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# Conflict of Laws—Multistate Torts—Arkansas Relies on Choice-Influencing Considerations and the Better Rule of Law

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CONFLICT OF LAWS—MULTISTATE TORTS—ARKANSAS RELIES ON CHOICE-INFLUENCING CONSIDERATIONS AND THE “BETTER RULE OF LAW.” *Schlemmer v. Fireman’s Fund Insurance Co.*, 292 Ark. 344, 730 S.W.2d 217 (1987).

In May of 1981, Donna Schlemmer, a resident of Memphis, Tennessee, drove her car to Rochelle Smith’s home in West Memphis, Arkansas. After deciding to attend a party, the pair got into an uninsured vehicle belonging to Smith’s sister. Smith drove the car to another location in West Memphis. On the way home from the party, Smith lost control of the car. In the resulting accident, Schlemmer sustained injuries.

Schlemmer’s stepfather maintained uninsured motor vehicle coverage through Fireman’s Fund Insurance Company. Schlemmer filed suit in Arkansas against the insurance company, seeking compensation for her injuries. The defendant insurance company filed a motion for summary judgment in which it contended that her stepfather’s policy did not cover Schlemmer, and, alternatively, that the Arkansas guest statute<sup>1</sup> barred recovery.

The Crittenden County Circuit Court held that the Arkansas guest statute barred recovery because Smith was not driving in willful and wanton disregard of the rights of others. The trial court did not reach the issue of whether the plaintiff was a covered person under the terms of the insurance policy.

The Arkansas Supreme Court reversed. The court held that Tennessee law, rather than Arkansas law, applied to the tort phase of the suit because Tennessee law, which contains no guest statute,<sup>2</sup> was the better rule of law. The court remanded the case for a determination of whether the insurance policy covered the plaintiff. *Schlemmer v. Fireman’s Fund Insurance Co.*, 292 Ark. 344, 730 S.W.2d 217 (1987).

The term “conflict of laws” applies to a situation in which two or

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1. Act of February 20, 1935, No. 61, §§ 1 & 2, 1935 Ark. Acts 138; Act of March 21, 1935, No. 179, § 1, 1935 Ark. Acts 481; Act of March 30, 1959, No. 453, § 15, 1959 Ark. Acts 1805 (repealed 1983). The statute provided that a guest shall not have a cause of action against the owner or operator of a vehicle unless the vehicle was operated in willful and wanton disregard of the rights of others.

2. Absent a guest statute, a plaintiff need only show ordinary negligence in order to recover for injuries suffered while a guest in an automobile. See W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 34, at 215 (5th ed. 1984).

more jurisdictions have an interest in a particular case.<sup>3</sup> When the substantive laws of the interested states differ, courts must choose which law should apply to the case. The question of which law to apply is a branch of conflict of laws termed "choice of law."<sup>4</sup>

States are free to develop their choice of law rules, subject to the Federal Constitution and federal laws derived from it.<sup>5</sup> In formulating choice of law rules, courts in the various states rely on several theories.<sup>6</sup> In recent choice of law cases, courts cited the following theories as influential authority for their decisions: the center of gravity approach, the governmental interest analysis, the most significant relationship test from the Restatement (Second) of Conflict of Laws, and choice-influencing considerations.<sup>7</sup> Conflict of laws scholars consider these theories "modern" because they appeared after the original Restatement of Conflict of Laws.<sup>8</sup> Some states continue to follow the traditional approach of the First Restatement<sup>9</sup> while others use a combination of modern theories.

The first modern theory to appear was called the "center of gravity" approach.<sup>10</sup> The Indiana Supreme Court first applied this theory,<sup>11</sup> and the New York Court of Appeals soon followed.<sup>12</sup> The initial cases analyzed under the "center of gravity" theory were con-

3. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971) [hereinafter RESTATEMENT 2D] provides: "Conflict of Laws is that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state."

4. Conflict of laws is a diverse subject. In addition to choice of law, the subject matter of conflicts includes jurisdiction, recognition and enforcement of judgments, family law, decedents' estates, and other matters. See Leflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080 (1981).

5. See R. LEFLAR, L. MACDOUGAL & R. FELIX, *AMERICAN CONFLICTS LAW* § 8 (4th ed. 1986) [hereinafter R. LEFLAR].

6. This note will focus on a jurisdictional comparison of current choice of law theories. For a chronological history of choice of law, see Note, *Wallis v. Mrs. Smith's Pie Co.*, 1 UALR L.J. 103 (1978).

7. See Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983) (This author wishes to acknowledge the thorough research and analysis contained in Prof. Kay's article, and commends it to the scholar seeking a greater understanding "in this mercurial area of the law.").

8. RESTATEMENT OF CONFLICT OF LAWS (1934).

9. For a discussion of the traditional approach, see *infra* text accompanying notes 53-57. States following the traditional approach include Alabama, Connecticut, Delaware, Georgia, Kansas, Maryland, Nebraska, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. The District of Columbia also follows this approach. See Kay, *supra* note 7, at 582-84 & n.376.

10. See Kay, *supra* note 7, at 525-38.

11. *Id.* at 526-27 (citing *W.H. Barber Co. v. Hughes*, 223 Ind. 570, 63 N.E.2d 417 (1945)).

12. *Id.* at 527 (citing *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954)).

tract cases, but the New York court was quick to apply the theory to tort cases.<sup>13</sup>

The "center of gravity" approach is based on a counting of the "contacts" each state has with the case.<sup>14</sup> No standard exists for determining what constitutes a contact.<sup>15</sup> Virtually any factor related to the case may be considered a contact.<sup>16</sup> After the court counts the contacts, the law of the state with the greatest number of contacts is applied to the case.<sup>17</sup>

Because of its emphasis on the number rather than the quality of contacts,<sup>18</sup> the center of gravity theory is not popular. Other than New York, North Dakota stands as the only state court to adopt the center of gravity approach exclusively.<sup>19</sup>

Professor Brainerd Currie developed the next modern theory to emerge and named it "governmental interest analysis."<sup>20</sup> According to this theory, when a forum state possesses a legitimate policy interest in the outcome of a case, the court should apply forum law to that case.<sup>21</sup> Currie believed forum law should apply even when the foreign state has an equally strong interest in applying its own policy.<sup>22</sup> Thus, under pure governmental interest analysis, courts will always apply forum law unless the forum state is completely disinterested in applying its own law.<sup>23</sup>

California was the first state to adopt the governmental interest

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

14. See *Haag v. Barnes*, 9 N.Y.2d 554, 555, 175 N.E.2d 441, 443, 216 N.Y.S.2d 65, 68-69 (1961) (citing *Auten v. Auten*, 308 N.Y. 155, 160, 124 N.E.2d 99, 101 (1954)).

15. See Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 43.

16. See *id.* at 45-47.

17. See *Haag* at 560, 175 N.E.2d at 444, 216 N.Y.S.2d at 69.

18. But see R. LEFLAR, *supra* note 5, § 90, at 265.

19. See *Issendorf v. Olson*, 194 N.W.2d 750 (N.D. 1972) (where plaintiff was a resident of North Dakota, the vehicle was registered in North Dakota, and the trip began and was to end in North Dakota, the contacts with North Dakota were most significant, and North Dakota law applied). See also *Kay*, *supra* note 7, at 535-36.

20. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171. See *Kay*, *supra* note 7, at 538-39.

21. Currie, *supra* note 20, at 178. A state's legitimate policy interests include those expressed in legislative enactments as well as more general concerns, such as the support of children domiciled within the state.

22. *Id.* Currie thought it inappropriate for courts to "weigh" the competing interests of sister states. Such weighing could be avoided by always applying forum law when the forum state had an interest in the case. *Id.* at 176.

23. *Id.* at 178. See also E. SCOLAS & P. HAY, *CONFLICT OF LAWS* 16-19 (1982); Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963).

analysis.<sup>24</sup> Although several states incorporate pieces of this theory into their choice of law formula,<sup>25</sup> New Jersey is the only state to join California in claiming to use a pure form of governmental interest analysis.<sup>26</sup>

The Restatement (Second) of Conflict of Laws incorporated the governmental interest analysis and the center of gravity approach in an attempt to provide a flexible guide to choice of law problems.<sup>27</sup> However, the concept most often associated with the Second Restatement is the "most significant relationship test."<sup>28</sup> Courts following the Second Restatement apply the law of the state having the most significant relationship to the issues and the parties.<sup>29</sup> In determining which state has the most significant relationship to a case, the court must consider contacts as well as policy-related choice of law principles.<sup>30</sup>

The requirement that courts consider "contacts" is drawn from the center of gravity theory.<sup>31</sup> The Second Restatement differs from the center of gravity theory by defining exactly what contacts a court should consider.<sup>32</sup> Significant contacts include "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, . . . and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered."<sup>33</sup>

Courts do not consider these contacts in isolation but evaluate them in accordance with articulated choice of law principles.<sup>34</sup> The choice of law principles enumerated in the Second Restatement reflect a broad range of policy concerns, including those of the governmental interest analysis.<sup>35</sup>

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24. Kay, *supra* note 7, at 540-42. See, e.g., *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

25. See Kay, *supra* note 7, at 544 & n.142. These states include Illinois and Washington.

26. *Id.* at 544-46 (citing *Pfau v. Trent Aluminum Co.*, 55 N.J. 511, 263 A.2d 129 (1970)).

27. See Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679 (1963).

28. This concept is expressed in the RESTATEMENT 2D, *supra* note 3, at § 145.

29. See *id.* See also Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts—Law and Reason Versus the Restatement Second*, 28 LAW & CONTEMP. PROBS. 700 (1963).

30. RESTATEMENT 2D, *supra* note 3, at § 145. The policy concerns expressed in the Restatement (Second) include the protection of justified expectations, the basic policies underlying the particular field of law, and predictability and uniformity of result. *Id.* § 6.

31. See *supra* text accompanying notes 10-19.

32. See RESTATEMENT 2D, *supra* note 3, at § 145.

33. *Id.*

34. *Id.* § 145(1) comment.

35. *Id.*

Fourteen states either expressly or implicitly follow the Second Restatement in choice of law cases.<sup>36</sup> One reason for the relative popularity of the Second Restatement is that it "includes most of the substance of all the modern thinking on choice of law."<sup>37</sup> A modern theory which particularly influenced the Second Restatement is Professor Robert A. Leflar's concept of "choice-influencing considerations."<sup>38</sup>

Professor Leflar introduced choice-influencing considerations in 1966.<sup>39</sup> Although other scholars developed lists of factors considered important in choice of law,<sup>40</sup> Leflar recognized the need to reduce the number of factors to a manageable size so that courts could use them in deciding cases.<sup>41</sup> The five considerations Leflar developed are:

1. Predictability of results.
2. Maintenance of interstate and international order.
3. Simplification of the judicial task.
4. Advancement of the forum's governmental interest.
5. Application of the better rule of law.<sup>42</sup>

Leflar did not intend that any consideration should have priority over another.<sup>43</sup> However, the relevance of each consideration varies according to the type of case involved.<sup>44</sup> For example, the first three considerations generally have little bearing on choice of law in torts cases.<sup>45</sup> In contracts cases, however, the first consideration is of pri-

36. See Kay, *supra* note 7, at 556 & nn.223-24. These states are: Arizona, Colorado, Florida, Idaho, Illinois, Iowa, Maine, Mississippi, Missouri, Oklahoma, Oregon, Texas, Vermont, and Washington.

37. R. LEFLAR, *supra* note 5, § 139 at 391.

38. See Kay, *supra* note 7, at 562-63.

39. *Id.* See Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966) [hereinafter Leflar]; Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966) [hereinafter Leflar, *More*].

40. R. LEFLAR, *supra* note 5, § 96 at 193-94. See, e.g., Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721 (1957).

41. See Leflar, *More*, *supra* note 39, at 1585.

42. *Id.* at 1586-87.

43. See Leflar, *supra* note 39, at 282.

44. *Id.*

45. Kay, *supra* note 7, at 569. See, e.g., *Milkovich v. Saari*, 295 Minn. 155, 170, 203 N.W.2d 408, 416-17 (1973) (simplification of the judicial task is of little concern because courts are capable of administering the law of another forum when necessary); *Clark v. Clark*, 107 N.H. 351, 354, 222 A.2d 205, 209 (1966) (maintenance of interstate orderliness is not a problem in an automobile accident case because neither interstate travel nor the sensibilities of either state will be affected by the choice of either state's law); *Conklin v. Horner*, 38 Wis.2d 468, 477-82, 157 N.W.2d 579, 583-85 (1968) (the choice-influencing consideration of predictability is minimal because parties do not plan to commit torts).

mary importance.<sup>46</sup>

New Hampshire was the first state to adopt choice-influencing considerations.<sup>47</sup> Wisconsin<sup>48</sup> and Minnesota<sup>49</sup> also adopted Leflar's theory. Other states combine the Leflar approach with other modern theories.<sup>50</sup> The combination of the various modern theories is so popular that Professor Leflar terms it the "new law" of choice of law.<sup>51</sup>

At one time Arkansas courts followed the traditional approach of the First Restatement, termed *lex loci delicti* (law of the place of injury).<sup>52</sup> Under *lex loci delicti*, "[i]f a cause of action . . . is created at the place of wrong, a cause of action will be recognized in other states . . . . If no cause of action is created at the place of wrong, no recovery . . . can be had in any other state."<sup>53</sup>

Although *lex loci delicti* has the advantages of "certainty, ease of application, and predictability of results,"<sup>54</sup> its disadvantages include "mechanical application"<sup>55</sup> and harsh results.<sup>56</sup> Finding the disadvantages persuasive, the Arkansas Supreme Court took the opportunity presented by *Wallis v. Mrs. Smith's Pie Co.*<sup>57</sup> and abandoned *lex loci delicti* in favor of the more flexible approach provided by Leflar's theory and the Second Restatement.<sup>58</sup>

In *Wallis* Arkansas residents brought suit in Arkansas for injuries suffered in Missouri. *Lex loci delicti* required the application of

46. R. LEFLAR, *supra* note 5, § 103 at 290-92. Predictability of results is important in contract cases because parties to the contract should be able to predict the legal consequences of the contract. When legal consequences depend upon where the litigation occurs, forum shopping may result.

47. Kay, *supra* note 7, at 564. See Clark, 107 N.H. 351, 222 A.2d 205 (1966).

48. Kay, *supra* note 7, at 566. See Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

49. Kay, *supra* note 7, at 566. See Milkovich, 295 Minn. 155, 203 N.W.2d 408 (1973).

50. See Kay, *supra* note 7, at 566-68 & nn.296-302. These states include Arkansas, Mississippi, Rhode Island, and Hawaii. *Id.* at 568.

51. See R. LEFLAR, *supra* note 5, § 109 at 303-05. The application of this blended "new law" results in consistent judicial opinions regardless of which theory is expressly relied upon to reach a given result.

52. See McGinty v. Ballentine Produce, Inc., 241 Ark. 533, 408 S.W.2d 891 (1966). See also Hogue, *Arkansas' New Choice of Law Rule for Interstate Torts: A Critique of Wallis, Williams, and the "Better Rule of Law,"* 1978 WASH. U.L.Q. 713, 714.

53. RESTATEMENT OF CONFLICT OF LAWS § 384 (1934).

54. See Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 627, 550 S.W.2d 453, 455 (1977).

55. See, e.g., *id.* at 627, 550 S.W.2d at 456.

56. See, e.g., Logan v. Missouri Valley Bridge & Iron Co., 157 Ark. 528, 249 S.W. 21 (1923) (Arkansas plaintiff injured while working for an Arkansas corporation on an Arkansas contract to build a bridge suffered dismissal of tort claim because the injury occurred past midstream).

57. 261 Ark. 622, 628, 550 S.W.2d 453, 456 (1977).

58. *Id.* at 627-28, 550 S.W.2d at 456.

Missouri law, but under Missouri law the plaintiffs could not recover;<sup>59</sup> however, Arkansas law would permit a limited recovery.<sup>60</sup> By discarding *lex loci delecti* and adopting the flexible approach offered by Leflar's theory and the Second Restatement, the Arkansas Supreme Court could justify applying Arkansas law to the case.<sup>61</sup>

Less than one year after the *Wallis* decision, the Arkansas Supreme Court again confronted choice of law issues in *Williams v. Carr*.<sup>62</sup> *Williams* involved two Tennessee residents killed when a tractor-trailer crossed the median on an Arkansas highway and struck them while they were standing on the highway discussing a prior accident with the police. The driver of the tractor-trailer was also a Tennessee resident. The decedents' personal representative instituted a wrongful death action in an Arkansas circuit court against the tractor-trailer driver's Tennessee employer. The trial court applied Arkansas law, and the jury found plaintiff and defendant equally at fault, thus barring recovery.<sup>63</sup> On appeal, the plaintiff argued that Tennessee law should apply.<sup>64</sup>

The Arkansas Supreme Court cited *Wallis* for the proposition that Arkansas "courts are free to apply the rule based on the 'most significant relationship' as affected by the . . . choice-influencing considerations . . . ."<sup>65</sup> The court then held that the trial court committed error in not applying Tennessee's substantive law on the measure of damages for wrongful death.<sup>66</sup>

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59. Missouri's contributory negligence doctrine bars a negligent plaintiff from relief. *Id.* at 627, 550 S.W.2d at 455 (citing *Chandler v. Mattox*, 544 S.W.2d 85 (Mo. Ct. App. 1976)). *But see* Hogue, *supra* note 52. Hogue's analysis indicates that Missouri's "humanitarian doctrine" could have allowed recovery in spite of the plaintiff's contributory negligence. *Id.* at 719-22.

60. 261 Ark. at 627, 550 S.W.2d at 455-56. Arkansas' comparative fault law permits a plaintiff to receive reduced damages where the negligence of the defendant exceeds that of the plaintiff. ARK. CODE ANN. § 16-64-122 (1987).

61. *See* 261 Ark. at 632-33, 550 S.W.2d at 458-59 (1977).

62. 263 Ark. 326, 565 S.W.2d 400 (1978).

63. *Id.* at 328, 565 S.W.2d at 401.

64. *Id.* at 330, 565 S.W.2d at 402. *See infra* note 66.

65. 263 Ark. at 333, 565 S.W.2d at 403-04.

66. *Id.* at 333, 565 S.W.2d at 404. The result in *Williams* is confusing because the application of Tennessee's substantive law could lead to an unfavorable result for the plaintiff. Tennessee follows the common law standard of contributory negligence. *See* Hogue, *supra* note 52 at 728 & n.92. Thus, if a jury found any negligence on the part of the plaintiff's decedents, all recovery would be denied. Arkansas' comparative negligence law appears more favorable to the plaintiff. However, the plaintiff wanted Tennessee's law on the measure of damages. When the court held that Tennessee's substantive law applied, the plaintiff became vulnerable to the effects of Tennessee's contributory negligence law as well.

The *Williams* plaintiff was protected from the potentially detrimental effect of Tennessee's contributory negligence law by the Arkansas Supreme Court's holding that the plaintiff's dece-



After *Wallis* and *Williams* it appeared certain that Arkansas courts would evaluate choice of law questions by using a combination of the Second Restatement's "most significant relationship" test and Professor Leflar's choice-influencing considerations. The Arkansas Supreme Court dispelled that appearance of certainty in the most recent choice of law case, *Schlemmer v. Fireman's Fund Insurance Co.*<sup>67</sup> In *Schlemmer* the Arkansas court relied exclusively on the Leflar choice-influencing considerations in reaching the decision that Tennessee law should apply.<sup>68</sup> The majority opinion, authored by Justice Dudley, listed the five considerations and applied each one to the facts.

In examining the predictability-of-results consideration, the court found that while this consideration usually has no bearing on accident cases because the injury is unplanned, it does have limited applicability in this case.<sup>69</sup> Because the plaintiff was a resident of Tennessee and the defendant insurance company issued its policy in Tennessee, the court reasoned that the insurance company based the premium calculation upon casualty experience under the liability laws of Tennessee.<sup>70</sup> Therefore, "Tennessee law [was] the most relevant under this consideration."<sup>71</sup>

The court found that the choice of either law would not affect free highway traffic between the states, nor would it affect either state's concern with its sovereignty.<sup>72</sup> Thus, the court favored neither state's law under the consideration of maintenance of interstate and international order.

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dents were not guilty of negligence which was a proximate cause of their death. 263 Ark. 326, 331, 565 S.W.2d 400, 403. The dissent took issue with this holding, saying that "the defendants are being deprived of the complete defense of contributory negligence under [Tennessee's] law." *Id.* at 337, 565 S.W.2d at 405.

One avenue of support for the majority's holding that the decedents were free of negligence can be found in Arkansas' rules of the road. Arkansas' rules of the road were applicable in this case. *Id.* at 333, 565 S.W.2d at 404. Arkansas' rules of the road provide, in pertinent part, "no person shall stop, stand, or park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer . . ." ARK. CODE ANN. § 27-51-1302 (1987). Since the plaintiff's decedents were following the instructions of the Arkansas State Police at the time they were struck, 263 Ark. at 331, 565 S.W.2d at 403, they were in compliance with Arkansas' rules of the road. Although the majority did not expressly rely on this reasoning in reaching the *Williams* result, the Arkansas rules of the road do provide logical support for the holding.

67. 292 Ark. 344, 730 S.W.2d 217 (1987).

68. *Id.* at 346-48, 730 S.W.2d at 219.

69. *Id.* at 346-48, 730 S.W.2d at 219.

70. *Id.* at 346-47, 730 S.W.2d at 219.

71. *Id.* at 347, 730 S.W.2d at 219.

72. *Id.*

Next the court examined the consideration of simplification of the judicial task. Tennessee does not have a guest statute.<sup>73</sup> Although Arkansas had a guest statute at the time of this accident,<sup>74</sup> the Arkansas legislature repealed the statute in 1983.<sup>75</sup> Therefore, Arkansas courts were accustomed either to applying the guest statute or not applying it, based solely on when the accident occurred. The court concluded that neither state's law is favored under this consideration.<sup>76</sup>

In considering advancement of the forum's governmental interest, the court found that because the Arkansas legislature expressly repealed the guest statute, Arkansas' policy is now against application of the guest statute.<sup>77</sup> Therefore, Tennessee law, since it contains no guest statute, would effectuate Arkansas' current policy and is more relevant under this consideration.<sup>78</sup>

Finally, the court analyzed the application of the better rule of law. The majority stated that, "[t]here is no doubt about which law we regard as the better law. The Arkansas guest statute in effect at the time of this accident was archaic and unfair."<sup>79</sup> The opinion quoted with favor Professor Leflar's observation that "[c]ourts sometimes realize that certain of their own laws, especially statutory ones, are archaic, anachronistic, [and] out of keeping with the times."<sup>80</sup> The court then decided that, "[u]nder this consideration, Tennessee's law is the better law."<sup>81</sup> The majority concluded that the five choice-influencing considerations dictated that "Tennessee law should be applied to the tort phase of this case."<sup>82</sup>

Justice Hickman, in dissent, disagreed with the assertion that Tennessee had the better law "simply because [Arkansas] had the guest statute."<sup>83</sup> Justice Hickman noted that the Arkansas Supreme Court upheld the guest statute repeatedly until the legislature repealed it. He also noted that the statute prevented law suits between

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73. *Id.*

74. *Id.*

75. Act of February 2, 1983, No. 13, 1983 Ark. Acts 44.

76. 292 Ark. at 347, 730 S.W.2d at 219 (1987).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* (quoting Leflar, *Conflict of Laws: Arkansas—The Choice-Influencing Considerations*, 28 ARK. L. REV. 199, 215 (1974)).

81. 292 Ark. at 348, 730 S.W.2d at 219 (1987).

82. *Id.*

83. *Id.* at 348, 730 S.W.2d at 220 (Hickman, J., dissenting).

friends.<sup>84</sup> In Justice Hickman's view, because "[t]he accident occurred in Arkansas in an Arkansas vehicle driven by an Arkansas resident," Arkansas law should apply.<sup>85</sup>

Justice Hays also dissented.<sup>86</sup> He believed that "[w]hen a resident of another state comes to Arkansas, enters an Arkansas based vehicle, owned and operated by an Arkansas resident, for a trip wholly local in character . . ." then Arkansas law should govern.<sup>87</sup>

The dissenters in *Schlemmer* are applying the "most significant relationship" test of the Second Restatement,<sup>88</sup> although they do not call it by name. In the two choice of law cases prior to *Schlemmer*,<sup>89</sup> the Arkansas Supreme Court expressly combined the Second Restatement approach with the Leflar choice-influencing considerations. However, in *Schlemmer* the majority makes no mention of the Second Restatement and does not purport to apply its test. This omission signals the abandonment of the Second Restatement in favor of exclusive reliance on Leflar's choice-influencing considerations.<sup>90</sup>

Had the majority followed the Second Restatement, the result in *Schlemmer* might have been different. The dissenters' analysis of the contacts each state had to the case indicated that Arkansas had the most significant relationship to the facts.<sup>91</sup> Therefore, a Restatement analysis could favor the application of Arkansas law. The majority's failure to mention the Second Restatement may have reflected an unwillingness to apply a disfavored Arkansas law. The choice-influencing considerations gave the court sufficient flexibility to reach what it saw as a better result.

The *Schlemmer* decision is of particular interest because of the majority's heavy emphasis on the last choice-influencing considera-

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84. *Id.*

85. *Id.*

86. *Id.* (Hayes, J., dissenting).

87. *Id.* at 349, 730 S.W.2d at 220.

88. See *supra* note 32. By examining the various connections Arkansas has to the case, the dissenters are focusing on the "contacts" component of the Second Restatement.

89. *Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977); *Williams v. Carr*, 263 Ark. 326, 565 S.W.2d 400 (1978).

90. The majority does not examine the "contacts" of each state to the case as required by the Second Restatement. See RESTATEMENT 2D, *supra* note 3, at § 145 & § 145(2) comment.

91. See *supra* text accompanying notes 84-86. However, the Second Restatement test is flexible enough to allow the conclusion that Tennessee had the most significant relationship to the case. This dispute was essentially between a Tennessee resident and a Tennessee insurer. One could conclude that Tennessee's relationship to the case outweighed the contacts Arkansas had to the case. Had the majority viewed the case in this way, the result under a Second Restatement analysis would have been the same as that reached using the choice-influencing considerations.

tion—the “better rule” of law. Leflar recognized that the “better rule” consideration was “the most controversial” component of his theory.<sup>92</sup> A potent criticism of the “better rule” approach is that it usurps the prerogative of the forum’s legislature.<sup>93</sup>

Many judges and commentators believe questions of policy belong to the legislature.<sup>94</sup> These commentators believe the solution to laws which no longer accurately reflect a state’s policy is legislative change.<sup>95</sup> However, when outdated laws remain in effect, the current policy interests of the community may argue against enforcing the old law.<sup>96</sup> In a choice of law situation, a court will probably prefer the law that better reflects current needs and interests.<sup>97</sup>

When a particular law is a “drag on the coat tails of civilization,”<sup>98</sup> it is desirable that a court exercise an available option<sup>99</sup> to apply a “better law.” However, everyone will not perceive “newer” law as “better” law,<sup>100</sup> as Justice Hickman pointed out in his *Schlemmer* dissent.<sup>101</sup> It is this lack of consensus as to what constitutes the “better law” that leads some to suggest that the decision is best left to a state legislature.<sup>102</sup>

One answer to this criticism is that the “better law” consideration does not stand alone.<sup>103</sup> Leflar’s theory requires that a court evaluate *all* of the choice-influencing considerations in the process of determining which law to apply.<sup>104</sup> According to Leflar, the “better law” consideration is more properly viewed as a vehicle for allowing judges to openly identify a primary factor in many decisions, albeit

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92. Leflar, *More, supra* note 39, at 1587.

93. *See, e.g., Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968).

94. *See Fuerste*, 156 N.W.2d at 834 (Iowa 1968); Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595 (1984).

95. *See Weinberg, supra* note 94.

96. *See R. LEFLAR, supra* note 5, § 107, at 298-99.

97. *Id.* § 107, at 299.

98. Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 980 (1952).

99. The option to apply a “better law” will not become available unless the state possessing the “better law” has sufficient contacts with a case to justify the application of its law. Federal constitutional requirements thus protect against the possibility that a court might arbitrarily choose to apply the law of a state with no relationship to the case. *See R. LEFLAR, supra* note 5, § 55, at 164.

100. One example of a potentially controversial “newer” law is a statute which places a ceiling on medical malpractice awards.

101. 292 Ark. 344, 348, 730 S.W.2d 217, 220 (1987) (Hickman, J., dissenting).

102. *See Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968).

103. *See Leflar, supra* note 80, at 204.

104. *Id.*

one that often goes unexpressed.<sup>105</sup> Because Leflar's theory encourages a frank identification of the factors underlying a choice of law decision, its adoption is a positive development in Arkansas law.

*Carmen L. Arick*

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105. See Leflar, *More, supra* note 39, at 1588.