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A Response from the Author

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A RESPONSE FROM THE AUTHOR

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My first reaction is that I have learned a lot from the presentations, not just about conflict of laws, though I have learned a good deal about conflict of laws during the last hour or two. But I have learned, or at least heard, a lot about myself that I did not know before. I am not sure what I know now.

I must express keen appreciation to the members of the panel for everything they have said, especially those parts of their remarks which have made me begin to rethink some of my former thoughts. I am going to be brief but will refer to a few points about which one panelist or another has asked me to say something.

I. NEW YORK CHOICE-OF-LAW CASES

To begin with, I may have attached more importance than I should to *Rosenthal v. Warren*.[1] I gather from what Professors Rosenberg and Juenger have said that I was wrong in taking it at face value. I started my study of that case on the assumption that the Second Circuit Court of Appeals was doing what it said it was doing, that is, attempting to figure out what the New York law is, as represented by *Neumeier v. Keuhner*[2] and prior cases. I thought that the Second Circuit was making an honest effort to determine what the New York Court of Appeals would say, as *Erie*[3] and *Klaxon v. Stentor*[4] require that the federal court of

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1. 475 F.2d 438 (2d Cir. 1973). For a similar New York state-court case, see Tjepkema v. Kenney, 31 A.D.2d 908, 298 N.Y.S.2d 175 (1969).

2. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). In *Neumeier*, a New York automobile host was sued for the death of his Ontario guest in an Ontario accident caused by the ordinary negligence of the defendant host. The holding was that Ontario's host-guest statute, rather than New York's ordinary-negligence rule, should govern. New York was deemed to have no governmental interest in applying its plaintiff-protective rule in favor of an Ontario plaintiff against the New York defendant. Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973), in contrast, involved an action against a Massachusetts surgeon for the wrongful death in Massachusetts of a New York resident. The conflict was between the Massachusetts law's top limit on death recoveries and New York's no-top-limit rule, and the holding was that New York's plaintiff-protective rule was to be applied in favor of the New York parties. *Cf.* Trautman, *Rule or Reason in Choice of Law: A Comment on* Neumeier, 1 VT. L. REV. 1 (1976).

3. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

4. 313 U.S. 487 (1941).

appeals sitting on a New York case must do.[5] Perhaps they were not doing what *Erie* and *Klaxon v. Stentor* called on them to do, though I thought they were. I am almost persuaded by what I have heard tonight, that *Rosenthal v. Warren* is not a New York case after all; I had thought it was.

At any rate, we do have a situation in which some of us have thought that the New York law, represented by the *Neumeier* holding in favor of a New York defendant, and *Rosenthal v. Warren,* purporting to apply the same New York conflicts law, on essentially similar facts in favor of a New York plaintiff, did indicate an apparent correspondence of New York's governmental interests with the interests of the local boys. I hope we can agree that this is wrong whether it represents the present New York conflicts law or not. My earlier criticism of the New York cases was based on a belief that this wrongness was inherent in them.[6]

A case that reached a result exactly opposite to *Neumeier,* and which I think deserves our approval, is *Johnson v. Spider Staging Corp.*[7] In it, the Washington court applied Washington plaintiff-protective law (no top limit on wrongful-death damages, as against a Kansas $50,000 top limit) against a Washington defendant in favor of a Kansas plaintiff for a Kansas tort. There was no problem with reference to the due process clause and legislative jurisdiction; Washington had plenty of contacts with the case, but Kansas also had plenty of contacts. If the Washington court had applied the approach which was used in *Neumeier v.*

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5. *See* R. LEFLAR, AMERICAN CONFLICTS LAW 126 (3d ed. 1977).

6. The effect [of the two New York cases] was that, with reference to an extrastate tort involving a nonresident and a New York party, the New Yorker, whether plaintiff or defendant, would win in each case on the analysis that New York's governmental interest favored its own citizens. An argument might be made that this amounts to a denial of equal protection of the laws to nonresident persons within the jurisdiction. At least it contradicts the ideal of a state's legal system as a repository of justice for residents and nonresidents alike, an ideal which should inhere in the governmental interests of any state. Unwillingness to take account of the better rule of law as a choice-influencing consideration seems strange indeed in the light of this preference for the litigant who is locally regarded as the "better party" because his home is in the forum state.

It seems that New York's law of choice of law, currently more unsatisfactory than that of any other state that has moved away from lex loci delicti and similar old rules, will have to be further modified, as undoubtedly it will be, before it can fairly be listed among the states that have achieved a reasonable flexibility under modern conflicts theories.

Leflar, *Choice of Law: A Well-Watered Plateau,* 41 LAW & CONTEMP. PROB. 10, 20-21 (Spring 1977).

7. 87 Wash. 2d 577, 555 P.2d 997 (1976).

Kuehner, the holding would have been in favor of the Washington defendant. It seemed to me that the Washington court in that case did what a civilized court ought to do.[8] It concerned itself with justice as between parties regardless of where they lived, even to the extent of holding against the local boy. We can at least recognize the difference in legal philosophy that appears in the two cases, though we can like or dislike either of them.

I recognize that you (Professors Rosenberg and Juenger) interpret these New York cases somewhat differently than I do, and you may be right as to their ultimate interpretation by the New York Court of Appeals, but I am worried about whether other courts, such as the Second Circuit, that attempt to follow *Neumeier,* understand the cases as well as you do. I am thinking of *O'Connor v. Lee-Hy Paving Corp.,*[9] a recent Second Circuit case, in which the New York residence of the plaintiff's decedent was given as a reason for applying New York's plaintiff-protective torts law rather than Virginia's defendant-protective rule in an action for a Virginia wrongful death. Reasonably intelligent judges on other courts may not read the New York cases as narrowly, or as carefully, as you do.

II. Due Process: Legislative and Judicial Jurisdiction

One of the matters I was asked to comment on is the interrelation of legislative jurisdiction (the outer limits on choice of law) and judicial jurisdiction (the power of a court to hear the case against a particular defendant). The due process clause, of course, controls both. In dealing with this matter, we should leave out cases in which judicial jurisdiction is based on the defendant's domicile[10] or on service on a defendant while he is temporarily within the state.[11] These are situations in which judicial

8. Washington's governmental interests, as they appeared from this opinion, were those of a justice-dispensing court in a modern American state, a repository of justice not only for the benefit of home-state domiciliaries but for all litigants who come before the court, even residents of distant states, and even against local persons.

Leflar, *supra* note 6, at 19.

9. 579 F.2d 194 (2d Cir.), *cert. denied,* 99 S. Ct. 639 (1978). There were other New York contacts, however, in addition to the decedent's residence, though the tort elements were centered in Virginia.

10. *E.g.,* Milliken v. Meyer, 311 U.S. 457 (1940).

11. *E.g.,* Peabody v. Hamilton, 106 Mass. 217 (1870). This may well be the next victim of the "fair play and substantial justice" limitation on judicial jurisdiction over defendants. *See* R. Leflar, *supra* note 5, at 48.

jurisdiction traditionally may be employed, yet in which legislative jurisdiction, that is, the application of the particular state's substantive law to the foreign facts, would be completely impermissible under the due process clause, as in *Home Insurance Co. v. Dick,*[12] and related cases.

The real question is the other side of the situation, in which legislative jurisdiction does exist. Assuming an appropriate service statute, may judicial jurisdiction always be exercised by the courts of a state that has sufficient contacts with the facts to permit it to exercise legislative jurisdiction?[13] We do not know a firm answer to that question. What we do know is that judicial jurisdiction and legislative jurisdiction have developed separately in respect to the outer limits of what the due process clause permits. I suspect that for the practicing lawyer a fairly safe guide would be that in almost any case in which a state has legislative jurisdiction, a court of that state can exercise judicial jurisdiction over a defendant who produced the situation to which that state's law may permissibly be applied. In "almost" any such case, but not in every such case?

In *Hanson v. Denckla,*[14] which enforced due process limits on the exercise of judicial jurisdiction, Chief Justice Warren issued the warning: "For choice-of-law purposes such a ruling may be justified, but we think it an insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a nonresident defendant."[15]

A comparable intimation appears near the end of Justice Marshall's prevailing opinion in *Shaffer v. Heitner.*[16] The language in each instance is inconclusive. If the governing law on separated substantive issues be that of different states, as by dépecage,[17] it may be doubtful whether a defendant has sufficiently submitted himself to one or the other of the different states to enable both of them to employ long-arm jurisdiction over him in actions brought on the entire transaction. There may

12. 281 U.S. 397 (1930).

13. *See* Leflar, *The Converging Limits of State Jurisdictional Power,* 9 J. PUB. L. 282 (1960); Comment, *At the Intersection of Jurisdiction and Choice of Law,* 59 CALIF. L. REV. 1514 (1971).

14. 357 U.S. 235 (1958).

15. *Id.* at 253.

16. 433 U.S. 186, 216 (1977).

17. See Reese, *Dépecage: A Common Phenomenon in Choice of Law,* 73 COLUM. L. REV. 58 (1973).

be contacts which, without dépecage, satisfy the due process requirements of *Home Insurance Co. v. Dick*, but do not satisfy *International Shoe*.[18] An agreement of the parties, for example, that a particular state's law shall govern their transaction, may be valid, yet not conclude the question of judicial jurisdiction. There may even be constitutional limitations other than those inherent in the due process clause that bear more on jurisdiction than on choice of law.

A current decision in the United States Court of Appeals for the Eighth Circuit illustrates the latter possibility. In *Hutson v. Fehr Bros.*,[19] a plaintiff injured in Arkansas by the breaking of a heavy log chain brought an action in that state with long-arm service against the Italian manufacturer of the chain. Some $74,000 worth of the defendant's chains had, over the years, been sold in Arkansas, though by agents rather than by the defendant. The four-to-three holding was against jurisdiction over the Italian defendant. The opinion emphasized the inconvenience of such a lawsuit, especially as it might interfere with foreign commerce.

> Weissenfels [the Italian defendant] is burdened substantially by having to defend this lawsuit. It must hire United States counsel and support personnel and presumably transport its witnesses to Arkansas from Italy in the event of trial. Naturally, it will be strongly tempted to settle, even if it believes it is not liable, because of the tremendous expense of trying the lawsuit, an expense that bears far more heavily on it than on the other [American] parties.[20]

The intimation is that interference with foreign commerce, as distinguished from a lesser interference with interstate commerce, might defeat otherwise permissible exercises of judicial jurisdiction.

At any rate, there are some judicial jurisdiction questions that are different from some legislative jurisdiction questions, whether they arise under the due process clause or some other

18. International Shoe Co. v. Washington, 326 U.S. 310 (1945). Kulko v. Superior Court, 436 U.S. 84 (1978), clarified somewhat the outer limits of judicial jurisdiction. Further clarification is promised by the Supreme Court's noting probable jurisdiction and ordering oral argument in World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351 (Okla. 1978), *prob. juris. noted*, 99 S. Ct. 1212 (1979), in which the Supreme Court of Oklahoma upheld long-arm service against a foreign corporation in an action brought on account of Oklahoma product liability injuries suffered by the plaintiffs.

19. 584 F.2d 833 (8th Cir. 1978).

20. *Id.* at 837.

clause of the Constitution. The two jurisdictional areas have been coming closer together. What confers jurisdiction in one area will usually confer it in the other. But they are certainly not yet identical, and may never be.

III. Bases for Legislative Jurisdiction

A closely related question is how substantial the factual contacts with a state must be in order for that state's substantive law to be allowed to govern a transaction. That, of course, is the problem of whether, under the due process clause,[21] legislative jurisdiction can be sustained. *Home Insurance Co. v. Dick,*[22] supplemented by a few later Supreme Court cases,[23] lays down the basic requirement. The Constitution is violated if a court applies to a legal issue the law of a state that has no substantial connection with the facts that bear upon that issue. Marginal or far-out contacts with the facts will not suffice.[24]

The question arises when a court attempts to apply the substantive law of a state whose only connection with the facts is that the plaintiff is, or was, a resident of that state, when all other elements in the transaction sued on were located or occurred in other states. No United States Supreme Court decision has gone that far.

It may be argued that *Home Insurance Co. v. Dick* itself answered the question in the negative. Not quite. It is true that in *Dick* the plaintiff was domiciled in Texas, and that was held not to be enough, under the due process clause, to permit Texas to apply Texas law to a contract made in Mexico, between Mexicans, for insurance on Mexican property. The Texas plaintiff had

21. Other constitutional clauses have been relied upon as controlling legislative jurisdiction. For a discussion of the application of the full faith and credit clause, see Martin, *Constitutional Limitations on Choice of Law,* 61 Cornell L. Rev. 185 (1976); Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law,* 62 Cornell L. Rev. 94 (1976) (a reply to Professor Martin's article); Martin, *A Reply to Professor Kirgis,* 62 Cornell L. Rev. 151 (1976). *See also* Horowitz, *The Commerce Clause as a Limitation on State Choice of Law Doctrine,* 84 Harv. L. Rev. 806 (1971); Note, *Unconstitutional Discrimination in Choice of Law,* 77 Colum. L. Rev. 272 (1977) (equal protection and privileges and immunities clauses).

22. 281 U.S. 397 (1930).

23. *E.g.,* Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964) (post-contract events are relevant); Carroll v. Lanza, 349 U.S. 408 (1955) (place of injury in tort).

24. On the inadequacy of marginal contacts, see Reese, *Legislative Jurisdiction,* 78 Colum. L. Rev. 1587 (1978) (article not yet distributed at the time of the Chicago panel program).

not been a party to the original Mexican transaction, but was only an assignee, though the assignment to him was made prior to the loss. Would it have changed the result had he been a party to the original Mexican transaction, perhaps then the owner of the insured Mexican property? Or, assuming that it would not have changed the result reached by a 1930 Supreme Court,[25] might it be deemed a sufficiently significant connecting factor by the same Court in 1979 to permit application of the plaintiff's domiciliary law?

I think this is the constitutional issue that underlies the much-vexed question of whether New York's *Seider v. Roth*[26] rule is still valid. That rule permits garnishment in New York against a nonresident tortfeasor's liability insurer which is doing business (found) in New York, on claims arising from out-of-state torts allegedly committed by out-of-state residents covered by out-of-state liability insurance policies, provided the suing plaintiff is a resident of New York. Prior to the 1977 decision in *Shaffer v. Heitner*,[27] the *Seider v. Roth* rule was supported by *Harris v. Balk*[28] which allowed such garnishments wherever the principal defendant's debtor was found, but *Shaffer* overruled *Harris v. Balk*. What is now left to sustain *Seider v. Roth*?

It has been asserted, both by the local courts[29] and by commentators,[30] that the effect of the New York rule is the same as if New York had a judicially created direct-action law, as does Florida,[31] making a liability insurer directly liable, as on a third-party beneficiary contract, to the tortiously injured person for whose

25. *Cf.* Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934) (superseded by subsequent decisions, *e.g.*, Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964)).

26. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). *Accord,* Donawitz v. Danek, 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977); Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). The *Seider* procedure was upheld as constitutional in Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir.), *cert. denied,* 396 U.S. 844 (1969) and O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir.), *cert. denied,* 99 S. Ct. 639 (1978).

27. 433 U.S. 186 (1977).

28. 198 U.S. 215 (1905).

29. See note 26 *supra.*

30. The most complete current attempt to sustain the *Seider v. Roth* rule appears in Note, *The Constitutionality of* Seider v. Roth *after* Shaffer v. Heitner, 78 COLUM. L. REV. 409 (1978).

31. Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969). *See* Note, *Judicial Creation of Direct Actions Against Automobile Liability Insurers:* Shingleton v. Bussey, 23 VAND. L. REV. 631 (1970).

benefit a liability policy normally operates. Clearly, it has that substantive effect. For all practical purposes the New York rule creates a new and separate cause of action against the insurance company. But does New York have a sufficiently substantial connection with the facts out of which the plaintiff's tort-contract claim arises to permit that state to exercise this legislative jurisdiction?

My problem is the permissible application of a substantive New York direct-action rule to a set of facts that has practically nothing to do with New York, where the injury occurred in another state, where the insurance policy was made in another state, where the defendant comes from another state and only the plaintiff comes from New York, and no other related state has a direct-action rule. Can we agree to this, when the only basis for applying the substantive law of New York is the fact that the plaintiff is a resident or domiciliary of that state?

The United States Supreme Court has upheld the constitutional applicability of direct-action statutes,[32] but only when the injury itself occurred in the state or the liability insurance contract was made there. New York has entertained actions brought on claims under the direct-action laws of some other state in which the tortious injury was inflicted.[33] In these cases the new direct cause of action was created by the law of a state that had substantial contacts with the facts, more than just the plaintiff's residence. Is the plaintiff's residence alone enough to enable New York to create a substantive cause of action which exists under the laws of no other connected state? That seems doubtful.[34]

If that be enough, another constitutional question is then presented, under the equal protection clause. It can at least be argued that a rule which, without other justification, allows residents only, and not nonresidents, to bring direct actions against insurers, denies to nonresident persons within its jurisdiction the equal protection of the laws. It may be hoped that, one of these

32. Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954).

33. Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965) (action on Puerto Rican statutory direct action). See also Barrios v. Dade County, 310 F. Supp. 744 (S.D.N.Y. 1970) (action on Florida common-law direct action).

34. Of the American direct-action statutes, only that of Arkansas expressly authorizes direct actions when the only factual connection with the state is the plaintiff's residence. ARK. STAT. ANN. § 66-3244 (1966). The validity of this enactment has not been judicially tested.

days, these constitutional questions will be authoritatively decided by the United States Supreme Court.[35]

IV. "FALSE CONFLICTS"

One of the panelists, I think it was Judge Todd, asked me to comment on "false conflicts" as contrasted with "no conflict of laws." Professor Brainerd Currie used the term "false conflicts" extensively, and explained rather carefully what he meant by it. He meant false conflicts of *governmental interests*. He said that if one state had the sole governmental interest, or even far and away the major governmental interest, in a particular transaction and related matters, it was such a false conflict of *governmental interests* that the state whose interests were the major ones should apply its law, especially if it were the forum state.[36] That did not, and he made it clear that it did not, mean that there was no conflict of laws question in the case. Rather, it was a method for resolving the choice-of-law issue that was clearly presented by the case.

Professor Currie consistently said, and I think most of us would agree with him, that if the sole contact of a particular state, X, with a tort case was the fact that the accident occurred in state X so that lex loci delicti could apply, this presented a real conflict-of-laws case even though the parties all came from another state, started on a trip from the other state, and rode in an auto registered in the other state, so that the governmental interests and the dominant contacts were centered in the other state. It is a real conflict-of-laws case, because traditionally the law of the place of the injury was applied. The due process clause permits the application of the lex loci delicti, even though most of us would agree that the other state's law ought to govern some issues at least. The term "false conflicts" as he used it was a clear one, pointing out that the governmental interests involved in such a case, insofar as they bore on the relationships of the parties

35. This hope may be approaching realization. The Supreme Court has noted probable jurisdiction and ordered oral argument in Savchuk v. Rush, 272 N.W.2d 888 (Minn. 1978), *prob. juris. noted*, 99 S. Ct. 1211 (1979), *oral argument heard*, Rush v. Savchuk, 48 U.S.L.W. 3238 (Oct. 9, 1979), in which the Supreme Court of Minnesota sustained its *Seider*-type garnishment procedure on behalf of a plaintiff who became a Minnesota resident only after he had been injured in Indiana.

36. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 180, 183-84, 188-89, 203-04, 590, 621, 627 (1963).

(guest statutes, intrafamily immunities, and the like), but not as they bore on compliance with local "rules of the road," were centered in the other state, so that its law ought to govern those issues. On rules of the road, relating to the defendant driver's alleged negligence, the governmental interests and dominant contacts were centered in the state where the car was being driven at the time of the accident.[37]

The term "false conflicts" has not always been understood clearly because a lot of lawyers (not judges I hope) have thought that it meant that there is no conflict of laws question to be resolved. Of course, there is a conflicts question to be resolved. The consideration of governmental interests, including the false conflict of governmental interests, is just one way of resolving the conflicts problem. We all know that, but the term was a bit misleading. At least, anything that misleads people is misleading, isn't it?

The statement that there is "no conflict of laws" presented by a given case means something else. I have preferred to use the term "no conflicts" to describe situations in which, the law of two states being the same, there is no conflict between the laws of the two states.[38] We can go back to Dave Cavers' early writing for clarification of this idea.[39] What we ought to be concerned with is whether there is no real difference between laws, regardless of plural or multiple jurisdictions. If the relevant laws of two states are alike, there is no conflict between them and no need to make a choice between their laws. That is a real meaning for the term "no conflict of laws." My whole point is that Professor Currie's term "false conflict" means something else; it refers to an approach to solving conflicts problems, not to denying their existence. I think that is something all of us know already, but we need to emphasize it to our students.

Those are the conflicts areas that I have been specifically asked to discuss this evening. I have touched them only briefly. There are a lot of others, especially some that are raised by cur-

37. For Currie's reaction to such a case, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), see Currie, *Comments on* Babcock v. Jackson, 63 COLUM. L. REV. 1233 (1963). *See generally* Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1.

38. Leflar, *True "False Conflicts" et Alia*, 48 B.U.L. REV. 164 (1968).

39. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178, 192 (1933). *See also* D. CAVERS, THE CHOICE-OF-LAW PROCESS 9, 79 (1965).

rent cases,[40] that are equally interesting. I'm sorry we do not have more time. Anyway, I appreciate your interest, what the other panel members have said, and particularly Bob Felix's efficient labors in arranging this entire—I hope useful—program. Thank you!

40. See Leflar, *Conflict of Laws*, in 1979 ANN. SURVEY AM. L. 1. *See, e.g.*, Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979) (abandoning the old Texas disregard of Mexican law and adopting a modern approach to choice of law in the torts area).