which regulate or deter primary conduct, nor are these the type of rules upon which we would expect tortfeasors to rely.\textsuperscript{209} Common sense suggests that a person does not rely on the fact that Maryland has a damage limitation statute when he negligently injures another in that jurisdiction. Negligence is, by definition, conduct which is neither intended nor planned. So, too, these rules of law do not deter conduct. It is unlikely that a driver on a highway will be more careful in West Virginia, which has no damage limitation statute, than in Maryland, which has such a statute, merely because of the possibility of a larger adverse judgment should he be negligent in West Virginia.\textsuperscript{210} The driver’s concern for his own safety and that of his passengers, or his desire not to be ticketed by the highway patrol will determine his conduct; the state’s recovery or non-recovery rule will not.

The recovery or nonrecovery law of the common domicile should control the rights of parties. Since parties have affiliated in a single community, recovery rules which determine how to shift losses after conduct has occurred should control how those losses are shifted, if at all, between or among members of the common community. Those persons, by affiliation in a single community, accept both the benefits and the burdens of the law of that community.

\textit{C. Cases Involving Corporations and Parties of Different Domiciles}

Only two choice-of-law cases involving accidents occurring out-of-state decided by the Supreme Court of Appeals include individual

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\item \textsuperscript{208} Korn, \textit{supra} note 11, at 791, 935.
\item \textsuperscript{209} Sutherland & Waxman, \textit{supra} note 11, at 136; Korn, \textit{supra} note 11, at 791, 935; R. Weintraub, \textit{Commentary}, \textit{supra} note 53, at 333-34.
\item \textsuperscript{210} Sutherland & Waxman, \textit{supra} note 11, at 136; Korn, \textit{supra} note 11, at 791, 935.
\end{itemize}
litigants from separate states. Both cases involving parties of differing domiciles were decided using the *lex loci delicti*. As the discussion of the *Paul* court's venue limitation indicates, it is not clear whether a trial court is allowed to use public policy to displace the *lex loci delicti* in these cases. The venue limitation in *Paul* suggests a trial court could consider use of the public policy doctrine in cases involving out-of-state defendants.

The split domicile cases arising from out-of-state accidents involving West Virginia residents are of two types. One is the so-called true conflict case, where the law of the plaintiff's domicile favors his recovery while the law of the defendant's domicile favors his defense. The other is the "unprovided-for" case where the law of the plaintiff's domicile disfavors her claim while the law of the defendant's domicile disfavors his defense. In the true conflict case, each party argues for the application of the law of his own domicile; and in the "unprovided-for" case, each party argues for application of the law of the other party's domicile.

Where the West Virginia resident is the tortfeasor in a tort occurring out-of-state, as in the "unprovided-for" case, the plaintiff has a choice of suing the defendant where the tort occurred or in West Virginia where the defendant resides. However, in cases where the out-of-state resident is the tortfeasor who injured a West Virginia resident in the former's home state, due to the difficulty of procuring personal jurisdiction in West Virginia over the defendant, it is rare for such cases to be litigated in the plaintiff's home state. These cases are usually litigated in the state where the accident occurred. As long as the Supreme Court of Appeals rigidly adheres to the *lex loci delicti* rule, plaintiffs are given little incentive to try to litigate these actions in West Virginia.

So, too, corporations doing business in several states do not have the same affiliations with a single state that individuals have by way of domicile. The common domicile rule suggested for cases arising from out-of-state accidents will not work for corporate parties or

211. See supra text accompanying notes 65-67, 73-80.
212. See supra note 67.
for split domicile cases. If the Supreme Court of Appeals desires a fair and predictable rule, the *lex loci delicti* should continue to be applied in both the true conflict and the "unprovided-for" case arising from out-of-state accidents, as well as cases involving corporate parties.

The domicile of the parties does not provide a neutral indicator for choosing applicable law in cases arising from out-of-state injuries involving individuals from different states or corporate parties. However, the place where the parties have accidentally come together, (*i.e.*, the place where the injury occurred and the right to sue in tort accrues) does provide an indicator for choice of law. Application of the law where the injury occurred comports with notions of fairness and neutrality in the administration of justice. As Professor Korn has argued, "An innate sense of justice would . . . produce a consensus that, all other things being equal, the traveler in a foreign land must accept the law of the stay-at-home citizen of that land." This would justify applying the law of the place of the tort when a West Virginia resident is injured by or injures an out-of-state resident in the latter's home state. However, the out-of-state resident who is injured by the West Virginian should likewise be bound by his law in such circumstances.

Where the resident of another state is injured in his own state by a West Virginia resident, as in the "unprovided-for" case, that out-of-state resident, assuming he brings his action in West Virginia, should not be able to avoid the application of the law of the place of the wrong merely because West Virginia law is more favorable to him. Principles of fairness and mutuality suggest that the out-of-state resident injured by a West Virginia resident should not be given the benefit of West Virginia law if that law could not bind him had he chosen to sue where the injury occurred.

IX. Fairness in Choice of Law

The West Virginia Supreme Court of Appeals refused to adopt any of the modern conflict of laws methods and instead stated that

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214. *Id.*
215. *Id.* at 967.
216. *Id.* at 968-69.
it wanted a rule by which trial courts could quickly and predictably resolve conflict of laws issues.\textsuperscript{217} The public policy doctrine will complicate the choice-of-law process for trial courts. Abandoning the public policy doctrine and applying the law of the common domicile in common domicile cases and the \textit{lex loci} in split domicile cases will not disturb the holdings of most of the cases decided by the West Virginia Supreme Court of Appeals. In the guest passenger cases, all of which involved parties from West Virginia only, the law of West Virginia rather than the law of the place of the injury would be applied under the common domicile rule. This choice of law is already required by the public policy rationale in \textit{Paul v. National Life}. Choices of West Virginia law on issues decided on public policy grounds in other cases, likewise, would not change. West Virginia law would still be applied under the common domicile rule. Abandonment of the public policy rationale in common domicile cases merely establishes that it is the home connection of all parties affected by a particular issue which allows the application of West Virginia law, not the obnoxious quality of foreign law.

In all cases decided by the Supreme Court of Appeals involving parties from different states, the court has applied the \textit{lex loci}. The court should continue to resolve such cases according to its traditional rule, without consideration of public policy. These rules do not involve the complexities of interest analysis or the \textit{Restatement Second} approach, both of which the court has rejected. Using these rules, trial courts will not have to confront the vagaries of the public policy doctrine. Also, these rules will reduce the potential for forum shopping because plaintiffs injured by West Virginia residents in the plaintiff's home state will not be able to seek a greater tort recovery in West Virginia than that allowed where the tort occurred.

Acceptance of these rules will, of course, require the Supreme Court of Appeals to abandon its recent penchant for manipulating choice-of-law rules to achieve results in particular cases. These rules do not have the manipulability that the public policy doctrine has, and so will promote fairness and evenhandedness to all litigants in

\begin{footnote}
\textsuperscript{217} \textit{Paul}, 352 S.E.2d at 554.
\end{footnote}
conflict-of-law cases. Justice Brotherton, in his concise and blunt dissent in *Paul v. National Life* which addressed the court’s decisions in both *Paul* and *Perkins v. Doe*, criticized the court for lacking fairness in its decisions.

In the classic pose, Justice is blindfolded so that she can weigh the equities in a case equally without prejudice. We are peeking beneath the blindfold in conflict of law cases to see if an insurance company is involved. If they are, we appear to be manipulating our conflict of law rule so that the insurance company loses. I believe that even insurance companies are entitled to impartiality in the courts.218

The Supreme Court of Appeals’ recent decisions appear to manipulate conflict-of-laws doctrine to favor the recovery of plaintiffs. Whether Justice Brotherton is correct in stating that the existence of insurance coverage is motivating the court in its recent binge of manipulation is not apparent from the decisions.

Certainly the availability of insurance as a device to spread losses has had a substantial impact on thinking of courts and commentators in conflict of laws.219 Some commentators have used the availability of insurance as a basis for suggesting that the law favoring the plaintiff’s recovery should be applied in true conflict cases.220 However, a defendant’s insured status should not change the fact that each party in a choice-of-law case, defendant as well as plaintiff, is entitled to evenhandedness from the court on choice-of-law issues.221 In a purely domestic tort case, for instance, the defendant may be held liable because he was negligent or because he produced a defective product, but not because he is insured.222 Insurance is

218. *Id.* at 557 (Brotherton, J. dissenting).
221. Professor Baxter has written:

> Every choice of law case involves several parties, each of whom would prevail if the internal law of one rather than another state were applied. Each party is “right,” “worthy,” and “deserving” and “ought in all fairness” to prevail under one of the competing bodies of law and in the view of one of the competing lawmakers. Fact situations differ only in that they are internal to a single state, have been assessed by a different group of lawmakers, and each has reached a different value judgment on the rule best calculated to serve the overall interest of its community.

Baxter, *supra* note 73, at 5.
a matter scrupulously removed from the determination of liability.

Defendants are not liable because they are insured; they are insured in the event they are liable. In determining applicable law in a choice-of-law case, insurance should not be a basis for choosing law favorable to one party and unfavorable to the other. When insurance is used to justify a lack of evenhandedness in determining applicable law, insurance becomes a reason for making the defendant liable instead of a device to spread losses in the event of liability. Of course, if insurance justifies favoring one party over another in determining applicable law, the defendant should only be held liable to the extent of insurance coverage, because allowing recovery beyond insurance limits would erase the justification for selecting unfavorable law.223

X. CONCLUSION

The rules suggested for resolving conflict-of-law issues in tort cases in West Virginia will meet all of the requirements set by the courts. These rules will achieve predictable results, are easy to apply, will reduce forum shopping, will quickly resolve conflicts issues in tort cases; and are not based in interest analysis or the Restatement Second approach. They would require that West Virginia’s recovery rules be applied to cases involving only West Virginia residents and would require the application of the lex loci delicti in all other cases. This choice of law would preserve the result but not the rationale of Paul v. National Life, and would not change the result in Perkins v. Doe. While the Perkins result is indefensible, as long as the court insists on manipulating statutes so as to find an opportunity to make choices of foreign law where the legislature intended none, such aberrational cases will persist. The rules offered will not prevent manipulation of statutes and choice-of-law doctrine as occurred in Perkins, but they will limit that activity in other cases by eliminating the public policy doctrine as a choice-of-law indicator. This should

promote fairness to all parties, something not recently achieved in the court’s conflict-of-laws jurisprudence.