DEPECAGE: EMBRACING COMPLEXITY TO SOLVE CHOICE-OF-LAW ISSUES

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INTRODUCTION

An airplane crashes in the Arizona desert with no survivors. There are numerous causal links to the crash, such as: (1) a defective aircraft engine manufactured in Missouri by a company incorporated in Delaware; (2) a defectively designed airframe made in France by a company that has its U.S. headquarters in Virginia; (3) negligent actions of the pilot who was employed by a Texas company, but was trained and certified by a Florida based company through a contract with the pilot's employer; (4) negligent actions of the Federal Aviation Administration (FAA) air traffic controller in Nevada; (5) faulty information on the pilot's aeronautical maps, which were printed by a governmental agency in Washington D.C.; and (6) poor weather conditions which were not reported by an FAA weather observer in New Mexico. Additionally, there were passengers on board from twenty different states. The question is: Which state's law applies?

A difficult hypothetical question to say the least, but not far from the truth. Courts have been faced with factual scenarios similar to this hypothetical not only in aircraft disasters, but also in complex mass tort litigation where tortfeasors and victims are dispersed across the country.[1]

Then, what does a court do when it faces a situation similar to the one posed under this hypothetical scenario? Does a court pick one state's law and apply it to all parties on all issues? By using this approach a court could, devoid of any legal analysis, find that because the plane crashed in Arizona, Arizona law should apply across the board. On the other hand, a court could choose to apply different states' laws depending on a state's relationship to individual defects, negligent acts, passenger's domicile or residency in determining liability and damages. Under the hypothetical, the court might apply Missouri law to the engine manufacturer who produced the defect in the doomed aircraft's engine, but apply Virginia law as to any defects in the airframe. Furthermore, the court could calculate compensatory damages for passenger Smith, a Californian, according to California law, and for passenger Jones, from Georgia, according to Georgia law.

It is this approach of applying various states' laws to separate issues which has been labeled as "depecage." Specifically, "under the doctrine of depecage,

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1. Use of depecage in mass tort litigation is frequently found in large class action suits. A class action suit filed against Philip Morris, Inc. provided fertile ground for the court's application of depecage. *See* Simon v. Philip Morris, Inc., 124 F. Supp. 2d 46, 75-78 (E.D.N.Y. 2000); *In re* Simon II Litigation, 211 F.R.D. 86, at 111 (E.D.N.Y 2002) (applying principles of depecage to multi-state tobacco litigation). *But see In re* Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002) (failing to mention depecage as a possible solution).

different substantive issues in a tort case may be resolved under the laws of different states where the choices influencing decisions differ."[2] This Note attempts to explore depecage and offer it as a needed tool for efficient and effective choice-of-law analysis. Part I provides examination of the origins of depecage from modern day choice-of-law principals. Part II discusses the mechanics of applying depecage to complex litigation, and demonstrate how various courts have used depecage as a successful judicial instrument.

Part III explores the reasons why some courts have not embraced depecage. There are some theoretical underpinnings behind this counter-rationale, and a tremendous push by some legal scholars to disregard the doctrine completely. Assisting in this counter-movement against depecage are those cases where either the court used depecage without any formal recognition of what it was doing, or failed to apply depecage to a situation which desperately called for its use.[3] Part IV discusses the lack of direction that has left courts in confusion with little knowledge and guidance from higher authority on the application of depecage to choice-of-law problems. While most courts have not expressly rejected depecage, their use of the doctrine has hardly been a model of clarity.

Despite the opposition to the doctrine expressed by courts and the indifference exhibited by others, Part V provides the rationale for applying depecage and the necessity of its application to an otherwise irreconcilable conflict.[4] Part V contends that, when dealing with complicated choice-of-law issues, courts should actively embrace complexity by applying the doctrine of depecage. Depecage allows courts to isolate and limit true conflicts between differing bodies of law, which facilitates more adequate analysis of underlying interests and policies.[5] By promoting diversity among state law, depecage is also consistent with the federalist view of state sovereignty.[6] Thus, through its use, courts will provide better direction for the doctrine, protect state and individual interests, and eventually broaden its use.[7]

I. THE ORIGINS OF DEPECAGE

A French word, dépeçage (DE-PA-SAJ) is defined as a "cutting up, dismembering, carving up."[8] In a legal setting "depecage" is "[a] court's application of different state laws to different issues in a legal dispute; choice of

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2. LaPlante v. Am. Honda Motor Co. Inc., 27 F.3d 731, 741 (1st Cir. 1994).

3. *See* Allen v. Great Am. Reserve Ins. Co., 766 N.E.2d 1157 (Ind. 2002) (applying Indiana law to the construction of a contract and South Carolina law to claim based on multistate agency principle); *see* discussion *infra* Part III.

4. *See* Schalliol v. Fare, 206 F. Supp. 2d 689, 700 n.30 (E.D. Pa. 2002).

5. *See infra* Part V.A.

6. *See infra* Part V.B.

7. Courtland H. Peterson, *Private International Law at the End of the Twentieth Century: Progress or Regress?*, 46 AM. J. COMP. L. 197, 224 (1998).

8. COLLINS ROBERT FRENCH ENGLISH DICTIONARY 233 (4th ed. 1995).

law on an issue-by-issue basis."[9] In other words, depecage is "the process of cutting up a case into individual issues, each subject to a separate choice-of-law analysis."[10]

A. Vested Rights and Lex Loci Delicti

Before the modern choice-of-law approach used by courts which entertains concepts of a party's relationship or contact with other states, courts strictly enforced the doctrine of *lex loci delicti*. Under this "vested rights" doctrine, in determining which state's law to apply, a court looks solely at the place where the tort was committed.[11] This doctrine was in full force at the turn of the century when choice-of-law questions were often raised by railroad accidents.

In *Northern Pacific Railroad Co. v. Babcock*, a locomotive engineer was killed when the train derailed in Montana.[12] His estate brought suit in Minnesota citing Montana law; however, the defendant wanted Minnesota law to apply.[13] The defendant admitted the general rule of *lex loci delicti*, but contended that, because plaintiff's action was founded in state statutory language, the law of the forum and the law of the place where the right of action accrued must concur in order for the *lex loci* to apply.[14] Quoting from the Supreme Court of Minnesota, the Court reasoned that:

> [I]t by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made.[15]

Under *lex loci delicti*, the Court held that because the contract of employment was made in Montana, and the accident occurred in that state, there was no error in holding that the right to recover was governed by Montana law.[16]

Justice Holmes strongly affirmed the doctrine of *lex loci delicti* in *Slater v. Mexican National Railroad Co*.[17] In *Slater*, a Texas resident, employed by a Colorado railroad company, was killed while coupling cars together in Nueva

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9. BLACK'S LAW DICTIONARY 448 (7th ed. 1999).

10. *See* Ruiz v. Blentech Corp., 89 F.3d 320, 324 n.1 (7th Cir. 1996).

11. BLACK'S LAW DICTIONARY, *supra* note 9, at 923.

12. N. Pac. R.R. Co. v. Babcock, 154 U.S. 190, 196 (1894) (quoting Harrick v. Minneapolis & St. Louis Ry. Co., 16 N.W. 413, 414 (Minn. 1883)).

13. *Id*. at 197.

14. *Id*.

15. *Id*. at 198.

16. *Id*. at 199.

17. Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120 (1904).

Laredo, Mexico. His widow and children brought suit in Texas.[18] Without any discussion of relationships, contacts, or state interests the Court stated that "[a]s the cause of action relied upon is one which is supposed to have arisen in Mexico, under Mexican laws, the place of the death and the domicile of the parties have no bearing upon the case."[19] Thus, the *Slater* Court affirmed the circuit court's ruling dismissing plaintiffs' claim brought in Texas.[20] This "vested rights" approach was enshrined in the 1934 Restatement (First) of Conflict of Laws, which advocated hard and fast choice-of-law rules "premised on the principle that the last event necessary to create or change a legal relationship determines where a right vests."[21]

However, even in 1894 under *National Pacific Railroad Co. v. Babcock*, the Court recognized that there may be some situations where the use of *lex loci delicti* should not be used. In order to justify the disregard of *lex loci delicti*, "it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it [*lex loci delicti*] would be prejudicial to the general interests of our own citizens."[22] Such policy considerations had been argued by legal scholars for many years prior to their adoption by American courts. Scholars discredited *lex loci delicti* because it failed to take into account underlying policy considerations in evaluating the significance to be ascribed to the circumstance that an act had concerning the rights and liabilities which arise out of that act.[23]

B. The Move Toward Interest Analysis

As our nation began to industrialize, the mass production and marketing of goods such as telephones, radios, wire services, and automobiles, on a national scale, made the nation seem smaller and more closely knit.[24] This national industrialization corresponded with a diminished sense of the importance of state lines that served to divide people. In the mobile Twentieth Century, courts began to ask themselves whether the results dictated by the inflexible rules of *lex loci delicti* and vested rights retained their past attraction.[25] Courts began to decide cases in ways that made "good socio-economic sense."[26] However, the rule of

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18. *Id*. at 124.

19. *Id*. at 127.

20. *Id*. at 126, 131.

21. Simon v. Philip Morris, Inc., 124 F. Supp. 2d 46, 65 (E.D.N.Y. 2000) (quoting J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1288 (1935)).

22. N. Pac. R.R. Co. v. Babcock, 154 U.S. 190, 198 (quoting Hervick v. Minneapolis & St. Louis Ry. Co., 16 N.W. 413 (Minn. 1883)).

23. Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451, 478-79 (2000).

24. *Simon*, 124 F. Supp. 2d at 66; Southerland, *supra* note 23, at 471-72.

25. *Simon*, 124 F. Supp. 2d at 66; Babcock v. Jackson, 191 N.E.2d 279, 283 (N.Y. 1963); Southerland, *supra* note 23, at 471.

26. Southerland, *supra* note 23, at 473 (quoting Robert A. Lefler, *Conflict Laws: More on*

lex loci delicti still formally governed tort actions. To circumvent this rigid rule and give courts an excuse to look beyond the law of the state where the action accrued, parties began to invent escape devices.[27] One such escape device was the characterization of a tort claim as a contract claim, which raised the contention that the issue was more procedural than substantive.[28]

In the 1960s, courts began to change course and take into consideration varying factors separate from *lex loci delicti*. The watershed case of *Babcock v. Jackson* is a defining moment in choice-of-law analysis.[29] In *Babcock*, an automobile passenger from Rochester, New York, was seriously injured when the driver (also from Rochester) lost control of a car in Ontario, Canada.[30] The passenger, Ms. Babcock, filed suit in New York, where she had a cognizable claim. A Canadian statute absolved the driver of any liability for injuries sustained by a guest passenger in his or her vehicle.[31] The court resoundingly stated that the law of New York should apply regardless of where the accident occurred.[32] In so doing, the *Babcock* court thoroughly denounced the vested rights and *lex loci delicti* doctrine. The court stated that "the vice of the vested rights theory, it has been aptly stated, 'is that it affects to decide concrete cases upon generalities which do not state the practical considerations involved.'"[33] The court instead used a "center of gravity" or "grouping of contacts" to analyze the choice-of-law issue.[34] The court explained this new test as a way to achieve the best practical result "by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation."[35] By drawing upon the ideas legal scholars had been advocating for years, the *Babcock* court laid the ground work for other courts to follow suit in denouncing *lex loci delicti*.[36]

However, *Babcock* left many questions regarding this new approach unanswered for other courts. The *Babcock* opinion furnished no guidance whatsoever for situations where all the contacts fail to converge in a single state. For example, what should the result be when a trip's starting point and destination are in different states, or codomiciliaries of one state rent a car

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Choice-Influencing Considerations, 54 CAL. L. REV. 1584, 1587-88 (1966)).

27. *Id*.

28. *Id*.

29. *Babcock*, 191 N.E.2d at 279; Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 827 (1983).

30. *Babcock*, 191 N.E.2d at 280.

31. *Id*.

32. *Id.* at 285.

33. *Id*. at 281 (quoting Hassel E. Yatena, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 482-83 (1928)).

34. *Id*. at 283.

35. *Id*.

36. Korn, *supra* note 29, at 831.

licensed, garaged and insured in another.[37] This same type of failure, where higher courts fail to give adequate guidance on choice-of-law analysis, continues to occur today.[38]

C. The Restatement (Second) of Conflict of Laws

After almost twenty years in the making, in 1971, the Restatement (Second) of Conflict of Laws ("Restatement") attempted to summarize the nature of choice of law in American courts under the new "significant relationship test." Section 6 of the Restatement introduced the various considerations of interest analysis as:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.[39]

From the Restatement section 145 came the expressed language of the doctrine of depecage. Section 145 introduced this concept as:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, **with respect to that issue**, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
> These contacts are to be evaluated according to their relative importance **with respect to the particular issue**.[40]

Thus, by calling for choice-of-law analysis for each particular issue and by providing what contacts are to be considered, the Restatement lays a framework for the application of depecage.

II. MECHANICS OF USING DEPECAGE: WHICH COURTS HAVE USED THE DOCTRINE AND WHY

Choice-of-law analysis involving the use of depecage often involves complex

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37. *Id*. at 835.
38. Allen v. Great Am. Reserve Ins. Co., 766 N.E.2d 1157 (Ind. 2002); *see infra* Part IV.
39. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).
40. *Id.* § 145 (emphasis added).

legal and factual parameters. In order to better understand how these complex factors work together it is beneficial to carefully examine how courts, which have been particularly adept in applying depecage, have used the doctrine in deciding choice-of-law issues. However, before considering how courts have used depecage, it is important to understand how depecage works through the acknowledgment of its driving forces.

A. Driving Forces of Depecage

The legal concepts of federalism, advocacy, and the prevention of forum shopping create choice-of-law problems which may require the use of depecage. While these concepts do not promote a particular rationale for or against the usage of depecage, they do provide a honest look at why choice-of-law becomes an issue to be dealt with in the first place.

The constitutional concept of federalism and the individual sovereignty it conveys to each state cuts to the core of depecage. Federalism is defined as "[t]he doctrine holding that a federal court must refrain from hearing a constitutional challenge to state action if federal adjudication would be considered an improper intrusion into the state's right to enforce its own laws in its own courts."[41] Justice Marshall also described the concept of federalism in *M'Culloch v. State*. He stated "[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other."[42]

Federal/state political structuring creates the phenomenon of differential state sovereignty.[43] When the federal government was created, certain powers previously subject only to state authority were vested in the federal government.[44] Because every state gave up the same powers to the federal government, states still possessed identical powers after the creation of the federal government.[45] While all the states possess the same authority, it was expected that the states will exercise these powers differently. "The states are allowed—indeed, expected—to disagree on substantive issues."[46] The most valuable aspects of federalism is what courts and commentators frequently have recognized as the fifty state laboratories, which provide for the development of new social, economic, and political ideas.[47] Additionally, federalism preserves the ability of citizens to learn the democratic processes through participation in local

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41. BLACK'S LAW DICTIONARY, *supra* note 9, at 1128.

42. M'Culloch v. Sate, 17 U.S. 316, 410 (1819).

43. Lea Brilmayer & Ronald D. Lee, *State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws*, 60 NOTRE DAME L. REV. 833, 852 (1985).

44. *Id*.

45. *Id*.

46. *Id*.

47. Fed. Energy Regulatory Comm'n, 456 U.S. 742, 788 (1982).

government and to govern their local problems.[48] Thus, federalism enhances states' ability to disagree with each other creating the atmosphere necessary for the use of depecage.

Federalism and its creation of state sovereignty contributes to choice-of-law problems because each state is free, and even encouraged, to develop its own sovereign body of law. However, courts pay a high price for federalism in the enormous challenge of respecting each state's sovereignty. Judicial resources, including time and effort, are spent attempting to respect each state's sovereignty in determining whose law will apply. Application of one federal body of law to all multi-state actions would conserve judicial resources.[49]

The second root of depecage and modern day choice of law is the concept of advocacy. "A lawyer shall act with reasonable diligence and promptness in representing a client."[50] Lawyers must diligently advocate for their clients. Carrying out this charge often calls for lawyers to contend that one state's law should apply over another. If there is a remote chance that a more liberal state's law will offer a victim more compensation, a plaintiff's lawyer will most often zealously pursue the application of that state's law. Similarly, a lawyer counseling the defendant will be equally adamant that a more conservative state's law should apply. Thus, when applicable, courts are faced with motions to apply whichever state's law best helps each party's position. If neither party cared which state's law should apply, then a court's job in choosing applicable law would be much easier.

The third driving force of depecage and modern day choice-of-law principles is the goal of preventing "forum shopping." The goal of *Erie Railroad Co. v. Tompkins*, in prescribing uniformity between federal and state courts, was to prevent forum shopping between those court systems.[51] While *Erie* deals with state and federal forums, the same danger of forum shopping occurs among states when a *lex fori* choice-of-law approach is used. If there were a uniform rule that the law of the forum governs a claim, the problem would arise that all injured victims would run to file their claim in a forum with the most favorable law for their situation. Thus, a flood of litigation would ensue in only certain forums. At the same time, refusing to apply the law of the forum to an entire cause of action in turn requires selecting which state's law will apply. Again, conflicts

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48. *Id*. at 789-90.

49. The face of our political design may be changing with the enactment of the Multiparty, Multiforum Trial Jurisdiction Act, 28 U.S.C § 1369 (2003). The Act gives federal district courts original jurisdiction of any action involving "minimal diversity" between adverse parties from a single accident where at least seventy five persons have died. This Act directly attacks the *Erie* doctrine in that it will create federal common law, threatening federalism by arbitrarily preempting state law. Undoubtedly, the constitutional basis of this newly enacted law will be questioned, which may force the United State's Supreme Court to defend its era of federalism and finally speak on a conflicts of law issue.

50. MODEL RULES OF PROF'L CONDUCT R. 1.3 (1999).

51. Maryellen Corna, *Confusion and Dissension Surrounding the Venue Transfer Statutes*, 53 OHIO ST. L.J. 319, 328 (1992).

analysis would be simplified, if not eliminated, by the courts ability to apply the law of the forum to all issues.

After examining three driving forces—federalism, advocacy, and the prevention of forum shopping—one can quickly realize that these principles in American law are not likely to disappear any time in the near future. Therefore, some framework for choosing applicable law must be in place which makes depecage an essential part of this framework.

B. Air Crash Disaster Litigation: Fertile Ground for the Application of Depecage

Air crash disaster litigation has been the primary means by which the principles and application of depecage has grown. In *In re Disaster at Detroit Metropolitan Airport on August 16, 1987* ("*Detroit Metro*"), the court recognized the need for depecage in the choice-of-law problem presented.[52] The court found where there are legally significant facts which have occurred in more than one state, the court must identify those states that have sufficient contacts with the litigation. Once these states have been identified, the court must determine whether the various substantive laws at issue differ with regard to the particular issues in contest. In other words, is there a conflict? If so, this may result in the application of "the rules of different states to determine different issues in the same case."[53]

In *Detroit Metro*, the plaintiffs filed wrongful death claims against McDonnell Douglas Corporation and Northwest Airlines seeking compensatory and punitive damages.[54] In deciding to use depecage, the court used Michigan's choice-of-law rule for claims filed in Michigan.[55] The *Detroit Metro* court first split the plaintiffs' products liability claims against McDonnell Douglas from their punitive damages claim against Northwest Airlines.[56]

In determining which state's law to apply to the product liability claim against McDonnell Douglas, the court found three possible states: (1) Michigan—the place of the crash; (2) Missouri—McDonnell Douglas' principal place of business; and (3) California—the place of manufacture and design of the accident aircraft.[57] In *Detroit Metro*, there was a conflict between Michigan's

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52. *In re* Disaster at Detroit Metro. Airport on Aug. 16, 1987, 750 F. Supp. 793, 796 (E.D. Mich. 1989) [hereinafter Detroit Metro].

53. *Id*. (quoting Willis L. McReese, *Depecage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 75 (1973)).

54. *Id*.

55. Although Michigan had abandoned the doctrine *lex loci delicti*, at that time, they had declined to adopt a particular choice-of-law rule. Without expressly adopting the Restatement (Second) of Conflict of Laws, *see supra* notes 39-40 and accompanying text, the court in *Detroit Metro* did hint that Michigan law may be displaced when there are particular interests that each state has in having its substantive law apply to the precise issue in question. *Id*. at 797.

56. *Id*. at 799, 804-05.

57. *Id*. at 801-02.

products liability law, which applied a negligence standard to design defect claims, and Missouri and California products law which used strict liability.[58] The court analyzed which state's rule of law had the greater interest in seeing that its law was applied. The court discounted Michigan's interest stating that "Michigan simply has no interest in applying its law to protect a foreign state producer that supplies products for a company doing business in that state."[59] In contrast, the court found that both Missouri and California had a strong interest in applying their products liability law. The court reasoned that Missouri's and California's strict liability laws "reflect a desire to (1) regulate culpable conduct occurring within its borders, (2) induce corporations to design safe products and deter future misconduct, and (3) impose the financial repercussions, which have been incurred by the user of a defective product, upon the producer."[60] Because Missouri's and California's product liability laws were essentially identical, the court could have used either state's law, but the court ultimately concluded that California law should be applied since the alleged wrongful conduct occurred within its borders.[61] Thus, after splitting out the issue of product liability, the *Detroit Metro* court found a "false conflict" existed between Michigan's interest in seeing its law applied and California's interest.

With regard to the punitive damage claim against Northwest Airlines, the court decided that either Michigan law (the place of injury) or Minnesota law (the place of alleged misconduct and principal place of business) would apply.[62] The court found a conflict between the law of Michigan and Minnesota. Minnesota law allowed for punitive damages, while Michigan law did not.[63] As far as state interests in seeing its law applied to this particular issue, Michigan had a strong interest in prohibiting the imposition of punitive damages on companies doing substantial business within its borders.[64] On the other hand, Minnesota, Northwest's principal place of business, had an interest in deterring and preventing any wrongful conduct by corporations which locate their corporate headquarters within its borders.[65] This presented a "true conflict" for the court because application of either Minnesota's law or Michigan's law would undoubtedly undermine the policy which is reflected in the law of the other state. The court is then back to square one, and must make an arbitrary decision not unlike a *lex loci delicti* decision. In so doing, the court held that, as the forum state, the law of Michigan (which would not allow punitive damages) should apply.[66]

The series of decisions written by Judge Ruben Castillo concerning choice

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58. *Id.* at 799-800.
59. *Id*. at 801.
60. *Id*. at 802.
61. *Id.*
62. *Id*. at 804-06.
63. *Id*. at 805-06.
64. *Id*. at 807.
65. *Id*.
66. *Id.* at 808 (applying the law of the forum where a true conflict is presented).

of law in the air crash near Roselawn, Indiana utilized depecage as well. In *In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, the court found importance in understanding that

> the search for the applicable law is not a general one, but rather it is one that takes proper notice of the fact that the significance of a state's relationship to a particular aviation disaster may vary as a function of the particular issue presented. Consequently, under the doctrine of depecage, it is not uncommon for courts to apply the substantive law of several different states in resolving air crash cases.[67]

Roselawn involved flight 4184, which crashed in Indiana en route from Indianapolis to Chicago. Flight 4184 was an Avions de Transport Regionale (ATR) aircraft built in France.[68] The day of the accident, 4184 had touched four different states and at the time of the accident was on its final leg of the day.[69] Plaintiffs claimed that both American Airlines and ATR were liable for the ice accumulation on the aircraft's wings which ultimately led to the plane's instability, loss of control, and subsequent destruction, killing all on-board.[70]

Over the course of almost two years, the court weighed motions and responses regarding which law should be applied to which issues. In ruling upon these motions, the court first had to determine what state's choice-of-law rule would be used. The court found that different state's choice-of-law rules should be applied to different substantive choice-of-law analyses. For example, for those cases where the court's jurisdiction was based on the Foreign Sovereign Immunities Act, the court chose to apply a federal common law choice-of-law rule.[71] For those cases where the court's jurisdiction was based on diversity of citizenship, the court applied the choice-of-law rule of the forum state.[72] The majority of the cases' choice-of-law rules had adopted the Restatement and application of depecage.

At issue in *Roselawn III* was which substantive law regarding compensatory damages should apply to those passengers from Indiana who died in flight 4184. The defendants maintained that the law of Indiana should apply, while the plaintiffs urged that either Illinois or Texas law should apply.[73] Definitive differences in state law existed between Indiana and Illinois/Texas law, such as whether siblings of decedents were allowed to recover damages and whether a plaintiff could have brought survival claims for conscious pain and suffering.[74]

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67. 926 F. Supp. 736, 740 (N.D. Ill. 1996) [hereinafter Roselawn III].

68. *Id*. at 737-38.

69. *Id.*

70. *In re* Aircrash Disaster Near Roselawn, Indiana on October 31, 1994, No. 95 C 4593, MDL 1070, 1997 WL 572897, at *2-4 (N.D. Ill. Sept. 9, 1997) [hereinafter Roselawn V].

71. *Roselawn III*, 926 F. Supp. at 739.

72. *In re* Air Crash Near Roselawn, Indiana on October 31, 1994, 948 F. Supp. 747, 753-54 (N.D. Ill. 1996) [hereinafter Roselawn IV].

73. *Roselawn III*, 926 F. Supp. at 741.

74. *Id*. at 741-42.

In its application of depecage to this issue, the court went straight down the list of factors set forth in the Restatement (Second) of Conflicts section 145(2): (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered.[75] As to factor one, the court obviously found that Indiana was the place where the injury occurred.[76] Concerning factor two, the court found that with regard to compensatory damages, the place where the conduct causing the injury occurred has little significance.[77] However, the court noted plaintiffs' claims that several acts of negligence occurred at American Airlines headquarters in Texas.[78] Factor three was easily decided by the court because all of the decedents were residents of Indiana with all of their estates pending in Indiana as well.[79] The court's analysis of factor four found that there was no real relationship established between the decedents and ATR or American Eagle.[80] Most of the decedents' tickets were purchased through a travel agent, and suggested if any relationship existed it revolved around the place of departure, Indianapolis, Indiana.[81] Therefore, the court found that Indiana had the greatest interest in determining and providing for the appropriate recovery for survivors and estates of Indiana decedents.[82]

The court found the domicile of the decedents to be the greatest factor in determining which state's law to apply. The court discussed the rationale for giving this factor more weight when considering the issue of compensatory damages:

> The legitimate interests of [the domiciliary states], after all, are limited to assuring that the plaintiffs are adequately compensated for their injuries and that the proceeds of any award are distributed to the appropriate beneficiaries. . . . Those interests are fully served by applying the law of the plaintiffs' domiciles as to issues involving the measure of *compensatory* damages (insofar as that law would enhance the plaintiffs' recovery) and the distribution of any award. Once the plaintiffs are made whole by recovery of the full measure of compensatory damages to which they are entitled under the law of their domiciles, the interests of those states are satisfied.[83]

Judge Castillo, in a separate opinion, similarly ruled that for those decedents

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75. *Id*. at 742-44.

76. *Id*. at 742-43.

77. *Id.* at 743.

78. *Id*.

79. *Id*. at 743-44.

80. *Id.* at 744.

81. *Id.*

82. *Id*. at 744-45.

83. *Id.* at 745 (quoting *In re* Air Crash Disaster Near Chicago on May 25, 1979, 644 F.2d 594, 613 (7th Cir. 1981) [hereinafter Air Crash Chicago]).

who were non-Indiana residents, the substantive law relating to compensatory damages for pre-impact fear should be governed by each passengers' domicile. In so deciding the court reasoned that:

> [a]pplying the law of the injured person's domicile to issues of compensatory damages advances the principles of predictability and the protection of justified expectations set out in Second Restatement § 6, in that it respects the decedent's deliberate choice to make his or her home in a state and be governed by the laws of that state. Especially with respect to the claims of a decedent's estate, which are traditionally governed by the laws of the decedent's domicile, this deliberate decision to submit the daily affairs of life to the laws of a particular state may create justifiable expectations worthy of protection.[84]

Castillo further dissected the Roselawn litigation by separating out the issue of punitive damages. The plaintiffs claimed that Texas law should be applied to their punitive damage claims against American Airlines and ATR, while the defendants sought the application of the laws of France and Indiana.[85] Again, a difference existed between the law of Texas, which permitted punitive damages in wrongful death and survival claims, and the laws of Indiana and France, which would not permit punitive damages.[86]

Under the same depecage analysis, the court applied the law of Texas to plaintiffs' punitive damages claims against American Airlines.[87] In so holding, the Court reasoned that "the state that is both the principal place of business *and* the site of much of the alleged misconduct, Texas, has a far stronger interest in seeing its punitive damages law applied than any one of the half-dozen states in which some isolated aspects of the alleged misconduct occurred."[88] As to ATR, the Court held that French law should apply to punitive damage claims for the exact same reasons that Texas law would apply to American Airlines.[89] ATR's principal place of business was in France, and all of the alleged misconduct relating to the design, testing and manufacture of the ATR 72 airplane occurred in France.[90]

Finally, as if *Roselawn* had not been sufficiently dissected, the court found that as to plaintiffs' punitive damage claims against ATR's domestic corporation located in Virginia, Texas law should apply.[91] A conflict existed between Texas' allowance of uncapped punitive damages and Virginia's cap on punitives at $350,000 per person.[92] Much like the true conflict pertaining to Northwest

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84. *Roselawn IV*, 948 F. Supp. at 758.
85. Roselawn V, 1997 WL 572897, at *1 (N.D. Ill. Sept. 9, 1997).
86. *Id*.
87. *Id.* at *3.
88. *Id*.
89. *Id*. at *4
90. *Id*.
91. *Id*. at *5
92. *Id.*

Airlines which arose in *Detroit Metro*, a true conflict existed here because ATR's wrongdoing occurred in Texas, while its principal place of business was in Virginia.[93] The court looked to *Air Crash Chicago* for precedent on how to "break the tie" when the misconduct took place in one state (Texas) and the principal place of business is in another (Virginia).[94] *Air Crash Chicago* held that when the interests of other jurisdictions are equal and opposed, the law of the place of injury should be applied.[95]

However, the court did not use this "tie breaker" rule because it's application would result in the use of Indiana law as the place of injury.[96] As Indiana law would not permit punitive damages, this would only serve to frustrate and undermine the policies behind both Virginia and Texas law.[97] To apply this sort of tie breaking test would put courts back into the arbitrary analysis of *lex loci delicti*. The court looked to comments found in the Restatement (Second) of Conflicts section 145 to determine that the law of Texas should apply because that is where the misconduct of ATR's domestic corporation took place.[98]

The case presented in *Schoeberle v. United States* involved an aircrash that killed a pilot and his two passengers.[99] All plaintiffs asserted claims against the United States of America under the Federal Tort Claims Act (FTCA) and against Signature Flight Corporation. The plaintiffs representing the deceased passengers also brought a claim against Monarch Aviation Services, the company who owned the aircraft, and the estate of the deceased pilot.[100] The plane crashed en route from Cedar Rapids, Iowa, to Milwaukee, Wisconsin, near a farm in Bernard, Iowa. The pilot had been having problems with the plane en route to Cedar Rapids and decided to have Signature Flight perform maintenance on the aircraft before returning to Milwaukee.

However, shortly after departing from Cedar Rapids, the plane began to experience severe engine problems, and the pilot contacted air traffic controllers (United States employees) located in Chicago.[101] Although there was an airport only 6.5 miles from the plane's position, controllers advised the pilot not to proceed to this airport because it did not have an instrument flight approach which would enable the pilot to guide his plane to the ground safely through the low clouds and poor visibility.[102] The plane traveled another 7.5 miles and then crashed, never reaching the controller's recommended airport in Dubuque, Iowa. It was later discovered that at the time of the accident, the airport which air

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93. *Id.*; *see supra* notes 62-66 and accompanying text.

94. *Id.* at *5.

95. *See* Air Crash Chicago, 644 F.2d 594, 615-16 (7th Cir. 1981).

96. *Roselawn V*, 1997 WL 572897 at *5.

97. *Id.*

98. *Id.*

99. Schoeberle v. United States, Nos. 99 C 0352, 99 C 2599, 99 C 2292, 2000 WL 1868130 at *1 (N.D. Ill. Dec. 18, 2000).

100. *Id.*

101. *Id.* at *1-2.

102. *Id.* at *2.

traffic controllers thought was without an instrument approach did in fact have an instrument approach, which would have enabled the pilot to guide the plane safely to the ground.[103]

In analyzing what law to apply, the *Schoeberle* court was required under the FTCA to use the law of the state where the government's negligent act or omission occurred, which in this case was Illinois, the location of the air traffic controllers.[104] In applying Illinois choice-of-law principles, the court used depecage to wade through the complex but interesting connection the plane and its passengers had with three different states: Illinois, Wisconsin, and Iowa.[105] In its analysis, the court first examined what law would apply to issues of defendants' liability. Relying upon the Restatement (Second) of Conflicts section 175, the court applied the presumption that the law of the place of injury governs issues of liability in a wrongful death action, and therefore ruled that Iowa law must apply to the liability of Monarch Corp., Signature Flight Corp., and the pilot.[106] However, as to the United States' liability for the negligence of its air traffic controllers, the Court ruled that Illinois law must govern.[107]

In so holding, the court looked to the Restatement (Second) of Conflicts,[108] which defines the place of injury as "the place where the force set in motion by the actor first takes effect on the person. This place is not necessarily that where the death occurs."[109] Although the pilot's misconduct took place in Iowa where the aircraft crashed, this choice-of-law question involved the alleged misconduct of the United States which occurred in Illinois.[110]

The court determined the applicable law for compensatory and punitive damages separate from liability. The *Schoeberle* court followed *Roselawn III & IV* in finding the domicile of the decedents (Wisconsin) should govern compensatory damage claims.[111] As to plaintiffs' punitive damage claims against Signature Flight Corp., Monarch Corp., and the pilot, the court found that Iowa law should apply.[112] Again, similar to *Roselawn V*, the court considered both the place of injury and the place where the misconduct occurred as the rationale for their decision.[113]

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103. *Id*.
104. *See* Richards v. United States, 369 U.S. 1, 6-11 (1962).
105. *Schoeberle*, 2000 WL 1868130 at *2-3.
106. *Id.* at *4-6.
107. *Id*. at *9.
108. RESTATEMENT (SECOND) OF CONFLICTS § 17 cmt. b (1971).
109. *Schoeberle*, 2000 WL 1868130 at *8.
110. *Id*.
111. *Id*. at *10-11.
112. *Id.* at *13-14.
113. *Id*.

C. Summary of the Choice-of-Law Analysis Used Under the Principles of Depecage

Although those cases which involve in-depth choice-of-law issues are often complex, there is a pattern to the analysis that has developed. Courts evaluate which choice-of-law rule they should use, whether there is a conflict among state laws, and then decide what state's substantive law should apply to each issue.

1. Whose Choice-of-Law Rule Should the Court Use?—This question ultimately asks whether the principles of depecage may be applied in the first place. If the court uses a state's choice-of-law rule that has not rejected *lex loci delicti*, then depecage may not be used.[114] However, as later discussed, some states have adopted modified forms of *lex loci delicti*, which further complicates the question as to whether depecage may be applied.[115] Are there any federal statutes that may dictate what state's choice of law must be used? For example, under the Federal Tort Claims Act the whole law of the state where the "act or omission occurred," including its choice-of-law rule, must be used.[116] If the federal court has jurisdiction based on diversity, then the court must use the choice-of-law rule of the forum state.[117]

2. Is There a Conflict in the Laws?—For the analysis to continue, the states which may have an interest in seeing their law applied to a particular issue must have conflicting laws. A "true conflict" is one where the states with interests in the question presented have different laws, and the application of one state's law would conflict with or impair the interests of another state.[118] "A false conflict exists if only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's law. In such a situation, the court must apply the law of the state whose interests would be harmed if its law were not applied."[119] However, as *Schoeberle, Roselawn III, IV, & V*, and *Detroit Metro* demonstrate, choice-of-law rules do not distinguish between true conflicts and false conflicts.[120] Courts continue to analyze "false conflicts" when most legal scholars agree that they involve no choice-of-law problem at all.[121]

3. What State's Substantive Law Should Apply to a Particular Issue?—In this final step courts must examine the Restatement section 145 factors: (1) the

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114. *See* Roselawn IV, 948 F. Supp. 747, 754-55 (N.D. Ill. 1996).

115. *See* Schalliol v. Fare, 206 F .Supp. 2d. 689 (E.D. Pa. 2002); Allen v. Great Am. Reserve Ins. Co., 766 N.E.2d 1157 (Ind. 2002); Northwest Pipe Co. v. Eighth Judicial Dist. Ct., 42 P.3d 244, 245-46 (Nev. 2002); Motenko v. MGM Dist. Inc., 921 P.2d 933, 935-36 (Nev. 1996).

116. 28 U.S.C. § 1346(b)(1) (2000); Richards v. United States, 369 U.S. 1, 6-11 (1962).

117. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

118. *See* Air Crash Chicago, 644 F.2d 594, 615 (7th Cir. 1981) (reexamining the apparent conflict of laws reveals no way in which conflict can be resolved by a restrained or moderate interpretation, conflict is indeed a "true" conflict).

119. *See* Lacey v. Cessna Aircraft Co., 932 F.2d 170, 187 (3d Cir. 1991).

120. Christian L. Wilde, *Dépecage in the Choice of Tort Law*, 41 S. CAL. L. REV. 329, 342-45 (1968).

121. *Id.*

place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile of the parties (in the case of corporations, this would include the place of incorporation and principal place of business); and (4) the place where the relationship between the parties is centered, if that can be determined.[122] To determine which factors to weigh more heavily, courts look to case law on a particular issue. For example, in determining what state's law will apply to compensatory damages, courts consider the domicile of the decedent or injured plaintiff to be paramount.[123]

As seen by these examples of courts applying depecage, there are definite benefits realized through its use. Depecage reveals and disposes of false conflicts where the contacts and/or interests of one state greatly outweigh another state's contacts or interests on a separate issue. Although bodies of law may differ, a false conflict does not present a choice-of-law problem because one state's law may be applied without undermining the other disinterested state's laws or policies.[124] Thus, a court can focus on the true conflicts where multiple states have a significant interest in seeing their law applied to a particular issue and where the application of one state's law will undermine the laws and policy of other interested states.

III. RATIONALE FOR REJECTING DEPECAGE

Without delving into the alleged flaws contained behind the theory of depecage, it is easy to see why some courts are hesitant to trod down the path of depecage. First, depecage forces the court's legal analysis to become extremely complex. Secondly, there is a question as to how far a court should split issues. Splitting liability from damages, punitive damages from compensatory damages, and then further dissecting these issues as they relate to individual parties may water-down the decisive perception that courts should possess. This type of issue splitting presents the picture of Russian Matryoshka dolls where inside each doll is a smaller doll. Every time a court examines an issue to determine which state's law will apply to that issue, it then finds an issue inside of that issue.

Most recently, "a counterrevolution of sorts appears to be emerging, marked by the insistence that the concept of rights should have a greater role to play."[125] Although the United States Supreme Court has stated otherwise, many scholars believe that the Constitution has something to say about uniformity in choice-of-law analysis.[126] These scholars argue that the Privileges and Immunities Clause[127] "destroys the domiciliary-centered conception of governmental

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122. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

123. *See* Roselawn III, 926 F. Supp. 736, 745-46 (N.D. Ill. 1996).

124. *See* Wilde, *supra* note 120.

125. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2466 (1999).

126. *Id.* at 2466-67.

127. U.S. CONST. art. IV, § 2.

interests."[128] If a state grants rights to its domiciliaries, it must grant them to nondomiciliaries in the same cases. "The Privileges and Immunities Clause thus prevents the crudely selective exercise of legislative jurisdiction to favor domiciliaries."[129] This constitutional approach would eliminate the need for depecage in its current form.

Included in the push to alter the concept of depecage is an acknowledgment of the danger of distorting legislative intent by choosing certain portions of a state's laws to apply to a particular issue.[130] "[L]egislators may enact a given law only because of its expected interaction with a complementary law. [It would be] inappropriate to apply a state's wrongful death rule without its damage cap, which may have been an important condition on the adoption of the wrongful death statute."[131] For example, state A might provide broad recovery for injuries but adopt defenses or immunities to prevent fraudulent claims, which prevents too broad a recovery. In contrast, state B might permit all injured plaintiffs to sue for compensation, but prohibit direct actions, cap damages, limit negligence per se, and apply a narrow res ipsa loquitur doctrine.[132]

These bundles of law reflect different legislative decisions providing the optimal combination of legal standards deemed appropriate for that state. Plaintiffs should not be allowed to put "together half a donkey and half a camel, and then ride to victory on the synthetic hybrid."[133] How can, on the one hand, depecage emphasize governmental interests and, on the other, accept an outcome that none of the supposedly interested states would condone.[134] Additionally, when laws remain bundled together, any party need only make a single prediction as to what law may apply rather than making the separate, multiple predictions that depecage requires.[135] In order for people to abide by the law, they have to know which law applies. Separation of issues under depecage makes it much more difficult to predict which law a court will apply to each issue for any alleged misconduct.

In some ways depecage is no better than *lex loci delicti*. Like the *lex loci delicti* vested rights theory, depecage interest analysis avoids the difficult task of resolving conflicts between laws, though in a somewhat different way. *Lex loci delicti* denies the possibility of conflict, allowing only one law to govern the transaction. Depecage admits the conflict. Indeed, depecage recognizes the

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128. Roosevelt, *supra* note 125, at 2534.

129. *Id*.

130. *See* William H. Allen & Erin A. O'Hara, *Generation Law and Economic of Conflicts of Laws: Baxter's Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1034-36 (1999); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1192-93 (2000).

131. O'Hara & Ribstein, *supra* note 130, at 1193.

132. *Id*.; Allen & O'Hara, *supra* note 130, at 1034-36.

133. Frederick K. Juenger, *How Do You Rate a Century?*, 37 WILLIAMETTE L. REV. 89, 106 (2001) (quoting Brainerd Currie).

134. *Id*.

135. O'Hara & Ribstein, *supra* note 130, at 1193-94.

distinction between true conflict and false conflict. However, even depecage reverts to an arbitrary analysis for true conflicts where multiple states have equal interests in the application of their law. It is here where interest analysis under depecage fails by employing a technique that suggests that these true conflicts do not need to be resolved.[136] Reverting to an altered form of *lex loci delicti* analysis may eliminate the need for depecage. For example, *lex loci delicti* "could be modified to include a common domicile rule for 'loss distribution' rules while retaining a 'place of injury' rule for those laws directed toward conduct."[137]

Depecage has been labeled as an escape device to often harsh choice-of-law determinations.[138] "Because formal rules can never capture the complexities or depth of [every] situation they are meant to govern, they have a tendency to multiply exponentially," thus producing escape devices.[139] Escape devices, such as depecage, while producing just results, are intellectually dishonest. "They . . . tend to produce narrow rules that are not helpful in other cases with different facts."[140] Thus, depecage as it coexists with interest analysis, may give courts too much discretion. This is especially true in single-accident mass-tort cases, where the interests of multiple states are at issue. Depecage only compounds the wide discretion courts have under a state interest analysis, and thereby allows courts more discretion over their resolution of choice-of-law questions.[141]

Depecage also threatens neutrality and equality. Neutrality could be threatened through a court's abuse of depecage combining states' laws on various issues to create a set of rules that is more favorable to one party than the law of any single state.[142] Equality among parties is also in danger.

> [D]epecage favors the party with access to greater legal resources (usually defendants) because it requires a separate state-interest analysis as to each legal issue in the case, which must be multiplied by the number of interested states. It is thus much simpler, yet no less fair in single-accident mass-tort cases, to select one state's law to govern all issues in the entire controversy.[143]

One court has even compared the use of depecage to a type of lottery system.[144] The "winners" of the lottery would be those injured by tortfeasors

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136. Roosevelt, *supra* note 125, at 2463.

137. Allen & O'Hara, *supra* note 130, at 1044.

138. Erich H. Gaston, *Reassessing Connecticut's Eclectic Choice of Law Methodology: Time for (Another) New Direction*, 73 CONN. B.J. 462, 465-66 (1999).

139. *Id.* at 466.

140. *Id*.

141. Thomas M. Reavley & Jerome W. Wesevich, *An Old Rule for New Reasons: Place of Injury as a Federal Solution to Choice of Law in Single-Accident Mass-Tort Cases*, 71 TEX. L. REV. 1, 38 n.184 (1992).

142. *Id*.

143. *Id*.

144. *See* Boomsma v. Star Transport, Inc., 202 F. Supp. 2d 869, 879 (E.D. Wis. 2002).

from a foreign state that has liberal liability and damage rules, such as no cap on wrongful death damages. The "losers" would be those injured by fellow citizens of their own conservative state where recovery is limited. Such a system would undermine certainty, predictability, and uniformity of result.[145]

IV. LACK OF DIRECTION FOR THE DOCTRINE OF DEPECAGE

Despite the recent scholarly push to eliminate the use of depecage, courts have not followed suit. However, while courts have not affirmed the elimination of depecage, neither have they provided any direction for the doctrine. With the exception of air crash disaster litigation, very few courts have provided access for application of the doctrine. Thus, one reason for the courts' failure to embrace the use of depecage in choice-of-law analyses is the lack of precedent available from higher authority.

There are few written legal opinions from appellate and supreme courts which concern the doctrine of depecage. In fact, the U.S. Supreme Court has never used the term depecage in a written opinion.[146] Conflicts as a whole has been abandoned by the Supreme Court flowing from the recognition of the difficult and complex nature of conflict of law issues, and from the Court's current views to err on the side of federalism rather than nationalism.[147] Almost as lacking are written opinions from the circuit court of appeals. Only twenty-three circuit court of appeals written opinions exist which have used the term depecage, while there are literally hundreds of opinions written by the court of appeals which discuss choice of law.[148] State supreme courts have not fared much better in explaining the doctrine of depecage.[149]

Unfortunately, some courts have used a form of depecage without expressly stating so, or explaining the reasoning and source behind their analysis. In *Allen v. Great American Reserve Insurance Co.*, the Indiana Supreme Court applied a form of depecage without expressly stating so.[150] Thus, when courts look to Indiana's choice-of-law rule, they are left in a state of uncertainty. Choice-of-law analysis is difficult enough without courts implementing legal rules which lead to a lack of clarity and continuity. In *Allen*, North and South Carolina insurance agents brought an action against the life insurer, Great American Reserve Insurance Co. ("GARCO") and the general agent, Glen Guffey, for

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145. *See id*.

146. Search performed on February 25, 2003 of WestLaw databases "SCT" and "SCT-OLD" using search term "depecage."

147. Roosevelt, *supra* note 125, at 2503-04.

148. Search performed on February 25, 2003 of Westlaw database "CTA" and "CTA-OLD" using search term "depecage."

149. *See* Allen v. Great American Reserve Ins. Co., 766 N.E.2d 1157 (Ind. 2002); *see also* Brown v. Kleen Kut Mfg. Co., 714 P.2d 942, 943-46 (Kan. 1986) (claiming to adhere to *lex loci delicti* while separating out issues of successor corporation liability and tort law).

150. *Allen*, 766 N.E.2d at 1157.

misrepresentations about front-end load annuities.[151] Twelve counts were asserted against the two defendants alleging claims for breach of contract, fraud, Indiana Crime Victims Relief Act, Indiana statutory fraud, Indiana statutory deception, Indiana criminal mischief, North Carolina unfair trade practices, South Carolina unfair trade practices, civil conspiracy, tortious interference with a business relationship, negligence, indemnification, and accounting.[152] The Indiana Supreme Court reversed the trial court's application of South Carolina law to all of the claims.[153] In so ruling, the *Allen* court held that

> because the parties hail from different states, and because many of the activities in question occurred in different states, this case raises significant choice of law issues. In analyzing each of the counts of the plaintiffs' complaint, it is first necessary to determine which state's law applies to that count. The answer may differ for different counts and may differ between defendants as to a single count.[154]

In applying this rule, the court used various state's laws to different counts, and used the Restatement factors to analyze the contacts of the various states.[155] For example, plaintiffs' count I claim against GARCO for breach of a covenant of good faith implied in their contracts with GARCO was controlled by Indiana law.[156] Conversely, plaintiffs' count I claim against Guffey for a breach of the duty of good faith and fair dealing arising from the agency relationship itself, apart from any claims of breach of contract, was governed by South Carolina law.[157]

At first glance, it appears clear that *Allen* embraces the principles of depecage. However, *Allen* never uses the term "depecage," nor does it state that it is applying different state's law to different issues. *Allen* only purported to apply different state's law to different counts and different parties, and did not go so far as to separate out issues of damages and liability.[158] What then is

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151. *Id*. at 1160-61.

152. *Id*. at 1162-70.

153. *Id*. at 1161-62, 1170.

154. *Id*. at 1162.

155. RESTATEMENT (SECOND) OF CONFLICTS § 145 (1971).

156. *Allen*, 766 N.E.2d at 1162.

157. *Id.* at 1163.

158. Simon v. United States, 341 F.3d 193, 201 (3d Cir. 2003) ("*Allen* was a routine application of different choice-of-law analyses to different *counts*, as opposed to different issues within a single count."). Indiana may be forced to clarify its choice-of-law rule as *Simon* has certified two questions, which have arisen out of *Schalliol*, to the Indiana Supreme Court. First, the Indiana Supreme Court is to determine if a true conflict exists between Indiana's and the District of Columbia's choice-of-law rules. *Id.* at 205. In other words, the court must decide if Indiana recognizes depecage. *Id.* at 195-96. Secondly, the court must decide "how to resolve a split among the *Hubbard* factors in choosing a jurisdiction's substantive law when one factor points toward Indiana, another toward Pennsylvania, and the third is indeterminate . . . ." *Id.* at 205. The Indiana Supreme Court's rulings on these certified questions could significantly reshape Indiana's choice-

Indiana's stance on depecage? Part of the problem lies with Indiana's partial adoption of the Restatement (Second) of Conflicts. Indiana has never expressly adopted the Restatement as a whole but has established a modified *lex loci delicti* standard that looks first to the place of the tort to determine if there is any significant connection to the legal action.[159] However, in Indiana's defining choice-of-law case, *Hubbard Manufacturing Co. v. Greeson*, the court did adopt the Restatement section 145, which specifically states that "[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state . . . with respect to that issue . . . ."[160] Indiana is left in a state of uncertainty as to what its choice-of-law rule really is.

Indiana is not alone in failing to clearly set forth a framework for the use of depecage. Nevada, which is also a "twilight zone" state somewhere between *lex loci delicti* and the Restatement (Second) of Conflicts analysis, has also failed to grasp an opportunity to give guidance to lower courts concerning the doctrine of depecage. In *Northwest Pipe Co. v. Eighth Judicial District Court*, the court failed to embrace the concept of depecage.[161] The underlying actions in *Northwest Pipe* arose from an accident that occurred on a highway in San Bernardino County, California, when three concrete pipes weighing several tons fell off a Northwest Pipe Company truck and struck several vehicles. Six individuals were killed: two Nevada residents, and four California residents.[162] Northwest Pipe Company was an Oregon corporation doing business throughout the United States.[163] Suit was brought in Nevada, and Nevada's choice-of-law rule found in *Motenko v. MGM Distributor Inc*. was used.[164] *Motenko* held that the law of the forum should apply unless two or more of the four factors enumerated in the Restatement section 145 show that another state has an overwhelming interest in the litigation.[165] The court in *Northwest Pipe* was deeply divided, with two justices concurring in part and dissenting in part, and two justices dissenting.[166] The majority opinion held that Nevada law should be applied to all plaintiffs; however, the dissenters comprised a majority as to the California plaintiffs and held that California law should be applied to those cases.[167] Surprisingly, none of the justices in *Northwest Pipe* even mentioned the possibility of applying depecage; yet in a sense this is what the court did in applying the law of California to the California plaintiffs. True depecage in this case would have looked something like this: 1) as to issues of liability, California

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of-law rule.

159. Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071, 1074 (Ind. 1987).

160. *Id*.; RESTATEMENT (SECOND) OF CONFLICT OF LAWS: THE GENERAL PRINCIPLE § 145 (1971).

161. *See* Northwest Pipe Co. v. Eighth Judicial Dist. Court, 42 P.3d 244, 245-46 (Nev. 2002).

162. *Id*. at 245.

163. *Id*.

164. *Id*.; Motenko v. MGM Distrib. Inc., 921 P.2d 933 (Nev. 1996).

165. *Motenko*, 921 P.2d at 935.

166. *Northwest Pipe Co.*, 42 P.3d at 246, 249.

167. *Id.* at 246, 248.

or Oregon law would apply; 2) as to issues of compensatory damages for the Nevada residents, Nevada law would apply; 3) as to issues of compensatory damages for the California residents, California law would apply. Although *Northwest Pipe* does not go into details about the possible conflicts existing between California and Nevada law, simply from a state interest stand point, depecage is a logical solution to the court's divided dilemma.

The Seventh Circuit recently ignored an opportunity to apply the doctrine of depecage in *In re Bridgestone/Firestone, Inc.*[168] In *In re Bridgestone/Firestone*, the court was concerned with the issue of whether a class action certified by the District Court for the Southern District of Indiana met the commonality and superiority requirements of Federal Rules of Civil Procedure 23(a), (b)(3).[169] As a part of its analysis, the court had to struggle with the choice-of-law issue because no class action is proper unless all litigants are governed by the same legal rules.[170] Using Indiana's choice-of-law rule, the district court held that Indiana would look to the headquarters of the defendants, because that is where the products were designed and where the important decisions about disclosures and sales were made.[171] This ruling meant that all claims by the Ford Explorer class would be resolved under Michigan law (Ford Headquarters) and all claims by the tire class would be resolved under Tennessee law (Firestone Headquarters).[172] Thus, appropriate uniform law would serve to satisfy the commonality requirement.

Nevertheless, the Seventh Circuit reversed the district court's ruling and held that a certifiable class did not exist because the proper choice-of-law analysis would require the court to apply fifty different state laws to the issues presented.[173] Thus, no commonality existed.[174] In so holding, the court stated that "[i]t follows that Indiana's choice-of-law rule selects the [fifty] states and multiple territories where the buyers live, and not the place of the sellers' headquarters, for these suits."[175] The court hinted that there may be a better way to approach the problem presented in *In re Bridgestone/Firestone* but failed to elaborate upon their thinking.[176] The court concluded that they were bound by what they interpreted as Indiana's *lex loci delicti* rule.[177] Put in simple terms, the Seventh Circuit failed to recognize that Indiana's choice-of-law rule, specifically *Allen v. Great American Reserve Insurance, Co.*, may well call for the use of depecage.

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168. *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 870 (2003).

169. *Id*. at 1015.

170. *Id*.

171. *Id*.

172. *Id*.

173. *Id.* at 1016, 1018.

174. *Id.*

175. *Id*. at 1018.

176. *Id.* at 1019-20.

177. *Id*. at 1016.

In so doing, the Seventh Circuit missed a perfect opportunity to promote efficient litigation, while still respecting state sovereignty. If the *In re Bridgestone/Firestone* court was truly interested in fairly compensating the injured plaintiffs, then a proper result could have been reached by applying the law of Tennessee to issues of liability against Firestone, the law of Michigan to issues of liability against Ford, and the law of each injured parties' domicile for determining the measure of damages.

This is precisely the approach the district court took in *Simon v. Philip Morris Inc*.[178] In *Simon*, the plaintiffs' core theory sounded in fraudulent concealment by the tobacco industry, and consisted of a nationwide class implicating the interests of all fifty states' laws. Some of those laws conflicted with New York's laws (Philip Morris Headquarters).[179] However, rather than applying the law of the state where the plaintiff resided or had purchased the majority of his or her cigarettes, the court applied the law of New York to issues of liability and punitive damages.[180] The court reasoned that a number of critical meetings of tobacco representatives necessary to orchestrate the scheme allegedly occurred in New York, and at least two of the companies, Lorillard and Philip Morris, Inc., had their principle places of business in New York.[181] However, the court did not end its analysis there; it applied depecage to separate issues of liability and damages. In so deciding the court stated that:

> In this action, state interests of states other than New York will be less implicated in any conflict since the court envisions transferring individual compensatory questions to each plaintiff's home district. Through the use of depecage, each claimant will rely upon his or her own state law with regard to critical individual recovery issues.[182]

The court went on to add that "[w]hile New York has a paramount interest in punishing and deterring misconduct in New York, other states have a concurrent interest in ensuring that their own citizens receive individual relief in line with their own compensatory schemes."[183]

In re Bridgestone/Firestone is analogous to *Simon* in many respects. Both cases proposed theories of fraud, both involved a single principal place of business where most of the fraudulent conduct occurred, and both involved the purchase of a nationwide product. In *Simon*, as the place where a plaintiff bought his or her cigarettes bore little significance to the litigation, so too does the place where a plaintiff bought his or her tire or vehicle control all issues in

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178. Simon v. Philip Morris, Inc., 124 F. Supp. 2d 46, 71-77 (E.D.N.Y. 2000); Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST L. REV. 979, 1012-13 (2001).

179. *Simon*, 124 F. Supp. 2d at 71.

180. *Id*. at 72.

181. *Id*.

182. *Id*. at 74.

183. *Id*. at 76.

Bridgestone/Firestone. The only possible difference between these two situations which may prevent a court from applying depecage is that in *In re Bridgestone/Firestone*, the plaintiffs were trying to avoid the return of their individual cases to the originating court.[184] If, after a determination on liability or punitive damages is reached as a certified class, the individual cases are not returned for the calculation of damages under the law of each plaintiffs' domicile, then splitting issues of liability and compensatory damages would be pointless.

With these examples of courts fumbling with the doctrine of depecage, a clear analysis of the rationale supporting depecage is needed. Those courts that are teetering on the edge of modern conflicts thinking should openly embrace depecage for the following reasons.

V. DEPECAGE: A NEEDED TOOL FOR EFFECTIVE CHOICE-OF-LAW ANALYSIS

The rationale for the "center of gravity" or "grouping of contacts" doctrine adopted by the *Babcock* court, accommodating competing state interests in tort cases with multi-state contacts, centers on justice, fairness, and achieving the best practical result. The best practical result is reached "by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."[185]

A. A Logical Basis for Depecage

The merit behind the separation of issues is that it gives to the place having the most interest in the problem paramount control over the legal issues arising out of a particular factual context, and thereby allows the forum to apply the policy of the jurisdiction most intimately concerned with the outcome of the litigation.[186]

State rules of law are promulgated for a reason. They embody social, economic, or administrative policies which can be discovered through the ordinary way courts interpret and construct laws.[187] The rule of vested rights and *lex loci delicti* are void of this process for which courts were designed. Under the archaic vested rights doctrine, courts apply a law whose underlying policy would not be furthered by its application. In truly perverse fashion, this doctrine could even operate to suppress the interest of one state without advancing the interests of the other.[188] The doctrine of depecage, on the other hand, purports that because every rule of law may have a different purpose they must be construed separately. Depecage breaks down choice-of-law problems into

184. *See In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015 (7th Cir. 2002).

185. *Simon*, 124 F. Supp. 2d at 55; Babcock v. Jackson, 191 N.E.2d 279, 281-82 (N.Y. 1963).

186. *Babcock*, 191 N.E.2d at 283.

187. Southerland, *supra* note 23, at 479.

188. *Id.*

smaller groups to facilitate more adequate analysis of underlying policies.[189]

Depecage provides the means to solve complex choice-of-law problems which may be impossible or at least extremely difficult to solve under a traditional choice-of-law framework. Splitting the choice-of-law process into as many choices of law as there are conflicting rules has the advantage of reducing the number of seemingly unsolvable conflicts which exist between two bodies of state law taken as a whole.[190] Depecage seeks to apply to each issue the rule of the state with the greatest concern in the determination of that issue. Depecage also serves to effectuate the purpose of each of the rules applied without disappointing party expectations.[191]

B. Flaws in the Counter Movement's Approach to Choice-of-Law and Depecage

The counterrevolution to modern choice of law, which seeks to return to a form of vested rights analysis, has failed to see the importance of differing state laws and how depecage minimizes true conflicts.[192] Those who still believe in vested rights and *lex loci* have stated that the Supreme Court should intervene, and still others have gone a step farther stating that Congress should enact arbitrary rules on how to decide state conflicts of law issues.[193]

The first flaw in this reasoning is that it seeks uniformity and predictability in choice-of-law analysis at any cost; the cost of which is too high.[194] Unpredictability leads to real benefits from diversity and innovation among state law.[195] "[S]tate innovation is no judicial myth. When Wyoming became a State in 1890, it was the only State permitting women to vote. That novel idea did not bear national fruit for another thirty years. Wisconsin pioneered unemployment insurance, while Massachusetts initiated minimum wage laws for women and minors."[196] Americans and our legal system have learned to live with a certain amount of unpredictability in the application of law. Uniformity through federal legislation, pertaining to choice of law, would cost citizens the ability to govern, allowing them only to administer their local problems.[197]

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189. Wilde, *supra* note 120, at 345.

190. *Id*. at 346.

191. Willis L. M. Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 60 (1973).

192. Symposium, *Choice of Law: How It Ought to Be, A Roundtable Discussion*, 48 MERCER L. REV. 639, 705 (Winter 1996) (speaking against congress becoming involved in state choice-of-law analysis).

193. *Id*. at 703-04.

194. *Id*. at 705; *see* Roosevelt, *supra* note 125; *see also* Reavley & Wesevich, *supra* note 141, at 2-8.

195. Symposium, *supra* note 192, at 705.

196. Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 788-89 (1982) (O'Connor, J., concurring in part and dissenting in part) (footnotes omitted).

197. *Id*. at 789.

Secondly, even those who want federal control over state choice-of-law analysis admit that such control should only be exerted where a true conflict exists.[198] Professor David Currie stated that he "would like to see Congress enact some rules, and . . . would be happy to have them be perfectly arbitrary—place of the wrong, if you will—but only once you conclude that there is a true conflict."[199] Some type of choice-of-law analysis must still be in place to determine what is a true conflict. Thus, the ability of depecage to isolate true conflicts between differing state's laws is still useful.

The reasoning that depecage distorts state legislative intent by picking and choosing only certain laws out of a broader area of law also contains certain flaws.[200] In *Detroit Metro*, defendant, McDonnell Douglas, argued that the alleged misconduct did not occur in California where the aircraft was partially manufactured and designed, because the three allegedly defective component parts at issue were respectively and individually designed and manufactured in Massachusetts, Missouri, and Arizona.[201] Thus, McDonnell Douglas urged the court to use three different state laws as to plaintiffs' design defect claims. The *Detroit Metro* court, however, stated that

> to pare the Plaintiffs' design defect claims into subcategories and thereby conduct a separate choice of law analysis for each component, which has been alleged to be defective, would complicate and obfuscate the complex choice of law issues in this case and would require the jury to apply various and, possibly different, product liability standards in the same case dependent upon the particular component at issue.[202]

Detroit Metro is an example of a court's recognition of where to draw the line on issue splitting. Inherent in the *Detroit Metro* court's self restraint is the notion that issue splitting can only go so far before the true meaning of a body of law is lost. As such, the court in *Detroit Metro* realized that applying three different product liability standards to the same case would have the potential to distort state interests.[203] Therefore, although there is a valid concern regarding depecage's ability to distort legislative intent, courts are able to draw the line in the sand when it comes to issue splitting, and thereby thwart any danger of contorting state interests.

Even if critics of depecage lack confidence in a court's ability to exercise self-restraint and to avoid distorting legislative intent, the use of depecage may be justified by choice-of-law rules that mandate such distortion.[204] "When a choice-of-law rule calls for application of a given rule [depecage], that rule

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198. Symposium, *supra* note 192, at 704.

199. *Id*. Professor David Currie is the son of famed choice-of-law scholar Brainerd Currie. *See id*. at 639-40.

200. *See* Allen & O'Hara, *supra* note 130; O'Hara & Ribstein, *supra* note 130.

201. Detroit Metro, 750 F. Supp. 793, 799 n.12 (E.D. Mich. 1989).

202. *Id*.

203. *Id*.

204. Reese, *supra* note 191, at 74.

should usually be applied even at the risk of distortion. To do otherwise would deprive the rule of certainty of application, which is a vital attribute of a rule of law."[205]

Claims that depecage is merely an escape device that courts can use to favor one party over another also fall short.[206] When the Supreme Court has spoken on choice of law, it has clearly stated that there are certain restrictions prohibiting arbitrary and unfair decisions on applicable law.[207] Looking to the Constitution, the Court stated that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[208] Courts are not free to pick and choose state law for the benefit of one party over another without justifying such a result within the bounds of state contacts and interests. Thus, the danger of depecage being used as an arbitrary and inequitable tool by courts is no more likely to occur than any other constitutionally prohibited legal doctrine.[209]

Finally, depecage has been criticized for its inability to resolve true conflicts (where more than one state has an interest in seeing its law applied).[210] However, depecage does not purport to be a uniform solution to true conflicts of law. The value of depecage is its ability to enable courts to target their consideration of interests and policies more precisely.[211]

C. Depecage: A Solution for a Legal Impossibility

Depecage is essential for several reasons, but most importantly, there may be some unique situations where its use is imperative. *Schalliol v. Fare* provides the perfect example of the necessity of depecage by demonstrating a situation where failing to apply depecage leaves a court with a legal impossibility.[212] Further analysis of *Schalliol* may allow courts to rethink the importance of depecage in our legal system.

Schalliol involves a plane crash and the subsequent deaths of the pilot, John Fare, Sr., and three passengers. Dennis Schalliol and B. Kenin Hart were passengers on the plane, whose personal representatives of their estates brought

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205. *Id*.

206. *See* Gaston, *supra* note 138.

207. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818-19 (1985).

208. *Id*. at 818 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)).

209. The real threat of arbitrary and unfair application of state law exists in a single designated jurisdiction rule whereby state interests are disregarded and parties either are overcompensated or under compensated. *See* Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Litigation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76, 87-90 (1989).

210. *See* Roosevelt 125, at 2463.

211. Peterson, *supra* note 7.

212. *See* Schalliol v. Fare, 206 F. Supp. 2d 689 (E.D. Pa. 2002); *see also* Simon v. United States, 341 F.3d 193 (3d Cir. 2003).

legal actions. The estates claimed negligence on the part of FAA(United States) air traffic controllers in Indianapolis, and FAA(United States) offices in Washington, D.C. Mary Schalliol, widow of Dennis and personal representative of his estate also brought negligence claims against the pilot John Fare, Sr., and the owner and operator of the aircraft, Hart Delaware Corporation.[213] As to those claims against the United States, the United States filed a motion for determination of choice of law claiming that under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, the law of Indiana applied to all aspects of those actions brought by plaintiffs against the United States.[214] The Eastern District Court of Pennsylvania ruled in favor of the United States' motion stating "that Indiana substantive law applies to all claims pled against the United States under the FTCA."[215] However, the court certified its ruling for immediate appeal to the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b).[216]

Schalliol presents numerous contacts with multiple states. While in flight, Pilot Fare contacted an air traffic controller at the Indianapolis Air Route Traffic Control Center, who cleared him for landing via the Simplified Directional Facility approach at Runway 4 (SDF 4) at the Somerset, Kentucky airport. Pilot Fare also possessed an Instrument Approach Procedure (IAP) for the SDF 4, which was published by the United States, in Washington, D.C., and contained information stating that the approach was in service. However, the navigational facility supporting the SDF approach was out of service indefinitely.[217] Due to a combination of these factors the pilot flew into a radio tower striking the aircraft's right wing and hitting the ground several hundred feet beyond the tower.[218] At the time of the accident, the domiciles of the majority of the *Schalliol* plaintiffs were Pennsylvania. Mary and Dennis Schalliol, and Ken Hart, were residents of Pennsylvania, while John Fare, Sr., whose son John Fare, Jr. filed a cross-claim against the United States, resided in New Jersey.[219]

In their various claims against the United States, plaintiffs contended that the publication of the IAP was negligent. All parties agreed that any such negligence occurred in Washington, D.C. Plaintiffs also alleged that the air traffic controllers were negligent, and all parties agreed that any such negligence of the controllers, including any failure to monitor the aircraft or to supervise personnel, occurred in Indiana.[220] Finally, all parties agreed that any negligence of Pilot Fare occurred in Ohio and Kentucky.[221]

One of the reasons *Schalliol* presents such a complex choice-of-law problem is because all parties agreed that, as to claims against Fare and Hart Delaware,

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213. *Id*. at 691-93.
214. *Id*.
215. *Id*. at 691.
216. *Id*.
217. *Id*. at 691-92.
218. *Id*.
219. *Id*. at 700.
220. *Id*. at 692.
221. *Id*.

Pennsylvania law applies.[222] The reason being that Hart Delaware, the owner and operator of the plane, along with its sole employee, pilot Fare, have their principal place of business in Philadelphia, Pennsylvania.[223] This problem is further complicated by the fact that in claims against Hart Delaware and John Fare, Sr., a jury is the trier of fact, where as to claims against the United States, the judge is the trier of fact.[224]

With all of these multiple parties, contacts and interests, *Schalliol* appears to be a perfect candidate for applying depecage. Why then did the district court decline to apply the principles of depecage to *Schalliol*? The court, using Indiana's choice-of-law rule, agreed with the United States that Indiana courts, having never before explicitly applied depecage, would not apply depecage in the case at bar, and declined to infer a significant choice-of-law principle into Indiana law.[225]

Indiana evaluated the Restatement (Second) of Conflicts section 145 under *Hubbard Manufacturing Co. v. Greeson*.[226] *Hubbard* is the seminal choice-of-law case in Indiana. In *Hubbard*, Indiana adopted the factors enumerated in section 145, but arguably never specifically endorsed or applied the concept of depecage.[227] Nowhere in *Hubbard* does the court use the term depecage, nor did the court expressly separate out legal issues such as liability and damages.[228] *Hubbard* involved the job-related death of an employee in Illinois who was using a lift manufactured in Indiana.[229] Despite the fact that injury took place in Illinois, the court applied Indiana law. However, in so doing, the court applied Indiana law to damages as well as liability, even though Illinois was the site of the job-related death and of the job itself, as well as the provider of workmen's compensation to the survivors.[230]

The *Hubbard* test begins with the presumption that the substantive law of the place where the tort or place of injury occurred governs the case.[231] However, if the place of the tort bears little connection to the legal action, Indiana follows the most significant relationship test based on the Restatement section 145.[232] The factors for this significant relationship test include: 1) the place where the conduct causing the injury occurred; 2) the residence and place of incorporation

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222. Appellant's Brief at 3, *Schalliol* (No. 02-3996).

223. *Schalliol*, 206 F. Supp. 2d at 701 n.34.

224. 28 U.S.C. § 2402 (2002) ("[A]ny action against the United States under section 1346 shall be tried by the court without a jury . . . .").

225. *Schalliol*, 206 F. Supp. 2d at 700. *See also* Simon v. United States, 341 F.3d 193, 205 (3d Cir. 2003) (certifying questions for the Indiana Supreme Court to answer concerning the clarification of Indiana's choice-of-law rule).

226. Hubbard Mfg. Co., Inc. v. Greeson, 515 N.E.2d 1071, 1073-74 (Ind. 1987).

227. *See generally id.* (failing to mention the possibilities for issue splitting).

228. *Id.*

229. *Id*.

230. *Id*.

231. *Id*. at 1073.

232. *Id*. at 1074.

and place of business of the parties; and 3) the place where the relationship between the parties is centered.[233]

In applying *Hubbard* to *Schalliol*, the court decided that Indiana law must apply to all aspects of plaintiffs' claims against the United States for the negligent actions of their air traffic controllers sitting in Indianapolis.[234] The court reasoned that the place of the accident, Kentucky, bore little connection to the legal action concerning plaintiffs' claims against the United States' air traffic controllers.[235] Turning to the "place where the conduct causing the injury occurred," the court decided that the negligent actions of the air traffic controllers in Indiana most directly affected the aircraft's approach and subsequent destruction.[236] The court then admitted that the domiciles of the majority of the decedents were in Pennsylvania, but refused to apply Pennsylvania law to compensatory damages.[237]

However, on appeal the Third Circuit found that "*Hubbard* gives no guidance as to which factor is most important or how to 'break a tie,' so any decision by this court on which substantive law Indiana would apply would be little more than a guess."[238] In applying the *Hubbard* factors, the appellate court determined that "the first points to Indiana, the second to Pennsylvania, and the third is indeterminate."[239] The appellate court, therefore, certified questions for the Indiana Supreme Court to answer concerning the clarification of Indiana's choice-of-law rule.[240]

Schalliol presents a situation where depecage must be applied to reach a logical solution. Without its application the result creates a legal impossibility. Indiana law cannot apply to all aspects of the plaintiffs claims against the United States because to allow it would create an irreconcilable conflict, with the entry of a final judgment. All parties, including the United States, agreed that in Mary Schalliol's case, on behalf of her deceased husband, the law of Indiana applies, while against Fare and Hart Delaware, the law of Pennsylvania applies.[241] As a result of this agreement, it will be necessary to instruct a jury on the measure of damages in Pennsylvania, as well as an instruction on who, under Pennsylvania law, may recover for the wrongful death of Dennis Schalliol. Similarly, the jury will need to know how to apportion those damages to the different parties. In regards to Fare/Hart, the jury would use Pennsylvania's law of comparative fault coupled with joint and several liability.[242]

At the same time that the jury is deciding Schalliol's claims against Fare and

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233. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971).

234. *Schalliol*, 206 F. Supp. 2d at 700.

235. *Id.*

236. *Id.*

237. *Id*.

238. Simon v. United States, 341 F.3d 193, 205 (3d Cir. 2003).

239. *Id.*

240. *Id.*

241. *See supra* note 222.

242. *See* 42 PA. CONST. STAT. ANN. §§ 8322, 8324 (2002).

Hart Delaware, the judge as the trier of fact[243] will consider Indiana's laws for the measure of damages, who may recover, and the apportionment of such damages. The judge will use Indiana's rule of comparative fault (with no joint and several liability).[244] Even though the jury is only determining the liability of Fare and Hart Delaware, their decision under Pennsylvania law as to what percentage Fare and Hart are at fault will automatically determine the fault of the United States. For example, if the jury finds Fare/Hart ten percent at fault, the fault of the United States is then ninety percent. This is due to the fact that there is no question of contributory negligence on the part of Dennis Schalliol, an innocent passenger. The total fault between the defendants must equal 100%.

Without the use of depecage, an irreconcilable conflict exists between Pennsylvania and Indiana law as to whether the adult, independent children of Dennis Schalliol may recover damages. Under Pennsylvania law, adult independent children may recover,[245] while under Indiana's wrongful death act, only dependent children may recover.[246] Thus, the problem of applying Indiana law as to all issues surround the United States and Pennsylvania law as to all issues surrounding Hart Delaware and the Fare Estate is two tiered. First, Pennsylvania permits joint and several liability while Indiana does not.[247] Secondly, Pennsylvania permits different elements of damages and allows different people to recover than is allowed under Indiana law.[248]

If the district court's ruling in *Schalliol* is followed, applying Indiana law to all issues against the United States, then there is a possibility for plaintiff Schalliol to either be over or under compensated.[249] Assume that under Pennsylvania law, the jury returns a $5 million verdict broken down as follows: $4 million to Mary Schalliol; $1 million awarded to decedent Dennis Schalliol's adult independent children; and fault allocation of ninety percent to the United States and ten percent to Fare/Hart Delaware.

If the judge adopts the jury's findings concerning damages and fault apportionment, overcompensation occurs when the award to the adult independent children of Dennis Schalliol is taken into consideration. In the hypothetical, Dennis Schalliol's children are entitled to receive $1 million under

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243. *See* 28 U.S.C. § 2402 (2002); Hamm v. Nastka Barriers, Inc., 166 F.R.D. 1, 2 (D.C. 1996).

244. IND. CODE §§ 34-51-2-8, 34-51-2-12 (2002).

245. 42 PA. CONST. STAT. ANN. § 8301 (2002); Burchfield v. M.H.M. P'ship, 43 Pa. D. & C.4th 533, 542-43 (C.P. 1999).

246. IND. CODE § 34-23-1-1 (2002).

247. *Compare* 42 PA. CONST. STAT. ANN. §§ 8322, 8324 (2002), *with* IND. CODE §§ 34-51-2-8, 34-51-2-12 (2002).

248. *Compare* 42 PA. CONST. STAT. ANN. § 8301 (2002); *Burchfield*, 43 Pa. D. & C.4th at 542-43, *with* IND. CODE § 34-23-1-1 (2002).

249. Similar problems exist between Pennsylvania's allowance of an award for conscious pain and suffering and pre-impact fear, and Indiana's bar of such awards. *Compare* IND. CODE § 34-9-3-4 *and* Estate of Sears v. Griffin, 771 N.E.2d 1136, 1138 (Ind. 2002), *with* Williams v. S.E. Pa. Transp. Auth., 741 A.2d 848, 859 (1999).

Pennsylvania law, but not under Indiana law. Therefore, the children would not be able to recover any of their award from the United States. Nevertheless, because Pennsylvania allows joint and several liability,[250] the Schalliol children would still be able to collect the full $1 million from Fare/Hart Delaware. Thus, if under Pennsylvania law, the Schalliol children collect the full $1 million from Fare/Hart, the total award jumps to $5.5 million ($1 million to Schalliol children awarded by jury plus $4.5 million to Mary Schalliol awarded by judge), while both the judge and jury found the total award to be only $5 million.

One possible solution to this conundrum is for the judge to only award Fare/Hart Delaware's portion of damages as determined by the jury. Thus, under the hypothetical posed above, the most that the Schalliol children could receive from Fare/Hart Delaware is $500,000 (ten percent of $5 million). This would solve the problem of the excessive total award as it would equal $5 million ($500,000 plus $4.5 million). However, now there exists a problem of under compensation. The jury awarded the Schalliol children $1 million, but they are only able to collect half of that amount. The Schalliol children should be able to recover their award of $1 million from either joint tortfeasor, the United States or Fare/Hart Delaware. The essence of joint and several liability is that a plaintiff is allowed to obtain all or part of a judgment from any defendant.[251] Therefore, Pennsylvania requires that plaintiffs be allowed to collect any and/or all damages from any joint tortfeasor. Applying joint and several liability to less than all defendants severely undermines Pennsylvania's laws and interests and significantly burdens either the plaintiff or those joint tortfeasors who are subject to joint and several liability.

What then is the solution to such irreconcilable conflict between two states laws? Depecage is the answer. Instead of applying Indiana law to all issues regarding Schalliol's claims against the United States, the court should have separated out three issues: 1) negligence; 2) joint and several liability; and 3) compensatory damages. Under a Restatement section 145 analysis, Indiana's elements of negligence should apply to the United States since Indiana is where the most direct cause of the aircraft's fatal crash occurred. As to issues of compensatory damages, the law of the decedent's domicile, Pennsylvania, should govern. The issue of joint and several liability is a bit trickier. Joint and several liability is a common law negligence principle; however, it has a direct correlation to the apportionment of damages.

Indiana has an interest in applying its law to protect those doing business within its borders from the daunting concept of joint and several liability, while Pennsylvania has an interest in seeing its residents fully compensated. The question is which state's law should yield? Several arguments could be made about whose law should apply to this issue. Some of those arguments include: 1) apply Indiana law to the issue of joint and several liability because the court is using Indiana's choice-of-law rule; 2) apply Pennsylvania law because the

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250. 42 PA. CONST. STAT. ANN. §§ 8322, 8324 (2002).

251. *See* L.B. Foster Co. v. Charles Caracciolo Steel & Metal Yard, Inc., 777 A.2d 1090, 1095 (Pa. Super. 2001).

forum's law should prevail in a true conflict; 3) apply Pennsylvania law because Indiana's interest in seeing its law apply to a federal entity operating within its boarders is not as strong as the Pennsylvania's interest in seeing its law applied to its residents. To argue within the rules, any one of these arguments may be offered by the parties, but there is an argument to be made which does not fall within the normal interest analysis framework. For the law to function, Pennsylvania law must apply to the United States on the issue of joint and several liability. If it does not apply, then the court is faced with the irreconcilable conflict posed above.

This functional analysis has been used sparsely by other courts[252] and should be given consideration in the unique situation presented in *Schalliol*. Such a test should consist of factors such as ensuring "certainty, predictability and uniformity of result" and "ease of application of law to be applied . . . ."[253] A functional analysis of the law may in some instances "break the tie" between two states' equal interests in seeing their own law applied. In *Schalliol*, for the court to be able to enter a final judgment that fairly compensates parties and respects state interests, Pennsylvania law must be applied to the issue of joint and several liability.

Regardless of the approach used in deciding which state's law to apply when a true conflict exists, depecage is still an essential element. Depecage serves to minimize true conflicts by separating out and focusing in on only those issues where a true conflict exists. In examining *Schalliol*, it would be easy to say that a true conflict exists between the law of Indiana and Pennsylvania. However, a true conflict does not exist between every aspect of Indiana and Pennsylvania law. Depecage dissects state law to determine exactly where the true conflict exists.

Depecage may serve its purpose of limiting the number of true conflicts between state laws in many different settings. Although courts justify their use of depecage as a means of best respecting the interests of all states in the resolution of a multi-state controversy, permitting them to give effect to the interests of more than one state in each case, depecage does not necessarily have to coincide with interest analysis.[254] Depecage can be more than just a part of interest analysis because its true utility lies in its ability to lessen conflicts through separating out issues. So long as a court has not adopted a uniform rule that the law of the state where the tort occurred governs or that the law of the forum must govern, depecage is adaptable to any choice-of-law analysis.

Depecage is most often applied in complex situations, but arguably should be used in simple cases as well. Whether for ordinary or complex cases, the choice-of-law rules used to define substantive rights should be the same.[255] For example, depecage may be applied in marriage and divorce recognition. It is realistic to construct a coherent approach to choice of law in the area of validity

252. Clawans v. United States, 75 F. Supp. 2d 368, 375 (D. N.J. 1999).

253. *Id*.

254. Reavley & Wesevich, *supra* note 141, at 50 n.184.

255. Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 549 (1996).

of marriage through depecage, splitting the traditional category into smaller units, each restricted to genuinely related issues. "It has been propounded that for each delineated category there needs to be a separate connecting factor designed to make a policy-based link between all the related issues in the category and the abstractly defined state whose law is to apply."[256]

Cases do not have to fall into the typical complex fact pattern for depecage to be applied. In *Ruiz v. Blentech Corp.*, the court applied depecage to a situation where only two states and two parties were involved.[257] The plaintiff, a citizen of Illinois, suffered an injury in his home state from an allegedly defective product manufactured in California by a California corporation. The manufacturer had dissolved, but another California corporation followed in its footsteps by purchasing its principal assets and continuing its business. The plaintiff sought recovery under a successor corporation theory, with Illinois and California differing on the rules for determining when one corporation is responsible, as a successor, for the tort liabilities of its predecessors. The court used depecage to separate the issues of successor liability and tort liability and ruled that California law would apply to the issue of corporate successor liability while Illinois law would govern the actual tort.[258]

A broader use of depecage with adequate recognition for the legal analysis being performed would help to clear up the feared complexity that depecage brings to the table. As a result, courts might realize the benefits that come from embracing complexity through the use of depecage.

CONCLUSION

An incredible shift in choice-of-law analysis has taken place over the past one-hundred years. Many great legal minds have tried to develop a conflicts of law theory that avoids the arbitrary nature of *lex loci delicti* when choosing whose law to apply. In foregoing *lex loci delicti* and its process void of any legal analysis, courts have opened themselves up to complexity. Counting contacts, considering governmental interests, and determining reasonable expectations call for complicated legal analysis by courts. While at first glance, it appears that depecage adds to the complexity, in reality depecage allows courts to limit the number of true conflicts among two differing bodies of law. Instead of laying a blanket over a multi-faceted choice-of-law problem, depecage dissects the problem eliminating issues presenting false conflicts and leaving only those issues where true conflicts exist. Thus, justice, fairness, and efficiency in achieving the best practical result are attained.

Depecage is not only a helpful tool in choice-of-law analysis, it may be an essential tool to resolving what seems to be a legal impossibility. Although

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256. Alan Reed, *Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules,* 20 N.Y.L. SCH. J. INT'L & COMP. L. 387, 423-24 (2000).

257. Ruiz v. Blentech Corp., 89 F.3d 320, 325-26 (7th Cir. 1996).

258. *Id.*

consisting of many different parts, our legal system is designed to function as a whole. When bodies of law conflict in such a way as to threaten this functionality, a solution must be found. Through the separation of legal issues, depecage allows entirely different bodies of law to function while still honoring the interests of each.