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Beyond Dépeçage: A "New Rule" Approach to Choice of Law in Consumer Credit Transactions and a Critique of the Territorial Application of the Uniform Consumer Credit Code

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In multiple-issue choice-of-law problems, the use of dépeçage, whereby different issues are decided by references to the law of different states, can produce an outcome that differs from the outcomes that would have been reached, were the problem strictly an intrastate one, in each of the states involved. After discussing the situations in which this result may be justified, Professor Weintraub proposes an alternative to dépeçage. Under this "New Rule" approach, a court in an interstate case would seek to develop an ad hoc rule to accommodate in the best way feasible the policies of the contact states. Professor Weintraub illustrates the operation of this approach by applying it to interstate small loan transactions. He then compares the solution under his approach with the choice-of-law rules contained in various small loan statutes, principally the Uniform Consumer Credit Code.

IN THE 18 years that have passed since the publication of *Selected Readings on Conflict of Laws*[1] under the editorship of Professor Culp, there have been vast changes in most fields of the law, yet

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1. SELECTED READINGS ON CONFLICT OF LAWS (M. Culp ed. 1956).

nowhere has the pace of change approached so close to revolution as in the field of choice of law. The leitmotiv of the New Conflicts is that, in choosing which jurisdiction's law to apply to an interjurisdictional problem, we should inquire into where the social consequences of our decision are likely to be experienced and give preference to the state that will have to live with the flesh and blood results of what superficially appears to be a dry academic exercise. As usual in the history of thought, this central concept was not new, and the current generation of conflicts scholars reached their heights of insight and understanding on the broad shoulders of those who had preceded them. It was in 1947, for example, that Fowler Harper told us: "When two or more communities are touched or affected by a factual sequence, the nexus should be considered with a view to the respective interests of the societies affected *by the particular fact situation.*"[2]

In any event, for good or ill, the "interest" or "functional" analysis of choice-of-law problems has proceeded apace. As Christian Wilde has pointed out, in its issue-by-issue approach to analysis of a conflicts problem, interest analysis has greatly increased the likelihood that the law of one state will be applied to one aspect of the problem while the law of another state is applied to another aspect of the problem.[3] To be sure, there was some likelihood under the territorial choice-of-law rules, which are anathema to modern theorists, that this splitting up of the applicable law would occur. In the first *Restatement of Conflict of Laws,* for example, the validity of a contract was determined by the law of the place of contracting,[4] but the sufficiency of performance was determined by the law of the place of performance.[5] The first *Restatement's* tort rule, place of wrong,[6] was more monolithic, but with the right chisel even that monolith could be cracked. A particular issue in a "tort" case could be characterized, for example, as "procedural,"[7] and would therefore be resolved by the application of forum law, or as a "contract"[8] claim and require use of a different set of guidelines to deter-

2. Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays,* 56 YALE L.J. 1155, 1161 (1947) (emphasis in original).

3. Wilde, *Dépeçage in the Choice of Tort Law,* 41 S. CAL. L. REV. 329, 345-46 (1968).

4. RESTATEMENT OF CONFLICT OF LAWS § 332 (1934).

5. *Id.* § 358.

6. *Id.* § 378.

7. Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (measure of damages for wrongful death).

8. Handy v. Uniroyal, Inc., 327 F. Supp. 596 (D. Del. 1971) (tort is-

mine where to place the pin in the map. It is true, however, that the likelihood of applying different laws to different issues in the same problem, *alias dictus* "dépeçage," is much increased under the new methodology.

The questions arise then to what extent this issue-by-issue, onion-peeling approach to conflicts problems is desirable and to what extent it is fraught with the danger of producing foolish and unjust results. We are fortunate in having two excellent recent treatments of this problem, the one by Mr. Wilde already referred to,[9] and the article last year by Professor Reese.[10] It would serve no purpose to tread again the ground that these scholars have mapped. I will, however, outline briefly my views of dépeçage and then focus on the central inquiry of this article: to what extent is it desirable to move beyond dépeçage and resolve a particular issue in a conflicts problem by applying law that is not the domestic law of any of the contact jurisdictions, but represents a new rule crafted to give maximum effect and to cause minimal impairment to the relevant and otherwise irreconcilable policies of the contact states.[11] This "New Rule" approach will then be applied to one of our most important and intractable choice-of-law problems, interstate small loan transactions.

II. INTERSTATE RESULTS THAT DIFFER FROM INTRASTATE RESULTS: DÉPEÇAGE BROADLY DEFINED

Dépeçage has been defined as "applying the rules of different states to determine different issues."[12] This is a useful point of departure for inquiry into the problems involved.[13] Our focus of attention in analyzing dépeçage or, to avoid offending purists, dé-

sues governed by law of place of injury, warranty issues by law of place where product purchased).

9. Wilde, *supra* note 3.

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

11. This "New Rule" approach is distinguished from the *jus gentium* concept that draws upon a special body of rules applicable to interjurisdictional transactions.

12. Reese, *supra* note 10, at 58.

13. In making this inquiry, we must not get sidetracked by metaphysical debate about whether a problem involves different issues or rather different rules dealing with the same issue. For example, the will problem discussed at text accompanying note 14 *infra* could be viewed either as involving two issues (the capacity of the testator to devise and the capacity of the charity to take) or as a case of two rules concerning the same issue (the validity of the devise).

peçage-like issues, is whether, when the dust settles from our struggle with a conflicts problem, we have produced a result different from the result that would have been obtained in any of the states having a contact with the parties or with the transaction if this were an intrastate occurrence. If all intrastate results are thus changed, there is a good chance, but not a certainty, that the analysis has gone awry. The touchstone for reexamining the result is whether it produces a better accommodation of relevant state policies than would mirroring the intrastate results in any of the contact states and consequently is neither irrational nor unfair to the losing party.

Perhaps the easiest situation in which to justify the changing of intrastate results is when two states would reach the same result, but for different reasons, and neither of these reasons is applicable to the interstate problem being analyzed. Suppose the following case: A testator, who was a long-term resident of State *X*, as were all the natural objects of his bounty, dies in *X* devising realty located in State *Y* to a *Y* charity, which conducts its activities only in *Y*. If all contacts had been in *Y*, the devise would have failed because the will was executed closer to the time of death than is permitted by *Y* law for devises to charities. If all contacts had been in *X*, the bequest would have failed because *X* law forbids a charity to take realty by devise. Suppose also that upon thorough investigation of statutory histories and judicial constructions it is determined that the sole purpose of the *X* statute is to keep real estate out of the "dead hand" of charities—to keep it freely alienable and in the flow of commerce, and that the sole purpose of the *Y* statute is to protect *Y* testators and the natural objects of their bounty from ill-considered dispositions while in apprehension of approaching death.[14] The proper solution of this interstate problem may be to hold the devise valid, contrary to the result that would be reached in intrastate cases in either *X* or *Y*. The social evils sought to be avoided by the *X* statute will not occur in *X*, nor will the purpose of the *Y* statute be frustrated if it is not applied. Therefore neither statute is applicable; the general and common policy of both states in favor of validating wills prevails.

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14. For an early case pointing out the differences in type and policies of statutes invalidating certain gifts to charities, see Trustees of Amherst College v. Ritch, 151 N.Y. 282, 45 N.E. 876 (1897). *See also* Kerr v. Dougherty, 79 N.Y. 327 (1880) (finding Pennsylvania legislation limits both the testator's right to dispose and the charity's right to take). For a thorough discussion, see Hancock, *"In the Parish of St. Mary le Bow, in the Ward of Cheap,"* 16 STAN. L. REV. 561 (1964).

Another situation in which the interstate result may rationally differ from common intrastate solutions is that in which two states would reach the same result for different reasons, one of which is not applicable to the interstate problem and the second, although applicable, yields to a competing policy of the other state. For example: *D*, who is 20 years old and resides in State *X*, obtains a large business loan at 9 percent interest from *P*, which is incorporated in and has its only office in State *Y*. Under *X* law: the maximum legal interest is 8 percent; the penalty for usury is to invalidate the obligation to repay either principal or interest; persons 18 or older have full legal capacity. Under *Y* law: the maximum legal interest is 10 percent; contracts made by persons under the age of 21 are void. *X* law should apply to determine *D*'s contractual capacity. Although *X* would advance its usury policy by shielding its resident from a loan obligation involving what *X* considers excessive interest and by deterring the making of such contracts with its citizens, *X* should be willing to defer its domestic usury policy in favor of validating this interstate loan transaction which, let us assume, involves a knowledgeable borrower and no elements of adhesion.[15]

Changing of intrastate results because of the interstate nature of the facts in issue is least likely to be justifiable if the contact states would reach common results to advance the same policy. The most obvious example, and therefore one not likely to cause difficulty, is when two states have the same rules and these rules have identical underlying policies. *X* and *Y* each have guest statutes and the policy underlying both statutes is to keep down liability insurance rates. An *X* host, while driving his *X*-garaged automobile in *Y*, injures a *Y* guest. The common requirement of both statutes, that the guest cannot recover unless he shows that the host was guilty of "gross" negligence, should prevail. Consider, however, the following argument: The *Y* guest statute is not applicable because recovery in this case will affect insurance rates only on automobiles principally garaged in the same rating district as host's car;[16] therefore, the general *Y* policy of com-

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15. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971), upholding a contract "against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship."

16. *See* McNamara, *Automobile Liability Insurance Rates*, 35 INSURANCE COUNSEL J. 398, 401, 403-06 (1968); Stern, *Ratemaking Procedures for Automobile Liability Insurance*, 52 PROCEEDINGS CASUALTY ACTUARIAL SOC'Y 139, 155, 176-77, 183 (1965).

pensation for those injured by ordinary negligence is applicable. This *Y* compensation policy creates a "true" conflict with the *X* guest statute, which should be resolved in favor of the *Y* compensation rule. This argument is fallacious because both states have weighed the same competing social values—compensation as against keeping down insurance premiums by preventing recoveries that are likely to be collusive and in any event numerous. Each state has come to the same conclusion in resolving this social equation. There is no rational basis on which *Y* can claim disagreement or "conflict" with the policy sought to be advanced by the *X* guest statute.

Although the unwisdom of changing intrastate results is obvious when both states would reach the same answer under identical domestic rules with identical policies, this folly is just as great, though less obvious and therefore more troublesome, when two states would reach the same result for the same reason, but under differently articulated domestic rules. *Maryland Casualty Co. v. Jacek*[17] is an example. A New Jersey wife was injured in New York while a passenger in an automobile driven by her husband. Under New Jersey law, a wife could not sue her husband in tort. New York law permitted interspousal suits, but would construe the husband's liability insurance as not covering this liability unless the policy expressly so provided. There was no such provision in the policy. There was a summary judgment against the insurer when it sought a declaratory judgment determining its duties under the policy. The court applied New York law to determine that the wife could sue but held that the New York insurance statute was inapplicable to a policy issued in New Jersey. On the surface this seems reasonable enough. After all, the husband's New Jersey policy did protect him against liability and New York law did impose such liability. The difficulty is that New Jersey, not New York, law should have been applied to determine the husband's liability. Both states deemed preventing possibly collusive recoveries against insurers more important than compensation to an injured spouse. New York, therefore, had no countervailing policy that could create a conflict with the New Jersey immunity rule.[18]

The most difficult dépeçage problems concern the determination of when two or more rules of the same state are so related in purpose that they should be applied in tandem or not at all. The gen-

17. 156 F. Supp. 43 (D.N.J. 1957).

18. *But see* Reese, *supra* note 10, at 67.

eral answer is easy enough: apply one rule and not the other when this will produce a better accommodation of the conflicting policies of two states than will application of the entire domestic law of either state. Application of this standard to individual cases, however, requires great perspicacity and common sense.

An example of the improper splitting of interrelated state rules can be drawn from the facts of *Kilberg v. Northeast Airlines, Inc.*[19] A New York domiciliary boarded the defendant's airplane in New York. The plane crashed at its destination in Massachusetts and the New Yorker was killed. The Massachusetts wrongful death act measured wrongful death recovery according to the culpability of the defendant, but had a $15,000 limit on recovery. New York had no limit on recovery, but measured compensation by the amount of pecuniary loss to the decedent's dependents. The New York Court of Appeals was probably correct in indicating that the Massachusetts recovery limit was inapplicable. It would be outrageous, however, to couple the New York rule of no statutory limit on recovery with the Massachusetts culpability measure of damages. This would produce a punitive damages recovery that would have greatly exceeded the amount recoverable under either New York or Massachusetts law, would have accorded with neither state's view of proper wrongful death compensation, and would, therefore, have been grossly unfair to the defendant.[20]

On the other hand, it may be desirable to apply one of a state's rules but not a related rule when this will advance some of that state's policies and work a mutually acceptable compromise with the competing purposes of another state. Again, however, putting this fine-sounding exhortation into practice is very difficult—perhaps the most difficult task to confront adherents of "interest" or "functional" conflicts analysis. Some of the mind-boggling problems can be illustrated by drawing on my nomination for 1972's "Conflicts Case of the Year," *Neumeier v. Kuehner.*[21] That is the case in which the New York Court of Appeals held that the Ontario "gross negligence" standard rather than the New York ordinary negligence rule applied to a wrongful death suit brought against the estate of a New York host driver who collided with a Canadian train in Canada. As a result of the collision, the driver and his Canadian guest were killed.

19. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

20. For a different dépeçage problem drawn from *Kilberg*, see Reese, *supra* note 10, at 72.

21. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

The aspect of this case relevant to our inquiry is one not touched upon in any of the trial or appellate opinions—why did the railroad join the driver's estate in urging application of the Canadian guest statute? The answer turns upon the relationship of two Canadian statutory rules. One, of course, is the "gross negligence" barrier to passenger recovery against the driver. The other, unmentioned, Ontario rule, which explained the Canadian railroad's position, insulates the railroad from that portion of the damages attributable to the fault of the New York driver.[22] The logic of this second rule is apparent. Given that drivers are not liable for injuries caused to passengers by ordinary negligence, this freedom from liability should not be subverted by subjecting the driver to a claim for contribution by a joint tortfeasor.[23] In fairness to the joint tortfeasor, however, he should be relieved from liability for that portion of the damages attributable to the negligence of the immune driver.

The railroad was operating on the anti-dépeçage assumption that if the Canadian guest statute were not applied, no other aspect of Canadian law would be applied, including the rule that would limit the damages recoverable from the railroad.[24] Although if New York law were applied, the railroad would have a theoretical right to contribution from the New York driver, perhaps to the full degree of the driver's contribution to the damages,[25] this might prove an empty remedy if the driver were not fully insured and could not otherwise respond to a judgment for contribution or indemnity.

Suppose now that a different conclusion than that in *Neumeier* had been reached on the applicability of the Canadian guest statute. One line of reasoning to such a different result might run as follows: The Ontario statute had as its purpose keeping down Ontario in-

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22. ONT. REV. STAT. c. 296, § 2(2) (1970).

23. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1 (1939 version) accomplished this result through its definition of "joint tortfeasors": "two or more persons jointly or severally liable in tort for the same injury to person or property." Because, under the Act's definition, the driver would be deemed not to be a "joint tortfeasor" insofar as he is not liable under the guest statute, he is not subject to a right of contribution. *Id.* § 2(1). For purposes of this article, however, the term "joint tortfeasor" will be used to signify one who jointly causes tortious injury, regardless of whether he is jointly liable for it.

24. Letter from Courtland R. LaVallee, Counsel of Record for Canadian National Railway, to Russell J. Weintraub, Oct. 27, 1972.

25. *See* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); Baade, *The Case of the Disinterested Two States: Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 150, 157-58 (1973) (discussion of *Dole*).

surance rates,[26] not, as the *Neumeier* majority suggested,[27] controlling the conduct of Ontario guests so that they would not be ungrateful to their drivers. Thus, the social evil sought to be prevented by the Ontario statute would not be realized if that statute were not applied. New York's compensation rule, on the other hand, had as its purpose imposing on the New York driver the primary responsibility for providing insurance coverage so that the inevitable costs of automobile injuries caused by New York drivers would be distributed through the insurance device no matter where, at least within the territorial coverage of policies issued in New York, or to whom these losses were caused.[28]

Assuming, then, that we would not apply the Ontario guest statute, should the other Ontario rule partially reducing the Canadian railroad's liability be applied? On the surface, the answer to this question seems obvious. All of the Canadian railroad's actions and their effects in the course of this transaction were limited to Ontario. Surely the railroad is entitled to whatever benefits Ontario law would afford it. Applying the New York ordinary negligence rule and the Ontario joint tortfeasor rule would work a better accommodation of state interests than would applying the whole law of either jurisdiction, and this despite the fact that the Ontario rules are so closely related in purpose.

On closer examination, however, the answer is far more doubtful. Ironically, the two Ontario rules are so closely related in purpose that there is a substantial question whether the joint tortfeasor protecting rule has a purpose independent of the host protecting rule. It can be argued that the joint tortfeasor rule exists only to alleviate unfairness to the joint tortfeasor when, because of the guest rule, he cannot recover contribution or indemnity from the host. There is no independent Ontario policy to limit the liability of joint tortfeasors—they are jointly and severally liable for all harm done. Therefore, once it is decided not to apply the Ontario guest statute, the rule limiting liability of joint tortfeasors does not relate to any social evil that Ontario wishes to prevent and thus should fall also.

26. *See* Baade, *supra* note 25, at 152-56.

27. 31 N.Y.2d 121, 125-26, 286 N.E.2d 454, 456, 335 N.Y.S.2d 64, 68, *quoting* Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 558 (1971).

28. *See* Shapira, *"Manna for the Entire World" or "Thou Shalt Love Thy Neighbor as Thyself"—Comment on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 168, 172 (1973); Note, *Choice of Law in Tort Cases: Neumeier v. Kuehner*, 37 ALBANY L. REV. 173, 186 (1972).

It would seem, then, that the desirability of dépeçage in *Neumeier* is a question on which reasonable men might differ. Suppose, however, it is decided that the Canadian railroad is indeed entitled to whatever advantage it may derive from the Ontario joint tortfeasor rule and that to deprive it of this advantage would cause effects in Ontario that Ontario has sought to prevent. Then surely the best accommodation of New York and Ontario policies is to apply the New York host liability rule coupled with the Ontario limitation on the railroad's liability. But not necessarily. Suppose that the host's state were one in which he would be entitled to contribution or indemnity as to one-half the verdict even though the joint tortfeasor's negligence bore less than 50-percent responsibility for the loss.[29] Then if the railroad's comparative negligence is less than 50 percent, dépeçage would subject the host to greater liability than he would be subjected to under the domestic law of either state. He would be liable under the law of his own state, but under Ontario law he would not be entitled to indemnity from the railroad beyond that portion of the damages attributable to the railroad's negligence.

Therefore, if under his own state's law, the host would in all cases be entitled to a 50-percent contribution from a joint tortfeasor, dépeçage is inappropriate when the joint tortfeasor's contributory negligence is determined to be less than 50 percent. If in such a case it is decided that an Ontario court would apply the rule limiting the liability of a joint tortfeasor to the damages attributable to his fault, the joint tortfeasor who acts only in Ontario should be entitled to this protection no matter where the case is litigated, but then the Ontario gross negligence rule should also apply.[30] The host's state may wish to extend the benefits of its loss-distributing policies to nonresidents injured out of state, but not when this will subject its hosts to an amalgam of liability and contribution rules that represents the law of no state, furthers the purposes of no state, and therefore is unfair to its own hosts.

III. BEYOND DÉPEÇAGE

A. *Fashioning a New Rule to Fit a Particular Interstate Problem*

Interest analysis of conflicts problems is most cogent when it results in advancing the policies underlying the law of one state with-

29. This is probably not true of New York law. *See* authorities cited note 25 *supra.*

30. Another possibility under the "New Rule" approach described in section III, is to hold the host liable for ordinary negligence, but for only one-half the damages.

out creating any substantial likelihood that another state will, as a consequence, feel the effects of a social evil that it has, by its different law, sought to avoid. Frequently, however, investigation reveals that this cannot be accomplished. Giving effect to a policy that one state deems paramount will conflict with a purpose another state cherishes. Furthermore, there may be no mutually satisfactory basis for resolving this conflict: Both states may have a sufficient nexus with the parties and with the transaction to make it reasonable for them to assert the policies underlying their own rules. The two rules in conflict may defy analysis in terms of which is "better,"[31] at least by any standard even remotely objective. Both rules may represent widely-held views of the proper resolution of a current social issue. Neither may fairly be called "anachronistic."

When this most difficult of all conflicts problems arises, there are several tactics that may be employed: One may apply forum law on the ground that there is no cogent reason to displace it;[32] one may fall back on the security of old friends—the territorial rules that select some one event in the transaction to mark the applicable law;[33] or, as I would suggest, one may approach the conflicts problem with a result-oriented rebuttable presumption (*e.g.*, apply the validating law to contracts)[34] that, not having been rebutted, prevails. At times, however, a more satisfactory accommodation of conflicting state policies may be available than could be achieved by any of these methods. It may be possible to fashion a rule for the case in issue that differs in some respects from the domestic law of either contact state but that permits the accommodation of otherwise irreconcilable policies.

An example of this New Rule approach can be provided by examining a common variation of an interstate guest-statute problem. The owner of an automobile and his passenger are long-term resi-

31. *See* R. LEFLAR, AMERICAN CONFLICTS LAW 254-59 (1968). For use of the "better law" concept, see Tiernan v. Westext Transp., Inc., 295 F. Supp. 1256 (D.R.I. 1969); Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

32. *See* A. EHRENZWEIG, CONFLICT OF LAWS 314 (1962); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 245 (1958).

33. *See, e.g.*, RESTATEMENT OF CONFLICT OF LAWS § 378 (1934) ("law of the place of wrong").

34. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 284-92 (1971).

dents of State *X*. While on a short pleasure drive in State *F*, owner collides with another automobile driven by an *F* resident. This collision is caused by the ordinary, not gross, negligence of owner and the *F* resident. State *X* has a guest statute requiring gross negligence before guest can recover from owner. State *F* permits guest passengers to recover for injuries caused by their host's ordinary negligence. State *F* also permits a joint tortfeasor to obtain contribution from the other tortfeasor for half the verdict. Guest sues the *F* resident in *F*. The *F* resident seeks to implead the host for contribution towards any verdict. May he do so? Traditionally the host's amenability to contribution has turned on whether there is any common liability to guest.[35] If the guest statute of State *X* applies, the common liability on which contribution depends is absent.

Should the guest statute apply? If the suit were only between host and guest, there is a strong argument that the statute should apply. Assume that the purposes of *X*'s guest statute are found to be preventing a manifestation of ingratitude on the part of the guest (*i.e.*, the suit against the host) and the protection of liability insurers from collusive guest-host suits. These purposes of the *X* statute are just as applicable to out-of-state as to in-state crashes involving *X* hosts and guests and automobiles principally garaged in *X*. Whether these policies are wise or foolish, the social benefits or ills resulting from their application are likely to be experienced only in *X*. It is unlikely that *F* will have anything more than an officious interest in extending the benefits of its "better" law to the poor natives of *X* whenever they are lucky enough to be before an *F* court.[36]

Assuming that we would apply the guest statute to a case involving only host and guest, the presence of the *F* driver complicates the problem by giving *F* a cogent reason for wanting its ordinary negligence standard to apply. After all, this is one way that the *F* resident can get the contribution from the host that *F* deems con-

35. *See, e.g.*, Shonka v. Campbell, 260 Iowa 1178, 152 N.W.2d 242 (1967) (citing many cases in accord); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §§ 1, 2(1) (1939 version).

36. *See* Fuerste v. Bemis, 261 Iowa 775, 156 N.W.2d 831, 833 (1968) (Iowa guest statute rather than Wisconsin ordinary negligence rule applicable to Iowa guest's suit against Iowa host for injuries suffered in Wisconsin: "Wisconsin has no significant relationship with the parties nor any interest in any issue herein presented."). *But see* Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968) (apply Wisconsin ordinary negligence rule rather than Illinois guest statute to suit between Illinois guest and host).

sistent with its views of equitable sharing of liability. But is this the only way that the *F* resident can get contribution? It is if we apply the traditional correlative of the guest statute: that the host's immunity to liability for his ordinary negligence extends to claims against him by joint tortfeasors for contribution. In this interstate problem, however, perhaps the best accommodation of *X* and *F* policies is to apply the *X* guest statute to bar any claim by the guest against the host, but permit the *F* resident to obtain indemnity from the host to the extent that the *F* resident pays more than half of the verdict. This will avoid serious impairment of the policies underlying *X*'s guest statute. The guest will not manifest his ingratitude by suing the host and there is no motive for collusion between host and guest to make the host appear more negligent than he was. The guest's recovery can come only from the *F* resident.

Thus, by fashioning a new rule of law that did not exist in either *X* or *F*—the right to contribution from a joint tortfeasor who is not jointly or severally liable to the plaintiff for the same injury—a better accommodation of state interests is achieved than by the all-or-nothing utilization of either state's law. The typical statutory provisions for contribution among tortfeasors, which require common liability, should not preclude the fashioning of this judge-made rule for recovery under circumstances not covered by statute.[37]

B. *The New Rule Approach Applied to Interstate Small Loan Transactions*

The problem of when to invalidate in whole or in part an interstate contract for the repayment of money falls naturally into two subclasses: the large business loan and the small consumer loan. The large commercial loan often involves a sophisticated borrower who has shopped in his own state and elsewhere to get the money he needs on the best terms. It is not surprising that in this category of cases choice-of-law rules have emerged that, although expressing the concept in diverse ways, amount to a result-oriented rule of validation under any law that has a sufficient nexus with the parties and with the transaction to afford reasonable assurance that the

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37. *See* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1 (1939 version): "*For the purposes of this Act* the term 'joint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury . . . ." (emphasis added).

lender is not engaged in a sham to evade the protective law of the borrower's state.[38]

The reasons for this approach are not difficult to discern. The parties are big boys who ought to be able to take care of themselves.[39] The permissible interest rates on large loans are not likely to differ by more than a few percentage points between the contact states. Of course, even a few percentage points can amount to a great deal of money, especially if the loan is large and repayable over a long term. Moreover, substantial economic changes are likely to turn on a rise or fall of a few points in the prevailing rate of interest. But the fact that the difference in interest is slight does give a court sitting in the borrower's state some assurance that enforcement of the loan will not cause grave social consequences that the forum's law is designed to prevent and that the lender is not acting unconscionably and greedily far beyond the bounds permitted by local law.[40]

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38. *See, e.g.*, Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927) (alternative reference to place of making or performance); Brooks v. Universal C.I.T. Credit Corp., 431 F.2d 238 (8th Cir. 1970) (validate under law of place of making, or performance, or most significant contacts); Consolidated Jewelers, Inc. v. Standard Fin. Corp., 325 F.2d 31 (6th Cir. 1963) (choice-of-law clause stipulating lender's law); Nicholas v. Publishers Collection Serv., Inc., 320 F. Supp. 1200 (S.D. Fla.), *aff'd mem.*, 446 F.2d 891 (5th Cir. 1971) (many contacts with lender's state justify validation under that law); Yarbrough v. Prentice Lee Tractor Co., 252 Ark. 349, 479 S.W.2d 549 (1972) (apply law that will validate if that state has a substantial relationship to the transaction); Ury v. Jewelers Acceptance Corp., 227 Cal. App. 2d 11, 38 Cal. Rptr. 376 (1964) (validate under law of place of making and performance; law stipulated for construction of contract, parties expect validation); Green v. Northwestern Trust Co., 128 Minn. 30, 150 N.W. 229 (1914) (parties presumed to intend application of validating law); First Nat'l Bank v. Dreher, 202 N.W.2d 670 (N.D. 1972) (statutory place-of-performance rule); Securities Inv. Co. v. Finance Acceptance Corp., 474 S.W.2d 261 (Tex. Civ. App. 1971) (writ refused n.r.e.) (stipulated law having reasonable relation to contract); Pioneer Credit Corp. v. Carden, 127 Vt. 229, 245 A.2d 891 (1968) (place of making or performance if no scheme to evade forum law).

39. For cases in which the court stresses the buyer's sophistication as a factor influencing it to choose the validating law, see Brooks v. Universal C.I.T. Credit Corp., 431 F.2d 238 (8th Cir. 1970); Cooper v. Cherokee Village Dev. Co., 236 Ark. 37, 364 S.W.2d 158 (1963) (borrower drafted the agreement); Ury v. Jewelers Acceptance Corp., 227 Cal. App. 2d 11, 38 Cal. Rptr. 376 (1964); *cf.* Crisafulli v. Childs, 33 App. Div. 2d 293, 307 N.Y.S.2d 701 (1970) (usurious under both laws, apply law with lesser penalty; borrower represented by attorney and not oppressed).

40. *See, e.g.*, Ury v. Jewelers Acceptance Corp., 227 Cal. App. 2d 11, 21, 38 Cal. Rptr. 376, 383 (1964) (interest charged not "unconscionable" in the light of California rates); Green v. Northwestern Trust Co., 128 Minn. 30,

Small loans to necessitous consumers, however, present a far different picture. The contract is almost surely one of adhesion, one composed of terms drafted by the lender and offered to the borrower on a take-it-or-leave-it basis. The borrower not only is unable to bargain over the terms, but also is not likely to understand their full meaning and implication. Moreover, the higher rates of interest permitted in most states for small loans, and the provisions limiting and controlling lender practices, other than interest charges, that commonly appear in small loan legislation, make it more likely that significant differences will exist between the law of borrower and lender states. Validation under the lender's law is likely to cause social consequences in the borrower's state that its small loan legislation is designed to prevent. Moreover, the lender knows or can easily determine the content of the laws of the borrower's state.[41] If the lender engages in business activities in the borrower's state, either by branch offices, or by solicitations and advertisements addressed to borrowers there, the designing of contacts with the lender's state (such as designating it as the place of payment or arranging the loan transaction so that the borrower's application for a loan is "accepted" there) can more justifiably be regarded as an attempt to evade the protective laws of the borrower's state than when the lender makes a business loan to a party of more nearly equal bargaining power and sophistication.

One would expect, then, to find in the small loan cases not a flexible rule of validation, but a rule pointing all but inexorably to the law of the borrower's state.[42] Even in small loan cases, however, at least until recently, there was substantial authority that, if the lender's law offered the borrower approximately the same protections as his own law and if the contacts with the lender's state were not jerry-built to disguise an intrastate transaction as a conflicts problem, the loan would be upheld under the law of the

38, 150 N.W. 229, 232 (1914) ("no greed for interest" in the light of Minnesota rates).

41. For a summary of state usury laws, see 4 CCH FED. BANKING L. REP. ¶ 59,005 (1974).

42. *See* Comment, *Usury in the Conflict of Laws: The Doctrine of the Lex Debitoris*, 55 CALIF. L. REV. 123 (1967); *cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203, comment *f* (1971) ("It is uncertain whether a contract will be upheld if it provides for a rate of interest which is permissible under a special usury statute of a state having a substantial relationship to the contract, and which is not greatly in excess of the rate permitted by a special usury statute [relating to small loans, building and loan associations, credit unions, and pawnbrokers] of the state of the otherwise applicable law.").

lender's state.[43] In this time of heightened awareness of the need for consumer protection, however, the tide is turning, and it is now unlikely that the small loan merchant who engages in substantial activities in the borrower's state by way of negotiating the loan or soliciting business, will avoid the full consequences of not complying with the law of the borrower's state. In the light of the special need of the small necessitous borrower for all the protection he can get, this result is probably commendable. There are, however, two situations in which it is not desirable that the lender be subjected to the full rigor of the law of the consumer borrower's home state: when the borrower's residence changes and when the loan transaction occurs exclusively in the lender's state.

The less debatable of these propositions is when the borrower was either a resident of the lender's state at the time that the loan was made or has misrepresented to the lender that he is resident there. Under these circumstances, the law of the lender's state should ordinarily apply to validate a loan legally made there, although the borrower subsequently moves to or is discovered to live in a state with a more restrictive small loan law.[44] An exception should be made for charges and practices so in excess of or different from those permitted by the borrower's state that the borrower's new home would be justified in modifying the loan agreement to exclude them because they are very likely to cause consequences in the borrower's state that the borrower's state regards as not only contrary to local law, but also unconscionable.

The more difficult problem occurs when the borrower travels to the lender's state and there negotiates, receives, and promises to repay the loan, and the lender has not solicited the loan in the borrower's state either directly, through intermediaries, or through advertising not intended primarily for residents of the lender's state.

43. *See* Kinney Loan & Fin. Co. v. Sumner, 159 Neb. 57, 65 N.W.2d 240 (1954) (applying statute providing for validation if small loan made in state with "similar" act); *cf.* Trinidad Indus. Bank v. Romero, 81 N.M. 291, 466 P.2d 568 (1970) (dictum, difference from forum law too great); Tuition Plan, Inc. v. Zicari, 70 Misc. 2d 918, 335 N.Y.S.2d 95 (Dist. Ct. 1972) (dictum, not sufficient nexus with validating law). *But see* Lyles v. Union Planters Nat'l Bank, 239 Ark. 738, 393 S.W.2d 867 (1965).

44. *See* UNIFORM CONSUMER CREDIT CODE § 1.201 [hereinafter cited as UCCC]; Comment, *supra* note 42, at 246-47. *But see* Lyles v. Union Planters Nat'l Bank, 239 Ark. 738, 393 S.W.2d 867 (1965); N.Y. BANKING LAW § 357 (McKinney Supp. 1973) (if borrower moves into New York after transaction, cannot collect charges in excess of those permitted in local transactions).

If the loan agreement would be completely valid under the law of the lender's state but would be invalid as to both principal and interest under the law of the borrower's state, the choice of borrower's or lender's law is especially difficult.

In favor of invalidation under the law of the borrower's state are the following arguments: This is a contract of adhesion with a consumer, and the invalidating rule represents an emerging recognition of the need for protecting the necessitous individual in these circumstances. The lender knows or can easily determine the law of the borrower's state. To permit the lender to recover would subject similar lenders in the borrower's state to competition that they are powerless to meet.[45] Moreover, if the borrower does go to even a nearby city across the state line to make his loan, this indicates that he is even more necessitous, desperate, and in need of protection than if he had stayed home.[46]

There are also arguments for validation under the lender's law: the law of the borrower's state may set interest rates and other terms that are unrealistic in the light of the risk of making the kind of loan in issue.[47] The borrower's state does not have a sufficient nexus with the lender to make it fair and reasonable to subject the lender to its law.[48] It is unlikely, however, that this unfairness is of constitutional dignity, that the commerce clause,[49] the due process clause,[50] or the full faith and credit clause[51] would prohibit the

45. *See* Comment, *supra* note 42, at 175-76; *cf.* Robertson v. California, 328 U.S. 440, 457 (1946) (permitting defendant to act as an agent for a nonadmitted insurer "could only result in placing domestic and complying foreign insurers at great disadvantage and eventually in nullifying all controls unless or until Congress should take over the regulation."); Washington Nat'l Bldg., Loan & Inv. Ass'n v. Stanley, 38 Ore. 319, 63 P. 489 (1901) (apply forum law to small loan when all contacts in forum except incorporation of lender and place of payment, noting that otherwise lender would have advantage over local lenders).

46. *See* Comment, *supra* note 42, at 244-45.

47. *See* UCCC, Prefatory Note at xii-xiv (Working Redraft No. 5, 1973), *reprinted in* 28 PERSONAL FINANCE L.Q. REP. 2, 3, 30 (1973).

48. *Cf.* Bannowsky v. Krauser, 294 F. Supp. 1204, 1206 (D. Colo. 1969) (applying Colorado limit on recovery for wrongful death of New Mexico resident who was operated on by a Colorado doctor in a Colorado hospital: "[T]he only contact that New Mexico has with the injury is the residence of the plaintiff in that State. . . . [I]t would be nothing short of arbitrary to apply New Mexico law."). *But see* Rosenthal v. Warren, 475 F.2d 438 (2d Cir.), *cert. denied,* 414 U.S. 856 (1973) (refused to apply limit on wrongful death recovery of place where operation performed).

49. U.S. CONST. art. I, § 8, cl. 3.

50. U.S. CONST. amend. XIV, § 1.

51. U.S. CONST. art. IV, § 1.

borrower's state from applying its own law to the stay-at-home lender.

Under the commerce clause, it is questionable whether the borrower's state could impose penalties on the lender for failing to obtain a certificate to do business there or for otherwise not complying with registration, filing, and other regulations applicable to lenders doing business there. There is probably not sufficient contact with the borrower's state for the lender to be held to be "localized" there for any of these purposes.[52] It is another large step, however, to contend that the borrower's state cannot apply its small loan law to invalidate nonconforming loans made to resident borrowers. The lender can continue to do its interstate business, but when it deals with borrowers from another state, it must shape its agreements to their laws. That the lender cannot do this in some cases, because it is subject to conflicting requirements of its own law and the law of the borrower's state, does not necessarily mean that the borrower's state is imposing an unreasonable burden on commerce. The fault may be in the statute of the lender's state if it does not make an exception when a local lender is dealing with a foreign borrower and conforming to the law of the borrower's state.[53]

The constitutional unfairness argument seems best made in due process terms. The borrower's state, to use the language of *Home Insurance Co. v. Dick*,[54] "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done

52. *See* International Textbook Co. v. Pigg, 217 U.S. 91 (1910) (correspondence school doing interstate business, but with local agents, cannot be made to file statement of condition in order to use forum courts to collect debt from local student); *cf.* Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961) (can deny use of courts as sanction for failing to obtain certificate to do intrastate as distinguished from interstate business); Robertson v. California, 328 U.S. 440 (1946) (upheld prosecution of defendant acting as unlicensed local agent for nonadmitted foreign insurer); Union Brokerage v. Jensen, 322 U.S. 202, 210 (1944) (permitted exclusion of custom-house broker from state courts until authorized to do business: "It has localized its business, and to function effectively it must have a wide variety of dealings with people in the community."); People v. Fairfax Family Fund, Inc., 235 Cal. App. 2d 881, 47 Cal. Rptr. 812 (1964), *appeal dismissed*, 382 U.S. 1 (1965) (enjoined unlicensed lender from soliciting small loans by mail from forum residents, local credit investigation conducted by independent contractor).

53. *See* UCCC § 1.201(8)(a) (creditor not subject to Code if consumer is nonresident and law of consumer's residence is stipulated).

54. 281 U.S. 397 (1930).

within them."[55] But *Dick* can be distinguished on its facts. Texas, the forum, wished to apply its own law to invalidate a stipulation in the policy that suit must be brought within one year of a loss. Mr. Dick, however, at all relevant times, resided in Mexico. The only nexus with Texas was that it was Dick's domicile while he was actually residing in Mexico. Moreover, the boat insured was covered by the policy only in Mexican waters. In the stay-at-home lender case, the borrower's state has more nexus with the transaction. It is, after all, the borrower's actual residence, the place where social and economic effects sought to be avoided by its small loan law are most likely to manifest themselves if that law is not applied. Moreover, *Dick* may have given too much emphasis to the place of making and performance of the contract and too little to the foreseeable[56] interest of Texas in protecting its citizen, Mr. Dick. In a later case, *Hoopeston Canning Co. v. Cullen*,[57] New York was permitted to require out-of-state reciprocal insurers that insured New York risks to adopt prescribed forms of accounting and provide for the election of an advisory committee at an annual subscriber's meeting, which committee was to have the ultimate power of management. Although the holding in *Hoopeston* can be explained in terms of the very broad powers that a state has for imposing conditions on foreign corporations who wish to do business within the state,[58] the following language in the opinion reflects a viable view of the role of constitutional limitations on choice of law:

> In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance. More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated fac-

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55. *Id.* at 410.

56. Although the policy was issued to one Bonner, of Tampico, Mexico, the loss was made "payable to the Texas Gulf Steamship Company of Galveston, Texas, and C.J. Dick, as their respective interests may appear." Record at 38-39, Home Ins. Co. v. Dick, 281 U.S. 397 (1930). *See also* 281 U.S. at 403 n.2. Moreover, not only was Dick named along with a Texas company in the original policy, but also, before the policy could be assigned to Dick, the insurer had to give its written consent. Record at 38.

57. 318 U.S. 313 (1943).

58. *Cf.* Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 74 (1954) (Frankfurter, J., concurring in application of forum's direct action statute to foreign insurer on ground insurer had consented to direct suit in order to get a certificate to do business in the forum).

> tors. This interest may be measured by highly realistic considerations such as the protection of the citizen insured or the protection of the state from the incidents of loss.[59]

Absent a cogent argument by lender that it could not have foreseen at the time of the loan that borrower's state would have an interest in applying its law to invalidate the repayment obligation, there is no viable due process argument. Such an "outrageous surprise" argument is not likely to be available.[60] It might be raised if, for example, the borrower moved after the making of the loan and his new domicile applied its law to invalidate principal and interest of a loan perfectly valid by the law of both borrower's and lender's residence at the time of making.

If there is no tenable due process argument on behalf of the stay-at-home lender, it is not likely that invoking full faith and credit to a "public act" (the small loan statute)[61] of the lender's state will advance the lender's cause. There is not a sufficient need for a nationally uniform result under the small loan statute of the lender's state to outweigh the interest of the borrower's state in protecting the borrower under its own law.[62]

There does not seem to be, then, any constitutional barrier to the borrower's state applying the full force of its law even to the stay-at-home lender. This is just as well. Once before, then current notions of proper choice-of-law rules were frozen into constitutional imperatives.[63] We should not rush to repeat that error of the early decades of this century. Nevertheless, everything that is

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59. 318 U.S. at 316 (footnote omitted). *See also* Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964); Richards v. United States, 369 U.S. 1, 15 (1962) (dictum):

> Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.

But see Apodaca v. Banco Longoria, S.A., 451 S.W.2d 945 (Tex. Civ. App. 1970) (writ refused n.r.e.).

60. *See* Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964).

61. For authority that a statute is a "public act" within the meaning of the full faith and credit clause, see Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 154-55 (1932).

62. This is the standard for applying full faith and credit to statutes articulated in Order of United Commercial Travelers of America v. Wolfe, 331 U.S. 586, 624 (1947). For a less useful full-faith-and-credit standard requiring the weighing of one state's interest against the other's, see Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 549-50 (1935).

63. *See, e.g.*, New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918).

constitutional is not wise. Applying the full force of the borrower's law to the stay-at-home lender can be unfair without being sufficiently outrageous to call down a constitutional thunderbolt.

Because of the seeming unfairness of subjecting the stay-at-home lender to the borrower's law, it is unlikely that a court in the lender's state would apply the invalidating law of the borrower's home. The very factors that support this unfairness argument also make it likely that, under modern long-arm statutes, the lender will be able to obtain in personam jurisdiction over the borrower in the lender's state[64] without resorting to the constitutionally questionable[65] device of an adhesion "consent" to jurisdiction in the loan agreement. Borrowers, however, also can and do sue lenders[66] to have the loan transaction declared invalid and for recovery of already paid installments of principal and interest. It is likely that, because of the following factors, the borrower will be able to get jurisdiction over

64. *See* Hamilton Nat'l Bank v. Russell, 261 F. Supp. 145 (E.D. Tenn. 1966) (defendants executed note in forum and the proceeds were received by the defendants in the forum); Oxford Consumer Discount Co. v. Stefanelli, 55 N.J. 489, 500, 262 A.2d 874, 880 (dissent, Weintraub, C.J.: "If a Pennsylvania lender obtains judgment against a New Jersey borrower by service under a Pennsylvania long-arm statute, what then? We need not invite this discord to vindicate our State policy."), *appeal dismissed for want of final judgment*, 400 U.S. 923 (1970); *cf.* Banco Espanol de Credito v. Du Pont, 24 App. Div. 2d 445, 261 N.Y.S.2d 233 (1965) (the defendant was an accommodation endorser of notes to make available his credit in the production of motion pictures by forum partnerships of which the defendant was a special partner). *But see* Hubbard, Westervelt & Mottelay, Inc. v. Harsh Bldg. Co., 28 App. Div. 2d 295, 284 N.Y.S.2d 879 (1967) (no jurisdiction over maker of note payable to the plaintiff in the forum even though part of the service for which the note was given was rendered in the forum).

65. *Cf.* Swarb v. Lennox, 405 U.S. 191 (1972) (affirming invalidation on due process grounds of cognovit clauses in agreements with low-income consumers, but the creditors had not appealed). *But see* National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964).

66. For interstate commercial loan cases in which the borrower has sued for relief on the ground of usury, see Consolidated Jewelers, Inc. v. Standard Financial Corp., 325 F.2d 31 (6th Cir. 1963); Yarbrough v. Prentice Lee Tractor Co., 252 Ark. 349, 479 S.W.2d 549 (1972); Cooper v. Cherokee Village Dev. Co., 236 Ark. 37, 364 S.W.2d 158 (1963) (suit by borrower's stockholder against borrower and lender); Ury v. Jewelers Acceptance Corp., 227 Cal. App. 2d 11, 38 Cal. Rptr. 376 (1964); Crisafulli v. Childs, 33 App. Div. 2d 293, 307 N.Y.S.2d 701 (1970); Securities Inv. Co. v. Finance Acceptance Corp., 474 S.W.2d 261 (Tex. Civ. App. 1971) (writ refused n.r.e.). For similar suits in small loan cases, see Mell v. Goodbody & Co., 10 Ill. App. 3d 809, 295 N.E.2d 97 (1973) (class action on behalf of margin account customers); Oxford Consumer Discount Co. v. Stefanelli, 55 N.J. 489, 262 A.2d 874, *appeal dismissed for want of final judgment*, 400 U.S. 923 (1970) (intervenors in action against Stefanellis).

the lender in the borrower's state: the nearness of the lender's place of business, the large volume of similar loans by lender to residents of borrower's state, the fact that enforcement of the loan will have consequences in the borrower's state that were foreseeable when the loan was made,[67] and the probability that the lender, at least to sue on and execute the judgments that it recovers at home, employs lawyers in and litigates in the borrower's state.

We have the stage set then for a particularly grating and unseemly clash of conflicting state policies. There is likely to be a rush to judgment by borrower and lender, each in their own courts, so that the swifter may carry his judgment into the other state with the full faith and credit clause as his protector and champion. To remove the inducement for this race to judgment, it is desirable that there be some accommodation of the policies of the two states that the courts of either state might find acceptable. Such an accommodation lies in shaping a new rule for the stay-at-home lender case that is the law of neither the borrower's nor the lender's state: enforce the repayment agreement but in an amount and manner that accords with the limits and requirements of the borrower's state.[68] There is authority for this kind of judicial reformation of the loan agreement, even in intrastate cases, when either the borrower's misconduct or other circumstances make the penalties for violation of the loan law appear to the court as inappropriate.[69]

Against this New Rule approach in the difficult small loan conflicts case it can be argued that the result is to encourage the lender to continue to write loans under his own law and collect under his agreements as much as he can. In the few cases in which he meets a litigious borrower, he will still be able to salvage the lion's share of his commitment. In short, there is not sufficient deterrence to

67. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971); People v. Fairfax Family Fund, Inc., 235 Cal. App. 2d 881, 885, 47 Cal. Rptr. 812, 814 (1964), *appeal dismissed*, 382 U.S. 1 (1965) (dictum).

68. *See* Oxford Consumer Discount Co. v. Stefanelli, 55 N.J. 489, 499-500, 262 A.2d 874, 880 (dissent, Weintraub, C.J.), *appeal dismissed for want of final judgment*, 400 U.S. 923 (1970); *cf.* Comment, *supra* note 42, at 238.

69. Turney v. Roberts, 501 S.W.2d 601 (Ark. 1973) (reforms loan agreement drafted by borrower, no reference by court to law of Florida where loan made); Davidson v. Commercial Credit Equip. Corp., 499 S.W.2d 68 (Ark. 1973) (small error in calculating interest); *cf.* HIMC Inv. Co. v. Siciliano, 103 N.J. Super. 27, 246 A.2d 502 (1968) (interstate case: apply New Jersey law to invalidate, but will not cancel mortgage unless borrower returns $500 received on understanding rest of principal would be paid); Washington Nat'l Bldg., Loan & Inv. Ass'n v. Stanley, 38 Ore. 319, 63 P. 489 (1901) (interstate

the conduct by out-of-state lenders that violates the laws of the borrower's state.[70] This is a cogent point. The reader will have to decide for himself whether it is a sufficient answer to point out that the New Rule approach is suggested only for the most difficult small loan conflicts case in which there are reasonable arguments for both borrower's law and lender's law and in which the alternative is a race to dòn the armor of full faith and credit to judgments.

C. *Statutory Choice-of-Law Rules Concerning Small Loans*

Assuming that the New Rule approach to otherwise intractable small loan conflicts problems is desirable, to what extent is it possible? Choice of law in small loan cases has come to be a statutory subject. A symbol of this phenomenon is the subsequent history of the controversy that split the distinguished New Jersey Supreme Court four to three in *Oxford Consumer Discount Co. v. Stefanelli.*[71] In an action brought in the borrower's state, the court was wrestling with our stay-at-home lender problem, with the additional forum nexus of a second mortgage on the Stefanelli home. A bare majority of the court held that the New Jersey Secondary Mortgage Loan Act should be applied to invalidate the obligation to repay, both principal and interest.[72] Today the result reached by the majority would be compelled by a subsequent amendment to the New Jersey Act defining its territorial scope.[73]

Kinney Loan & Finance Co. v. Sumner[74] is likely to invoke lender nostalgia. The court enforced a loan agreement against a forum borrower under a proviso in the state's small loan act that

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case: permit equitable reformation of agreement in the light of prior uncertainty whether forum law would be applied). *But see* First Nat'l Bank v. Thompson, 249 Ark. 972, 463 S.W.2d 87 (1971) (no relief to lender who computed interest from wrong date).

70. *See* Comment, *supra* note 42, at 238.

71. 55 N.J. 489, 262 A.2d 874, *appeal dismissed for want of final judgment*, 400 U.S. 923 (1970).

72. The impact of this ruling on the Philadelphia small loan industry was somewhat softened by the court's ruling on the retroactivity of the decision. If the foreign lender made the loan to the New Jersey resident exclusively at the lender's out-of-state office with "no intermediation of any kind by others" (55 N.J. at 492, 262 A.2d at 876) in New Jersey, the decision was not retroactive to affect loans made prior to the first decision in the case on September 11, 1968; except that borrowers who were on that date in litigation contesting the validity of the loans, would repay principal without interest (*id.* at 493, 262 A.2d at 877).

73. N.J. STAT. ANN. § 17:11A-57 (Supp. 1973).

74. 159 Neb. 57, 65 N.W.2d 240 (1954).

immediately followed the invalidation sanction: "Provided, that the foregoing shall not apply to loans legally made in any state under and in accordance with a regulatory small loan law similar in principle to this act."[75] With only a minor change in wording, this is the language of a "Uniform" Small Loan Law[76] drafted by the Department of Remedial Loans of the Russell Sage Foundation and for a time, during the second and third decades of this century, sponsored by the American Association of Personal Finance Companies.[77] It applied to small loans approximately the same alternative reference validating rule that many courts had fashioned for large commercial transactions. Although not widely adopted, it influenced the wording of many small loan acts.[78]

The Uniform Consumer Credit Code reflects the emerging trend in small loan legislation in two respects. First of all, it contains in section 1.201 comprehensive provisions concerning the territorial application of the Code.[79] Secondly, the former validation rule is replaced by a series of provisions, some that are very much akin to the New Rule approach suggested here, but others that are far more unfavorable to the creditor.

Subsection 5(a) of 1.201[80] is closest to the New Rule approach. It provides that if a covered transaction is made in another state with a person resident in the enacting state at the time of the transaction, the creditor may not collect charges in excess of those per-

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75. *Id.* at 63, 65 N.W.2d at 246.

76. UNIFORM SMALL LOAN LAW § 18 (6th draft 1935), *reprinted in* F. HUBACHEK, ANNOTATIONS ON SMALL LOAN LAWS 111 (1938).

77. F. HUBACHEK, *supra* note 76, at 192-93.

78. *Id.* at 218-23.

79. *See* notes 80, 82-84, 88 *infra.*

80. UCCC § 1.201(5) provides:

> (5) If a consumer credit sale, consumer lease, or consumer loan, or modification thereof, is made in another state to a person who is a resident of this State when the sale, lease, loan, or modification is made, the following provisions apply as though the transaction occurred in this State:
>
> > (a) a seller, lessor, lender, or assignee of his rights, may not collect charges through actions or other proceedings in excess of those permitted by the Article on Credit Sales (Article 2) or by the Article on Loans (Article 3); and
> >
> > (b) a seller, lessor, lender, or assignee of his rights, may not enforce rights against the buyer, lessee, or debtor, with respect to the provisions of agreements which violate the provisions on Limitations on Agreements and Practices (Part 4) of the Article on Credit Sales (Article 2) or of the Article on Loans (Article 3).

mitted by the Code.[81] Subsection 5(b), in part, takes a similar approach, preventing the enforcement in the enacting state of provisions in the consumer agreement that violate Code standards with regard to various matters such as the consumer's promise not to assert defenses against an assignee (section 2.404) and the creditor's taking a security interest in the consumer's property (section 2.407). It may be that this is all that is intended by the somewhat cryptic wording of subsection 5(b), but it seems reasonably arguable that this subsection subjects the stay-at-home lender to one of the Code's most Draconian penalties—the voiding of any payment obligation if a sale is induced by a referral sale scheme (section 2.411). It is also somewhat less likely, but still possible, that subsection 5(b) subjects the stay-at-home lender to the penalties provided by the Code (article 5) if he attempts to inflate charges by the use of multiple agreements (sections 2.402 and 3.409) or uses negotiable instruments in a sale or lease transaction (section 2.403).

Subsections 1, 2, and 3, of section 1.201[82] subject resident creditors to the Code, but subsection 8(a) quite sensibly permits escape if the consumer is a nonresident at the time of the transaction, providing the creditor is sufficiently well counseled to insert

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81. *See also* CAL. FIN. CODE § 24458 (West 1968); N.J. STAT. ANN. § 17:10-20 (Supp. 1973) (small loan law, as distinguished from the Secondary Mortgage Loan Act involved in *Stefanelli*).

82. UCCC §§ 1.201(1)-(3) provide:

> (1) Except as otherwise provided in this section, this Act applies to sales, leases, and loans made in this State and to modifications, including refinancings, consolidations, and deferrals, made in this State, of sales, leases, and loans, wherever made. For purposes of this Act
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> . . .
>
> (c) a loan or modification of a loan agreement is made in this State if a writing signed by the debtor and evidencing the debt is received by the lender in this State.
>
> (2) With respect to sales made pursuant to a revolving charge account (Section 2.108), this Act applies if the buyer's communication or indication of his intention to establish the account is received by the seller in this State. If no communication or indication of intention is given by the buyer before the first sale, this Act applies if the seller's communication notifying the buyer of the privilege of using the account is mailed or personally delivered in this State.
>
> (3) With respect to loans made pursuant to a lender credit card or similar arrangement (subsection (9) of Section 1.301), this Act applies if the debtor's communication or indication of his intention to establish the arrangement with the lender is received by the lender in this State. If no communication or indication of intention is given by the debtor before the first loan, this Act applies if the lender's communication notifying the debtor of the privilege of using the arrangement is mailed or personally delivered in this State.

a choice-of-law clause in the agreement stipulating the law of the consumer's residence.[83]

The territorial provision that merits closest scrutiny is subsection 4 of section 1.201, which applies certain Code provisions to any action brought in the enacting state although that state has no contact except as forum with the consumer, the creditor, or the transaction.[84] The least objectionable application of this *qua* forum concept is in the prohibition against prejudgment garnishment (section 5.104)[85] and limitation on wages subject to garnishment (section 5.105). Subsection 4's incorporation by reference of section 5.103,[86] however, seems to insulate from a deficiency judgment a consumer who has moved into the enacting state after the goods have been repossessed in a state where both creditor and consumer then resided and where the creditor did not have to choose between repossession and judgment.

Also incorporated is section 5.107, which makes "unenforceable" repayment obligations if there are, at the time credit is extended, threats of criminal harm as a sanction for nonpayment. The word "unenforceable" should be interpreted as simply closing the forum to suit, not as entitling the consumer to a judgment cancelling principal and interest, if the enacting state's only nexus is as forum and there is no similar sanction for extortion in the states otherwise connected with the parties and with the transaction. Section 5.106, if

83. UCCC § 1.201(8) provides in part:

Notwithstanding other provisions of this section

(a) except as provided in subsection (4) [set out in note 84 *infra*], this Act does not apply if the buyer, lessee, or debtor is not a resident of this State at the time of a credit transaction and the parties then agree that the law of his residence applies . . . .

84. UCCC § 1.201(4) provides:

The Part on Limitations on Creditors' Remedies (Part 1) of the Article on Remedies and Penalties (Article 5) applies to actions or other proceedings brought in this State to enforce rights arising from consumer credit sales, consumer leases, or consumer loans, or extortionate extensions of credit, wherever made.

85. *See* Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (prejudgment garnishment violates due process if no hearing).

86. UCCC §§ 5.103(1), (2) provide:

(1) This section applies to a consumer credit sale of goods or services.

(2) If the seller repossesses or voluntarily accepts surrender of goods which were the subject of the sale and in which he has a security interest and the cash price of the goods repossessed or surrendered was $1000 or less, the buyer is not personally liable to the seller for the unpaid balance of the debt arising from the sale of the goods, and the seller is not obligated to resell the collateral.

read into section 1.201(4), would subject any employer who can be sued in the enacting state to that state's absolute bar on discharging an employee because the employee's wages have been garnished, a bar much stricter than the garnishment discharge provision of the Federal Consumer Credit Protection Act.[87]

Finally, the provision referred to in section 1.201(4) that the enacting state would be least justified in applying simply *qua* forum is section 5.108, which empowers the court to "limit the application of any unconscionable clause as to avoid any unconscionable result." The exercise of this power will almost certainly affect the result on the merits. Thus, when section 5.108 is applied *qua* forum, the sanctions should be limited to closing the forum to enforcement of all or part of an agreement that the court finds "unconscionable," a solution that would leave the creditor free to enforce those parts of the agreement in other states that have the appropriate contacts with the parties and the transaction and where the provision in issue is not deemed "unconscionable." This is not impossible under section 5.108, for it does provide that as alternatives to modifying the agreement "to avoid any unconscionable result," the court "may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable clause."

In general, section 1.201(4) should be redrafted to make it clear that the only rules of the enacting state that apply when that state is acting solely *qua* forum are rules that concern procedure and remedy and are unlikely to alter the creditor's rights under the agreement. The application of forum law beyond this should be limited to closing the forum's courts to enforcement of agreements that offend the forum's notions of basic morality and justice, but without deciding the merits of the controversy.

Section 1.201(6),[88] subject to the requirements of section 1.201(4) just discussed, permits enforcement in the enacting state of an agreement made elsewhere with consumers who were nonresidents at the time of the transaction, if the agreement "is valid and enforceable under the laws of the state applicable to the transac-

87. 15 U.S.C. § 1674 (1970): "No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness."

88. UCCC § 1.201(6) provides:

> Except as provided in subsection (4), a sale, lease, loan, or modification thereof, made in another state to a person who was not a resident of this State when the sale, lease, loan, or modification was made is valid and enforceable in this State according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction.

tion." This last clause frees the court to articulate and apply its own choice-of-law concepts. In the light of the preceding discussion of section 1.201, this would have been the preferable approach to all of the conflicts problems covered in that section.

The New York small loan act[89] contains a choice-of-law rule inconsistent with the treatment of the stay-at-home lender suggested here. That statute completely denies enforcement to any loan made with a person residing in New York at the time of the transaction if the charges exceed those permitted in New York.[90] The New Rule approach, enforcing the loan charges up to the limits permitted under New York law, is available only if the borrower has moved into New York after making the loan.[91]

IV. CONCLUSION

New approaches to conflict-of-laws cases alleviate some of the difficulties met in applying rigid, territorially-oriented rules. Current methods, however, generate new problems of their own. One of the most difficult of these problems is deciding when it is appropriate to reach a different result in an interstate case than any of the jurisdictions involved would have reached in an otherwise identical intrastate case. The answer, easy to state but difficult to apply, is when this outcome will best accommodate the relevant policies of the states involved and will not be unfair to any of the parties. Sometimes pursuit of this goal can be facilitated by fashioning a new rule of law unlike the law of any of the contact states. To the extent that many existing statutory choice-of-law rules in the field of small loans prevent accomplishing this goal, they are dysfunctional and sometimes outrageous responses to an important social problem. But this should not surprise us. This is usually the fate of attempts to write specific directions on choice of law into statutes.[92] It has always been true and is likely to be forever so—wise judges shaping a rule to the requirements of the case before them fare better than wise legislators trying to decide the infinite variety of unknown and unknowable future cases.

89. N.Y. BANKING LAW §§ 340-65 (McKinney 1971), *as amended,* (McKinney Supp. 1973).

90. *Id.* § 357 (McKinney Supp. 1973).

91. *Id.*

92. For critical examination of the choice-of-law provisions in Article 9 of the Uniform Commercial Code, see R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 352-62, 365-74 (1971).