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ABSTRACT

Most state rules of substantive law, whether legislative or judicial, ordinarily adjust rights and obligations among local parties with respect to local events. Conventional choice of law methodologies for adjudicating disputes with multistate connections all start from an explicit or implicit assumption of a choice between such locally oriented substantive rules. This article reveals, for the first time, that some state rules of substantive law ordinarily adjust rights and obligations with respect to parties and events connected to more than one state and only occasionally apply to wholly local matters. For these rules I use the term "nominally domestic rules having preponderantly multistate application." For choice of law cases presenting conflicts between such nominally domestic rules I use the term "preponderantly multistate cases."

As courts and scholars so far have failed to perceive the category of preponderantly multistate cases they have failed to appreciate their qualitative difference from cases presenting a choice between only locally oriented rules of law. This article describes preponderantly multistate cases and critiques the myriad ways in which courts have applied conventional choice of law methodologies to decide one category of these cases—those involving successor corporation products liability. The critique demonstrates why a court choosing between nominally domestic rules in a preponderantly multistate case never should use con-

* Professor of Law and Allan Axelrod Scholar, Rutgers Law School. This article is dedicated to the late Professor Herma Hill Kay whose teaching initiated my lifelong fascination with Conflict of Laws. My thanks go to the participants in the Rutgers Faculty Colloquium Series and to Professor Kermit Roosevelt for their helpful comments on an earlier version of the article, to Alexander Fontaine for help with footnotes, and to Lee Sclar who commented upon each subsequent version of the article.

ventional choice of law methodologies. My thesis is that when a state lawmaker, whether a legislature or a court, adopts a nominally domestic rule having preponderantly multistate application, the lawmaker concomitantly makes an inherent choice always to apply that substantive rule in the state's courts. Hence, in preponderantly multistate cases the forum should not be free to ignore the lawmaker's choice of law; the forum just should apply its substantive law to all preponderantly multistate issues.

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INTRODUCTION

Johnson Machine and Press Company, an Indiana corporation, manufactured Johnson Mechanical Presses at its Indiana plant. Workers from Massachusetts to California suffered injuries from

the presses[1] long after 1956 when Johnson sold all its assets to Amsted Industries, Inc., a Delaware corporation, and dissolved.[2] Amsted intended to manufacture Johnson Mechanical Presses at the same Indiana plant but it sought to avoid succeeding to Johnson's products liability by structuring the acquisition of Johnson as a purchase of Johnson's assets rather than as a merger or purchase of Johnson's stock.[3] Amsted no doubt expected to be protected against such liability by a common law rule of no successor liability

1. The geographic distribution of states reflects cases that either are reported or are referred to in other sources. Poole v. Amstead [sic] Indus., Inc., 575 F.2d 1338 No. 76-2652 (6th Cir. May 22, 1978), *aff'g* No. 1-76-75 (E.D. Tenn. Oct. 5, 1976); Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136, 138 (E.D. Mich. 1979); Diaz v. South Bend Lathe Inc., 707 F.Supp. 97, 98 (E.D.N.Y. 1989); Verhein v. South Bend Lathe, Inc., 448 F.Supp. 259, 260 (E.D. Wis. 1978); Ortiz v. South Bend Lathe, 120 Cal. Rptr. 556, 557 (Cal. Ct. App. 1975); Johnston v. Amsted Indus., Inc., 830 P.2d 1141, 1142 (Colo. Ct. App. 1992); Manh Hung Nguyen v. Johnson Machine & Press Corp., 433 N.E.2d 1104, 1105 (Ill. App. Ct. 1982); Hernandez v. Johnson Press Corp., 388 N.E.2d 778, 779 (Ill. App. Ct. 1979); Jones v. Johnson Machine & Press, 320 N.W.2d 481, 482 (Neb. 1982); Simoneau v. South Bend Lathe, Inc., 543 A.2d 407, 407 (N.H. 1988); Ramirez v. Amsted Indus., Inc. 431 A.2d 811, 812 (1981); McGaw v. South Bend Lathe, Inc., 598 N.E.2d 18, 20 (Ohio Ct. App. 1991); Burr v. South Bend Lathe, Inc., 480 N.E.2d 105, 106 (Ohio Ct. App. 1984); Fish v. Amsted Indus., 376 N.W.2d 820, 821–22 (Wis. 1985); Dayton v. Peck, Stow & Wilcox Co., 739 F.2d 690, 694 (1st Cir. 1984) (referring to Perez v. Amsted Indus., Inc., No. 57728 (Mass. Super. Ct. Apr. 20, 1984)); Segelman v. Amsted Indus., Inc., No. 666783 (Mass. Super. Ct. Oct. 18, 1978)).

2. The description of the corporate succession in the text has been simplified. Actually, Johnson sold all its assets, including its Indiana manufacturing plant, to Bontrager Construction Company, an Indiana corporation, in 1956. Johnson immediately ceased its manufacturing activities but remained in existence as a corporate shell until 1965, when it dissolved in accordance with the Indiana General Corporation Act. *Ramirez*, 431 A.2d at 814.

Bontrager, which expressly assumed all of Johnson's liabilities, continued to manufacture presses under the Johnson Press name at the Indiana plant. In 1962 Amsted bought, for cash, all of Bontrager's assets, including the Johnson Press assets Bontrager had acquired in 1956. From 1962 until 1975, Amsted manufactured the Johnson Press line through South Bend Lathe, a wholly owned subsidiary that Amsted dissolved in 1965 but continued to operate as an unincorporated division. *Fish*, 376 N.W.2d at 822.

In 1975, Amsted sold the Johnson Press assets it had acquired from Bontrager to LWE, Inc., an Indiana corporation, and ceased manufacturing the Johnson Press line. Amsted expressly agreed to indemnify LWE for any liability claims arising out of defects in the Johnson Press line. LWE, which changed its name to South Bend Lathe, Inc., currently manufactures the Johnson Press line in Indiana. This corporation is an entirely different entity from the former South Bend Lathe subsidiary and division of Amsted. *Id.* The sales of the Johnson Press line assets to Bontrager and LWE are not relevant to the choice of law issues in this article.

3. In addition, the asset sale contract expressly provided that Amsted did not assume Johnson's products liability for presses manufactured before the acquisition. *Id.*.

when a successor corporation purchases its predecessor's assets.[4]

4. Under the no successor liability rule, when one corporation (the "predecessor") sells or otherwise transfers its assets to another corporation (the "successor"), the successor is not responsible for the predecessor's liabilities unless one or more of the following exceptions apply: (1) the transaction is entered into fraudulently for the purpose of avoiding such liabilities; (2) the successor expressly or impliedly agrees to assume such liabilities; (3) the transaction amounts to a merger or consolidation; or (4) the successor is merely a continuation of the predecessor. 15 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 7122 (rev. perm. ed. 2020) [hereinafter 15 FLETCHER]. *See also, e.g.*, citations to § 7122 of Fletcher in Santa Maria v. Owens-Illinois, Inc., 808 F.2d 848, 856 (1st Cir. 1986); Morgan v. Havir Mfg. Co., 887 F. Supp. 759, 761 (E.D. Pa. 1994); Ray v. Alad, 560 P.2d 3, 7 (Cal. 1977); Nissen Corp. v. Miller, 594 A.2d 564, 556–66 (Md. 1991); Ramirez v. Amsted Indus., 431 A.2d 811, 815 (N.J. 1981); Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129, 1132 (Ohio 1993).

The first two exceptions have not been at issue in the successor corporation products liability cases. *See* Jerry J. Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. REV. 906, 908 (1983) (maintaining that fraudulent transfers are rare, and that transferees easily can craft purchase agreements so as to avoid express assumption of debts).

Courts have, however, differed about the kinds of transactions that properly should fall within the third and fourth exceptions, both of which focus principally on the structure of corporate ownership and operations. According to Phillips, these two exceptions are not readily distinguishable, however "the central issue is whether the purchasing corporation effectively has become the selling corporation by acquiring not only the latter's assets but also its entire business." *Id*. at 909.

Courts imposing liability under these exceptions commonly are said to have applied either the "de facto merger" or "mere continuation" exceptions. Under the former, the relevant factors are: (1) continuity of shareholders; (2) continuity of management, personnel, physical location, assets and business operations; (3) assumption by the successor of the obligations of the predecessor that are necessary for uninterrupted business operations; and (4) cessation by the predecessor of business operations followed by liquidation and dissolution. 15 FLETCHER, *supra*, § 7124.20. *See also, e.g.*, Diaz v. South Bend Lathe, Inc., 707 F.Supp. 97, 100–01 (citing Fletcher and enumerating the factors); Shannon v. Samuel Langston Co., 379 F.Supp. 797, 801 (W.D. Mich. 1974). Under the latter exception, "[T]he indicia . . . are a common identity of stock, directors, and stockholders and the existence of only one corporation at the completion of the transfer." Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977) (defining "mere continuation exception"). *See also* 15 FLETCHER, *supra*, § 7122 n.13 (citing cases).

A fifth exception to the no successor liability rule—the "continuity of enterprise" exception—has developed from a broad interpretation of the de facto merger and the mere continuation exceptions. 15 FLETCHER, *supra* § 7123.20. The exception made its debut in Turner v. Bituminous Casualty Co., 244 N.W.2d 873, 875 (Mich. 1976). The continuity of enterprise exception retains the earlier no successor liability exceptions' focus on the extent to which the successor corporation continues the personnel and operational structure of the predecessor corporation, but rejects the requirement that the predecessor's shareholders become shareholders in the successor. Hence the determination of successor corporation products liability under the continuity of enterprise exception does not turn solely on whether the successor acquires the predecessor for stock or cash. David M. Henry, Comment, *Choice-of-Law in Minnesota Corporate Successor Products Liability: Which Rule is the "Better Rule"?*, 8 MITCHELL HAMLINE L. REV. 373, 383–84 (1985).

Amsted's corporate strategy has, however, achieved only partial success. Although courts using the no successor liability rule dismissed many cases by workers who sued Amsted on account of injuries suffered while operating Johnson Mechanical Presses,[5] Massachusetts,[6] Michigan,[7] and New Jersey[8] courts have allowed workers injured by such presses to proceed with their product liability actions against Amsted. In refusing to grant Amsted's motions to dismiss these cases, the courts replaced the no successor liability rule with what has come to be known as the product line approach—a purchaser of corporate assets who continues to manufacture the same product line as the seller of those assets succeeds to the seller's products liability.[9]

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5. Verhein v. South Bend Lathe, Inc., 448 F. Supp. 259, 260 (E.D. Wis. 1978); Ortiz v. South Bend Lathe, 120 Cal. Rptr. 556, 560 (1975) (decided before California adopted the product line theory in Ray v. Alad, 560 P.2d 3, 136 Cal. Rptr. 574 (Cal. 1977)); Johnston v. Amsted Indus., Inc., 830 P.2d 1141, 1147 (Colo. Ct. App. 1992); Manh Hung Nguyen v. Johnson Machine & Press Corp., 433 N.E.2d 1104, 1105 (Ill. App. Ct. 1982); Hernandez v. Johnson Press Corp., 388 N.E.2d 778, 779 (Ill. App. Ct. 1979); Jones v. Johnson Machine & Press Co., 320 N.W.2d 481, 484 (Neb. 1982); Simoneau v. South Bend Lathe, Inc., 543 A.2d 407 (N.H. 1988); Burr v. South Bend Lathe, Inc., 480 N.E.2d 105, 109 (Ohio Ct. App. 1984); Fish v. Amsted Indus., 376 N.W.2d 820, 821 (Wis. 1985). Amsted also prevailed in two other cases, Poole v. Amstead [sic] Indus., Inc., 575 F.2d 1338 No. 76-2652 (6th Cir. May 22, 1978), *aff'g* No. 1-76-75 (E.D. Tenn. Oct. 5, 1976); *see* Bonee v. L & M Constr. Chem., 518 F. Supp. 375, 379 (M.D. Tenn. 1981) (describing *Poole* holdings) and Segelman v. Amsted Indus., Inc., No. 666783 (Mass. Super. Ct. Oct. 18, 1978) (cited in Dayton v. Peck, Stow & Wilcox Co., 739 F.2d 690, 694 (1st Cir. 1984)).

6. Perez v. Amsted Industries, Inc., No. 57728 (Mass. Super. Ct. Par 20, 1984) (cited in Wilkerson v. C.O. Porter Machinery Co., 567 A.2d 598, 599 n.1 (1989)).

7. Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136, 144 (E.D. Mich. 1979).

8. *Ramirez*, 431 A.2d at 824–25.

9. *See* Ray v. Alad Corp., 560 P.2d 3, 11 (Cal. 1977); Pastorick v. Lyn-Lad Truck Racks, Inc., No. CV 960562426S, 1999 WL 608674, at *2–3 (Conn. Super. Ct. Aug. 3, 1999); Ramirez v. Amsted Indus., 431 A.2d at 819 (N.J. 1981); Garcia v. Coe Mfg. Co., 933 P.2d 243, 249 (N.M. 1997); Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 111 (Pa. Super. Ct. 1981); Martin v. Abbott Lab'ys, Inc., 689 P.2d 368, 388 (Wash. 1984) (en banc). *Alad* made no reference to Article XX, Section 4 of the California Constitution which provides: "The legislature shall not pass any laws permitting the leasing or alienation of any franchise, so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee, or grantee contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges." Any corporation is a franchise under that Section. Lee v. Southern Pac. R.R. Co., 47 P. 932, 932–33 (Cal. 1897).

The product line approach replaces the emphasis on continuity of the structure of corporate ownership and operations with an approach focusing principally on whether the successor has continued to manufacture the same product line as the predecessor using the same manufacturing assets. As the New Jersey Supreme Court explained in holding Amsted responsible under this approach, the expanded continuity of enterprise theory "merely broadens the inroads into the traditional principles of corporate successor non-liability" whereas the product line approach "completely abandons the traditional rule and its exceptions, utilizing instead the

As the substantive policy considerations regarding whether to retain the no successor liability rule or to adopt the product line approach have been dealt with at length elsewhere,[10] I do not in-

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policies underlying strict liability in tort for injuries caused by defective products." *Ramirez*, 431 A.2d at 819.

Courts that have applied the de facto merger or the expanded continuity of enterprise exceptions after *Alad* and *Ramirez* have done so as a compromise between the no successor liability rule and the product line approach. *See* Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 175–76 (5th Cir. 1985) (continuity of enterprise, less radical departure than product line); Diaz v. S. Bend Lathe, Inc., 707 F. Supp. 97, 102 (E.D.N.Y. 1989) (de facto merger); Andrews v. John E. Smith's Sons Co., 369 So. 2d 781, 785 (Ala. 1979) (continuity of enterprise); Turner v. Wean United Inc., 531 So. 2d 827, 830 (Ala. 1988) (continuity of enterprise).

Unless otherwise clearly indicated by the context, this article hereafter (1) uses the phrases "product line approach" and "product line rule" to mean the product line approach as specified in this note 9 plus the five exceptions to the no successor liability rule specified in note 4, *supra*; and (2) uses the phrase "no successor liability rule" to mean the no successor liability rule described in note 4, *supra* but without the five exceptions specified in note 4. Thus, the "product line approach" and the "product line rule" describe a rule providing for liability and the "no successor liability rule" describes a rule barring liability.

10. Proponents of the traditional rule emphasize the considerations in favor of free transferability of corporate assets. *See, e.g.*, Michael D. Green, *Successor Liability: The Superiority of Statutory Reform to Protect Products Liability Claimants*, 72 CORNELL L. REV. 17, 19 (1986); David B. Hunt, Case Note, *Tort Law—Towards a Legislative Solution to the Successor Products Liability Dilemma*—Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989), 16 WM. MITCHELL L. REV. 581, 581–82 (1990); David R. Langdon, *Ohio Upholds Traditional Exception to General Rule of Corporate Successor Nonliability*, 28 AKRON L. REV. 333, 334 (1995); Donna M.D. MacDonald, *Torts—Successor Corporations—Defective Products—Can the Law and Policies of Strict Liability Be Reconciled with Corporate Law Policies Which Protect Successor Corporations in Order to Respond Fairly to the Legitimate Interests of the Products Liability Plaintiff?* Nissen Corp. v. Miller, 323 Md. 613, 594 A.2d 564 (1991) (4-2 Decision), 22 U. BALT. L. REV. 147, 165 (1992) (favoring statutory solution); Mark J. Roe, *Mergers, Acquisitions, and Tort: A Comment on the Problem of Successor Corporation Liability*, 70 VA. L. REV. 1559, 1599 (1984) (searching for solution outside of traditional rule and product line approach). Proponents of the product line approach emphasize the considerations in favor of compensation for tort claimants. *See, e.g.*, Anita Bernstein, *How Can a Product Be Liable?*, 45 DUKE L.J. 1, 75–76, nn.353–55 (1995); Jon C. Dupee, Jr., *Acquisition of Goodwill: The Acid Test of Successor Liability*, 53 ALB. L. REV. 475, 510–11 (1989) (generally for expansion of successor liability); Henry, *supra* note 4 (product line is better rule); Kathryn A. Klein, *An Evaluation of the Product Line Theory of Successor Liability*, 32 ST. LOUIS U. L.J. 219, 221–22 (1987) (justifying product line approach); Phillips, *supra* note 4 (arguing for product line approach); Dale A. Stalf, *A Search for the Outer Limits to Successor Corporation Liability for Defective Products of Predecessors*, 51 U. CIN. L. REV. 117, 118 (1982) (favorable to product line, but criticizing *Ramirez* as going too far).

Roe concludes that it is not possible to adopt rules that satisfy both policy goals when the extent of potential tort liability is uncertain at the time of asset transfer. *See* Roe, *supra* at 1562–63.

The most recent article, *Successor Liability*, proposes adoption of a federal statute that would impose liability on the successor to the full extent of the predecessor's liability. John H. Matheson, *Successor Liability*, 96 MINN. L. REV. 371,

tend to enter the debate over the relative merits of these rules. What has escaped comprehensive scholarly analysis, however, is the often outcome determinative issue of the choice of law component of successor corporation products liability.

This article tackles this so far only briefly analyzed yet critical topic. It makes three important contributions: (1) it identifies and defines a newly discovered category of substantive legal rules of decision—nominally domestic rules having preponderantly multistate application; (2) it identifies and defines a newly discovered category of choice of law cases—preponderantly multistate cases involving such rules of decision; and (3) it sets forth a choice of law rule for courts to use in choosing between preponderantly multistate rules in preponderantly multistate cases. These contributions should upend how courts and choice of law scholars think about existing and future cases that fall into the newly identified and defined category of preponderantly multistate cases.

Before I discuss my proposed choice of law rule, however, I critique the various conventional methods courts[11] have employed to choose the applicable successor corporation products liability rule. Some courts have utilized territorially based jurisdiction selecting rules,[12] under which the content of the substantive laws competing for application is irrelevant to the court's choice of law process. Characterization of the case or an issue is,[13] however, a

373–74 (2011). Matheson has a section on choice of law in which he emphasizes the uncertainty successors face because some courts have applied the law of the place of injury, over which the successor has no control. *Id.* at 404. According to Matheson, the advantage to the successor of his proposed federal statute would be clarity and predictability of its obligations, enabling it to negotiate more effectively at the time of asset purchase. *Id.* at 416–18.

11. In using the term "court" or "state court" throughout this article I am including federal courts sitting in diversity.

12. Jurisdiction selecting rules are choice of law rules that select the jurisdiction whose law will provide the rule of decision in a case. According to Professor David Cavers, under traditional territorially based choice of law rules only one jurisdiction can be the source of the applicable law in a given case. David F. Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173, 178 (1933). Cavers described jurisdiction selecting rules but did not use that specific term. Professors Herma Hill Kay, Larry Kramer, Kermit Roosevelt, & David L. Franklin, in CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 16 (10th ed. 2018) [hereinafter KAY, ET AL. CONFLICT OF LAWS] use the term to describe the traditional choice of law rules, which are embodied in RESTATEMENT (FIRST) OF CONFLICT OF LAWS (AM. L. INST. 1934) [hereinafter RESTATEMENT I].

13. Characterization is the assignment of a case (RESTATEMENT I) or an issue (RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. L. INST. 1971) [hereinafter Restatement II]) to a legal category such as "corporations," "contracts," or "torts." The choice of law rules in RESTATEMENT I are organized by legal category as are the presumptive choice of law rules in RESTATEMENT II. Neither Restatement, however, contains any rules by which a court is to characterize a case or an issue.

necessary step in the analysis.[14] Not surprisingly, courts have disagreed about whether the legal category from which to derive the applicable choice of law rule for successor corporation products liability should be corporate,[15] contract,[16] or tort[17] law. Other courts have taken a functional approach,[18] which requires examination of the content of the conflicting substantive rules to identify the state policies that would be advanced by their application or impaired by

14. *See, e.g.*, Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136, 138–42 (E.D. Mich. 1979) (engaging in searching analysis that resulted in tort characterization); Bonee v. L & M Constr. Chem., 518 F. Supp. 375, 379 (M.D. Tenn. 1981) (finding issue of characterization "very important" to choice of law determination); Brown v. Kleen Kut Mfg. Co., 714 P.2d 942, 944–45 (Kan. 1986) (considering whether tort, contract or corporate law governed on the issue of liability).

15. *See, e.g.*, Webb v. Rodgers Mach. Mfg. Co., 750 F.2d 368 (5th Cir. 1985); Shannon v. Samuel Langston Co., 379 F. Supp. 797 (W.D. Mich. 1974); *Brown*, 714 P.2d at 942.

16. *See, e.g.*, Gibson v. Armstrong World Indus., 648 F. Supp. 1538 (D. Colo. 1986); Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968); Wells v. Raymark Indus., Inc., No. 84-11-Civ-J-14, 1986 WL 6638 (M.D. Fla. Mar. 13, 1985); Hendrix v. Celotex Corp., No. CV479-327, 1981 U.S. Dist. LEXIS 18132 (S.D. Ga. Apr. 28, 1981); Wessinger v. Vetter Corp., 685 F. Supp. 769 (D. Kan. 1987); Bouley v. American Cyanamid Co., Civ. A. No. 85-4368-Z, 1987 WL 18738 (D. Mass Oct. 21, 1987); Bonee v. L & M Constr. Chem., 518 F. Supp. 375 (M.D. Tenn. 1981); Woody v. Combustion Eng'g, Inc., 463 F. Supp. 817 (E.D. Tenn. 1978); *Brown* v. Kleen Kut Mfg. Co., 714 P.2d 942 (Kan. 1986); In re Asbestos Litig. (Bell), 517 A.2d 697 (Del. Super. 1986).

17. *See, e.g.*, Florom v. Elliott Mfg. Co., 867 F.2d 570 (10th Cir. 1989); Brown v. E.W. Bliss Co., 818 F.2d 1405 (8th Cir. 1987); Leannais v. Cincinnati, Inc., 565 F.2d 437 (7th Cir. 1977); Reed v. Armstrong Cork Co., 577 F. Supp. 246 (E.D. Ark. 1983); Ede v. Mueller Pump Co., 652 F. Supp. 656 (D. Colo. 1987); Hickman v. Thomas C. Thompson Co., 592 F. Supp. 1282 (D. Colo. 1984); Weaver v. Nash Int'l, Inc., 562 F. Supp. 860 (S.D. Iowa 1983); Giraldi v. Sears, Roebuck & Co., 687 F. Supp. 987 (D. Md. 1988); Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136 (E.D. Mich. 1979); Schmoll v. ACandS, Inc., 703 F. Supp. 868 (D. Or. 1988); Young v. Fulton Iron Works Co., 709 S.W.2d 927 (Mo. Ct. App. 1986); Barron v. Kane & Roach, Inc., 398 N.E.2d 244 (Ill. App. Ct. 1979).

18. Functional analysis refers to any choice of law process that takes account of the content of the substantive laws competing for application. The specific term appears to have originated with ARTHUR TAYLOR VON MEHREN AND DONALD THEODORE TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 76–79 (1965). Most modern choice of law theories contain at least an element of functional analysis. Professor Russell Weintraub utilizes the term functional analysis and defends its importance. According to Professor Weintraub:

> A functional analysis of choice of law problems describes a process that first focuses on the apparently conflicting domestic rules of two or more jurisdictions having contacts with the parties and with the transaction. The analysis then identifies the policies underlying each state's rules. The key question is: "Which states are likely to experience the social consequences that their policies are attempting to avoid if a court or arbitrator does not apply their law."

RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 14–15, 55–56 (6th ed. 2010) [hereinafter WEINTRAUB COMMENTARY].

their rejection and then to decide which policies should be paramount. Predictably, those courts have disagreed as to whether the state with the strongest interest in having the case decided according to its successor liability rule is the state of incorporation,[19] the state of making and performance of the asset sale contract,[20] or the state of the product liability claimant's residence and injury.[21] And still other courts have made no mention of choice of law, even though the cases obviously involved parties and events with relevant connections to two or more states.[22] Ultimately, none of the methods by which courts have chosen the applicable successor corporation products liability rule has been satisfactory.

In Part I of the article I assess, in conventional choice of law terms, the existing methodologies by which courts have chosen the applicable successor corporation products liability rule. This assess-

19. *See* Elmer v. Tenneco Resins, Inc., 698 F. Supp. 535, 540 (D. Del. 1988) (emphasizing that predecessor and successor were incorporated in Delaware and choosing Delaware law); Santa Maria v. Empire-Ace Insulation Mfg. Corp., CIV. A No. 80-2642-Z, 1985 WL 17645, at *4 (emphasizing that predecessor and successor were incorporated in New York and applying New York law).

20. *See* Santa Maria v. Owens-Illinois, Inc., 808 F.2d 848, 856 (1st Cir. 1986) (emphasizing the making and performance of the asset sale contract in New York and applying New York law).

21. *See, e.g.*, Travis v. Harris Corp., 565 F.2d 443, 446 (1977) (explaining that when the claimant is domiciled and injured in Indiana "Having the principal interest in the resolution of the present issues, and under its conflict of laws principles, Indiana would apply its own law."); Leannis v. Cincinnati, Inc., 565 F.2d 437, 439 (1977) ("The parties agree that Wisconsin law applies. That state being the situs of the injury and the residence of Leannis, it has the principal interest of any state in the rules of law to be applied."); Savini v. Kent Mach. Works, 525 F. Supp. 711, 715 n.5 (E.D. Pa. 1981), (". . . [I]t would appear that Pennsylvania law applies because the decedent had been injured in Pennsylvania, the decedent had been a domiciliary of Pennsylvania, and plaintiff and the heirs of decedent's estate also are domiciliaries of Pennsylvania.").

22. *See, e.g.*, Myers v. Putzmeister, Inc., 596 N.E.2d 754, 754–55 (Ill. App. Ct. 1992) (holding California successor corporation not liable, under Illinois law, for injury to Illinois plaintiff); Nissen Corp. v. Miller, 594 A.2d 564, 565–70 (Md. 1991) (examining Maryland law without considering whether Indiana or Iowa law might apply in product liability suit against defendant successor corporation with contacts in the latter two states); Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 875, 879 (Mich. 1976) (applying Michigan law to Michigan plaintiff's suit against New York corporate defendant); Harashe v. Flintkote Co., 848 S.W.2d 506, 509 (Mo. Ct. App. 1993) (deeming choice of law "peripheral"); Chem. Design, Inc. v. Am. Standard, Inc., 847 S.W.2d 488, 491–93 (Mo. Ct. App. 1993) (analyzing and applying Missouri successor corporation liability rule without addressing choice of law in the case of plaintiff Missouri company seeking indemnity from Delaware and Oklahoma defendants); Ramirez v. Amsted Indus., 431 A.2d 811, 814–17 (N.J. 1981) (applying New Jersey law to allow recovery by New Jersey plaintiffs injured in New Jersey by machine manufactured in Indiana); Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 110 (Pa. Super. Ct. 1981) (applying Pennsylvania law to allow recovery by Pennsylvania plaintiff from Connecticut corporate purchaser of assets of Connecticut manufacturer).

ment reveals that, at least as applied to successor liability, conventional choice of law analysis based on jurisdiction selecting rules and functional approaches to choice of law is deeply flawed, even disregarding the failure of conventional analysis to perceive its inapplicability to preponderantly multistate cases.

In Part II of the article I use the example of successor corporation products liability to illustrate the fundamental difference between conventional choice of law cases and preponderantly multistate cases, and to suggest a choice of law approach to cases in the latter category. Conventional choice of law cases present conflicts between what I call typical domestic rules—state law substantive rules that ordinarily adjust rights and obligations among local citizens with respect to local events[23] and only occasionally implicate parties and events in other states.[24] Preponderantly multistate cases, however, present conflicts between state law substantive rules that ordinarily adjust rights and obligations with respect to parties and events connected to two or more states and only occasionally apply to wholly local matters. I call these rules nominally domestic rules having preponderantly multistate application.

A state lawmaker, whether legislative or judicial,[25] deliberating whether to adopt or modify a typical domestic rule need not consider the rule's potential multistate implications in order to address the state's local concerns. Hence, typical domestic rules usually do not specify the extent of their applicability to non-local parties or events. Consideration of the multistate implications of typical domestic rules becomes necessary only in the small percentage of cases involving parties or events connected to two or more states, one of which has a conflicting rule. The conventional choice of law question in those few cases is whether the multistate implications of applying the forum's typical domestic rule require the court to dis-

23. The term "domestic rule" first was used by Professor Walter Wheeler Cook in Walter Wheeler Cook, *The Logical and Legal Bases of Conflict of Laws*, 33 YALE L.J. . 457, 469 (1924).

24. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 305–06 (1981) (automobile insurance law regarding "stacking" of policies covering uninsured motorists); Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 681 (N.Y. 1985) (charitable immunity to suit); Babcock v. Jackson, 191 N.E.2d 279, 280–81 (N.Y. 1963) (automobile guest statutes); Lilienthal v. Kaufman, 395 P.2d 543, 543–44 (Or. 1964) (law protecting spendthrifts). *See also* Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, *in* NEW DIRECTIONS IN LIABILITY LAW 90, 92 (Walter Olsen ed., 1988) (positing the fields of medical malpractice and municipal liability as areas where both producers and consumers probably will be local residents).

25. I use the term "lawmaker" to include state legislatures with respect to statutes and state courts with respect to common law.

place it and to apply the other state's conflicting typical domestic rule. In each case, the answer depends on the conventional choice of law methodology to which the court subscribes.[26]

A state lawmaker deliberating whether to adopt or modify a nominally domestic rule having preponderantly multistate application, by contrast, realistically cannot separate the rule's multistate implications from the state's local concerns. Consideration of such implications is integral to the lawmaker's deliberations because a preponderance of the cases to which the substance of the nominally domestic rule is addressed will involve parties and events outside the state as well as within the state. In addition, the lawmaker will have to adopt its rule not knowing at that time which contacts in a particular case will be local and which will be out of state.

A court of the adopting state should, therefore, understand the lawmaker's adoption of such a nominally domestic substantive rule as inherently prescribing the rule's application to all cases brought in that state that raise the issue to which the substantive rule is addressed regardless of the location of the parties and events in those preponderantly multistate cases. Effectively, the substantive rule embodies its own choice of law rule.

The conventional choice of law question—whether the multistate implications of applying the forum state's nominally domestic rule require displacing it and applying the other state's conflicting

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26. *Grant v. McAuliffe*, 264 P.2d 944 (1953), illustrates how different choice of law theories depend on different facts. Grant, a California resident, was injured in Arizona when the car in which he was riding collided with a car driven by Pullen, also a California resident. Pullen died several weeks later and McAuliffe was appointed administrator of his estate by a California court. Grant sued Pullen's estate to recover for his injuries.

The case presented a choice between Arizona law, under which a tort action that had not been commenced prior to the death of the tortfeasor must be abated, and California law, under which causes of action for negligent torts survived the death of the tortfeasor and could be maintained against the administrator of the estate.

McAuliffe moved to dismiss, relying on Arizona law. The trial court granted his motion. The trial court's decision was correct under the traditional rule of Restatement I § 390. It provides: "Whether a claim for damages for a tort survives the death of the tortfeasor or of the injured person is determined by the law of the place of wrong." RESTATEMENT OF CONFLICT OF LAWS § 390 (AM. L. INST. 1934). That Grant and Pullen both were Californians was irrelevant under the traditional rule.

Had the California trial court relied on a functional analysis, McAuliffe's motion would have been denied. The relevant facts were the California residence of Grant and Pullen. The purpose of California's survival rule is to prefer the victim of the decedent's negligence over the decedent's survivors in distributing decedent's estate. California had an interest in the application of its law because Grant was a California victim and Pullen's estate was being administered in California. Pullen's survivors were likely to be Californians, as well. The place of the accident was irrelevant under this functional analysis.

nominally domestic rule—is irrelevant in such cases. The same multistate implications that confront the forum existed, and would have been taken into account by the state lawmaker, during the lawmaker's deliberations about the appropriate substantive content of the rule. For a court in a preponderantly multistate case to embark on a conventional choice of law analysis would be to disregard the choice of law already made. Hence, in a preponderantly multistate case the court should, as I explain in Part II, determine the parties' rights and obligations according to the state's nominally domestic rule having preponderantly multistate application.

In Part III of the article I discuss the legal obstacles the claimant and the successor may face when claimant sues the successor. For the claimant these obstacles include obtaining personal jurisdiction over the successor in the claimant's state of residence and injury and the possibility that the successor may file a reactive suit in another state for a declaratory judgment of no successor liability. For the successor these obstacles include the possibility that claimant will obtain an injunction prohibiting the successor from bringing a reactive suit in another state for a declaratory judgment of no successor liability and the possibility of the successor being found in contempt if it nevertheless brings such a reactive suit.

In Part IV of the article I anticipate major objections that critics reasonably may make to my suggested approach and discuss why I believe they are less troublesome than the objections to the current practice of treating preponderantly multistate cases as though they are conventional choice of law cases.

I conclude by summarizing the reasons why a nominally domestic rule of preponderantly multistate applicability embodies its own choice of law rule and why the forum must apply its own such rule in a preponderantly multistate case.

I. EXISTING JUDICIAL METHODOLOGIES FOR CHOOSING THE APPLICABLE LAW IN SUCCESSOR CORPORATION PRODUCTS LIABILITY CASES

The judicial methodologies in this Part are organized by first considering territorially based choice of law decisions, next considering functionally based choice of law decisions, and finally considering decisions in which the court applied the law of the forum without discussing choice of law.

A. Territorially Based Jurisdiction Selecting Rules: The Pervasive Problem[27] *of Characterization*

Jurisdiction selecting rules are so named[28] because they direct the forum to the sole jurisdiction that is the source of the applicable law.[29] The choice of law process, according to the traditional theory underlying such rules, is about choosing from among competing sovereigns the only sovereign having legislative jurisdiction—the power to regulate the parties' rights and obligations.[30] The content of their respective laws is not relevant to the choice of law process because the laws, themselves, are not considered to be competing for applicability.[31]

Indispensable to the process is characterization. As jurisdiction selecting rules are organized by legal category, the forum cannot locate the appropriate choice of law rule until it assigns the matter before it to the correct legal category.[32] But assigning successor corporation products liability to a single correct legal category is virtually impossible.

A corporation that sells all its assets to a successor corporation and dissolves must comply with the governing state's corporation law; the validity and interpretation of the contract between the predecessor and successor for the sale of assets depend upon the governing state's contract law; and whether the successor is responsible for the products liability of the predecessor, and, if so, the causes of action available to the claimant and the defenses available to the successor arise under the governing state's tort law. Each of these issues may, in conventional choice of law terms, require the forum to choose the state whose law should govern. The legal category—corporate, contract, or tort—in which the forum will find the

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27. According to Professor Weintraub: "[T]here are certain problems that pervade attempts to resolve conflict of laws questions by traditional territorially-oriented choice of law rules." *See* WEINTRAUB COMMENTARY, *supra* note 18, at 55. The first problem Weintraub discusses is characterization. *Id.*

28. *See supra* note 12.

29. Restatement I is territorially based—only one jurisdiction can be the source of the applicable substantive law. Restatement II also is territorially based but the initial reference to a jurisdiction is a presumptive reference. It may be overridden if another jurisdiction has a more significant relationship. Only the initial reference, therefore, is jurisdiction selecting.

30. Legislative jurisdiction is the choice of law analog of adjudicatory jurisdiction. Just as a state is said to have adjudicatory jurisdiction whenever the Constitution permits its courts to hear a case, a state is said to have legislative jurisdiction whenever the Constitution permits its statutes or common law to apply to a case.

31. *See supra* note 12 and accompanying text.

32. Restatement I requires characterization of the entire case. Restatement II requires characterization of each issue in the case.

appropriate choice of law rule for each of the foregoing issues is reasonably clear.

Whether the successor corporation should be responsible for the products liability of the predecessor is a question that overlaps all three legal categories. A forum utilizing jurisdiction selecting rules[33] will not, however, find within those rules any objective standards to determine which of the three categories contains the choice of law rule to answer the above question. Moreover, the choice of law rule for each category may point the forum to a different jurisdiction as the source of the applicable substantive law. Characterization is, therefore, often outcome determinative.

1. Corporate Law Characterization

Corporate law characterization of the rights and obligations between a successor corporation and a person claiming injury from its predecessor's product invokes choice of law rules for applying the "domestic"[34] successor corporation products liability rule of the predecessor's state of incorporation.[35] One might think that the

33. More than half the states, because they follow either the traditional vested rights theory of Restatement I or the most significant relationship theory of Restatement II, require their courts to characterize successor corporation products liability. *See, e.g.*, Ruiz v. Blentech, 89 F.3d 320, 323–24 (7th Cir. 1996) ("To properly apply the Second Restatement method, a court must begin its choice-of-law analysis with a characterization of the issue at hand in terms of substantive law").

As of the beginning of 2019, eleven states still adhered to the lex loci contractus rule; and nine adhered to lex loci delicti. Symeon C. Symeonides, *Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey*, 69 AM J. COMP. L. (2021). Twenty-five states followed the Second Restatement for tort law conflicts. For contract law conflicts, twenty-four states followed the Second Restatement. *Id.*

34. In this Part I, the quotation marks around the word "domestic" emphasize that for purposes of conventional choice of law purposes the courts treat successor corporation products liability rules as though they are typical "domestic" rules although they actually are nominally domestic rules having preponderantly multistate application.

35. *See generally* Webb v. Rodgers Mach. Mfg. Co., 750 F.2d 368, 374 (5th Cir. 1985) (predecessor was a California corporation; California law was applied); Shannon v. Samuel Langston Co., 379 F. Supp. 797, 800 (W.D. Mich. 1974) (predecessor was New Jersey corporation with its principal place of business in New Jersey; New Jersey law was applied); Brown v. Kleen Kut Mfg. Co., 714 P.2d 942, 945 (Kan. 1986) (predecessor was an Ohio corporation; Ohio law was applied).

In each of these cases, the state whose law was chosen also had the kinds of contacts with the predecessor, successor, and asset sale contract that could have supported choice of that state's "domestic" successor liability rule based on contract characterization. In *Webb*, the contract for sale of the predecessor's production equipment apparently had been made and performed in California, where both the predecessor and successor manufactured the type of equipment claimant was operating when injured. 750 F.2d at 374. In *Shannon*, the asset sale contract was performed in New Jersey, where the transfer of assets occurred. 379 F. Supp.

relevant state of incorporation would be that of the successor, which the claimant seeks to hold liable, but all three courts that have used corporate characterization have, without explanation, selected the state in which the predecessor was incorporated.

Putting aside that peculiarity, corporate characterization seems warranted on cursory review. The corporate law of its state of incorporation ordinarily governs the procedure a corporation must follow to obtain its shareholders' approval for sale of all its assets, the provisions it must make for payment of its creditors prior to dissolution, and the extent of its liability to claimants who bring suit against it after dissolution.[36] In addition, the merger law of the

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at 800. In *Brown*, the asset sale contract was executed in Ohio and the asset transfer took place there. 714 P.2d at 944. Contract characterization ordinarily points to the law of either the place of making or the place of performance of a contract. *See infra* notes 56–66 and accompanying text for discussion of relevant contacts in contract cases under Restatements I and II.

Interestingly, in each of these cases the claimant, a citizen of the forum state, was injured in that state. Webb injured his hip while working on a wood shaper in Texas. *Webb*, 750 F.2d at 370. Shannon lost an arm while working at a cardboard printer-slotter machine in Michigan. *Shannon*, 379 F. Supp. at 798. Brown got his hand caught in a meat grinder while working as a cook in Kansas. *Brown,* 714 P.2d at 943. Had the forum characterized successor liability as a matter of tort law, each applicable state choice of law rule for torts would have pointed to the respective forum state's "domestic" successor liability rule. In the two cases in which the claimant was allowed to proceed against the successor under the "domestic" successor liability rule of the predecessor's state of incorporation, the outcome might well have been different because the forum state's "domestic" rule would have required dismissal. In *Webb*, the U.S. District Court for the Eastern District of Texas directed a verdict against the Texas claimant under the law of Texas, which followed the no successor liability rule. The Fifth Circuit Court of Appeals reversed on the ground that the claimant stated a cause of action under the law of California, which followed the product line approach. *See Webb*, 750 F.2d at 373–74. In *Shannon*, the U.S. District Court for the Western District of Michigan granted the Michigan claimant's motion for partial summary judgment on the ground that a de facto merger had occurred under New Jersey law. Analysis under Michigan law might not have led to a finding of de facto merger.

Significantly, none of the opinions in the three cases contains any explanation of why the court preferred corporate characterization to contract or tort characterization. *See Webb*, 750 F.2d at 374; *Shannon*, 379 F. Supp. at 800; *Brown*, 714 P.2d at 944–45.

36. Restatement II specifies that with the exception of the "unusual" case in which another state has a more significant relationship to the occurrence and parties, *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2) (AM. L. INST. 1971), the local law of the state of incorporation will determine:

> Matters . . . [including] steps taken in the course of the original incorporation, the election or appointment of directors and officers, the adoption of by-laws, the issuance of corporate shares, preemptive rights, the holding of directors' and shareholders' meetings, methods of voting . . . mergers, consolidations and reorganizations and the reclassification of shares. Matters which also may affect the interests of the corporation's creditors include the issuance of bonds, the declaration and payment of dividends,

predecessor's state of incorporation is a logical starting point for an inquiry into continuity of corporate ownership and operations between the predecessor and successor to determine whether a de facto merger occurred and, if not, whether the successor nevertheless is a mere continuation of the predecessor.[37] On closer analysis, however, corporate law characterization of successor corporation products liability is unsatisfactory.

A corporation and its shareholders, directors, and officers enter into voluntary relationships with each other in furtherance of the corporation's goals.[38] The proper allocation of rights and obligations among these parties comes within the corporation's internal affairs.[39] Courts and academic commentators generally agree that the corporate law of its state of incorporation should apply to resolve disputes between these parties about the corporation's internal affairs.[40] This choice of law rule is fair to the corporation and to

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loans by the corporation to directors, officers and shareholders, and the purchase and redemption by the corporation of outstanding shares of its own stock.

Id. cmt. a.

37. *Id*.

38. Many states adhere to "a highly contractual view of corporation law," according to which the arrangements made by the private parties are given a good deal of deference, with minimal state regulation. Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, L. & CONTEMP. PROBS., Summer 1985, at 161, 179.

39. The Supreme Court has defined internal affairs as "matters peculiar to the relationship among or between the corporation and its current officers, directors, and shareholders." Atherton v. FDIC, 117 S. Ct. 666, 673 (1997). The Second Restatement defines internal affairs as: "the relations inter se of the corporation, its shareholders, directors, officers or agents." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302, cmt. a (AM. L. INST. 1971).

40. *See, e.g.*, C.T.S. Corp. v. Dynamics Corp. of America, 481 U.S. 69, 89–90 (1987) (free markets in corporate shares are permitted by the fact that corporations are governed by corporate law of state of incorporation); First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983) (internal affairs doctrine achieves certainty and predictability of result while protecting justified expectations of interested parties); Shaffer v. Heitner, 433 U.S. 186, 215 n.44 (1977) (rationale for doctrine is uniformity). *Cf*. McDermott Inc. v. Lewis, 531 A.2d 206, 214–17 (Del. 1987) (internal affairs doctrine is generally mandated by federal constitutional principles). *But see* Western Airlines v. Sobieski, 12 Cal. Rptr. 719 (Cal. App. 1961). According to Restatement II, application of the law of the state of incorporation to a corporation's internal affairs usually is relatively easy to apply, promotes the needs of the interstate system, meets the expectation of the parties, and results in certainty, predictability, and uniformity of results. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302, cmt. e (AM. L. INST. 1971).

See also Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CALIF. L. REV. 29, 43–44 (1987) (explaining origins of doctrine); DeMott, *supra* note 38, at 161 (defining internal affairs doctrine as the "notion that only one state, almost always the site of incor-

its shareholders, directors, and officers, all of whom reasonably could have been expected to ascertain the content of that state's law governing corporate internal affairs before deciding whether to become associated with the corporation and with each other.[41]

A corporation and a person claiming to have been injured by a product manufactured by it, on the contrary, hardly may be regarded as having entered into a voluntary relationship with each other in furtherance of that corporation's goals.[42] Hence, the proper allocation of rights and obligations between them is not plausibly within the corporation's internal affairs. To resolve disputes about the corporation's liability to the claimant according to the products liability law of the manufacturer's state of incorporation might be fair to the corporation but would not be fair to the claimant, who could not have been expected, as a reasonable per-

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poration, should be authorized to regulate the relationships among a corporation and its officers, directors, and shareholders"); Janet C. Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387, 410, 412 n.120 (1992) (stating that rationale for doctrine is that internal matters should be regulated by uniform, predictable law, and state of incorporation has most significant relationship to internal matters and questioning whether C.T.S. raised the internal affairs doctrine to constitutional status); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes,* 80 GEO. L.J. 1, 16 (1991) (suggesting federal choice of law rules to resolve problems posed by challenge to internal affairs doctrine); Joseph W. Singer, *Real Conflicts,* 69 B.U. L. REV. 3, 60–64 (1989) (discussing internal affairs doctrine and the demands of comity). *But see* P. John Kozyris, *Corporate Wars and Choice of Law*, DUKE L.J. 1, 16 (1985) (discussing implication of internal affairs doctrine for choice of law, and criticizing "[f]ixed, single-factor, content-blind, forum neutral rules" which "defer automatically" to "one legal system"); Matt Stevens, Note: *Internal Affairs Doctrine: California v. Delaware in a Fight for the Right to Regulate Foreign Corporations*, 48 B.C. L. REV. 1047, 1047–48 (2007). One commentator has suggested that courts do not attach enough significance to the law of the place of incorporation, especially in the context of interest analysis. Jack L. Goldsmith III, *Interest Analysis Applied to Corporations: The Unprincipled Use of A Choice of Law Method*, 98 YALE L.J. 597, 605 (1989).

41. One commentator notes, however, that when addressing choice of law, judges and scholars give virtually no weight to "the idea that the decision to incorporate is one that expresses contractual intentions and creates contractual expectations," and focus, instead, on the "interests . . . of states, not private parties." DeMott, *supra* note 38, at 179. This focus, DeMott contends, ignores the "strong governmental interest . . . of the state of incorporation in the enforcement of private parties' agreements that are permitted or validated [by its statutes]." DeMott, *supra* note 38, at 195–96.

42. The lack of a voluntary relationship is obvious when the injured person was a bystander. But even a purchaser or a user of a product has not interacted with the manufacturer for the purpose of furthering the latter's goals. According to Restatement II, choice of law concerning rights and obligations between a corporation and third parties is governed by the principles of §§ 187–88 for purposes of contracts and by §§ 145 and 174 for purposes of torts. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 301 cmt. b, at 301 (AM. L. INST. 1971).

son, to ascertain the content of that state's product liability law before deciding whether to become "associated" with the corporation's product.[43] Appropriately, no choice of law theory mandates or even suggests that products liability issues other than successor corporation liability be resolved under the products liability law of a manufacturer's state of incorporation, and no court appears to have applied such law.

Likewise, a predecessor corporation, its successor, and a person claiming to have been injured by a product manufactured by the predecessor hardly may be regarded as having entered into voluntary relationships with one another in furtherance of either corporation's goals, and the proper allocation of rights and obligations among them is not plausibly within either corporation's internal affairs. Moreover, if a "successor" corporation had purchased all of the "predecessor" manufacturing corporation's stock, the two corporations' states of incorporation would be irrelevant in measuring their liability to a claimant injured by the "predecessor's" product, just as the "predecessor's" place of incorporation would be irrelevant in measuring the "predecessor's" liability to an injured claimant if no change had occurred in ownership of the "predecessor's" stock.[44]

In sum, holdings applying corporate characterization have brought about some anomalous consequences: (1) A court applied a choice of law rule suitable for resolving disputes about a corporation's internal affairs between parties who enter into voluntary relationships with a corporation and each other to resolve a dispute about a corporation's products liability—an issue external to corporate ownership and management structure—between parties who had not entered into any relationship with each other. (2) A court applied the law of the state of incorporation of a corporate manufacturer to allocate rights and obligations between a person claiming to have been injured by one of the manufacturer's products and the corporation that purchased all of its assets, although that state's law would not have been applied to allocate rights and obligations between the claimant and the corporate manufacturer itself or be-

43. DeMott comments: "[W]hen the subject matter of the litigation concerns some matter *other than* the corporation's internal affairs, the site of incorporation fades from insignificance to complete irrelevance." DeMott, *supra* note 38, at 162. As to torts and contracts with third parties, one might well find oneself echoing Justice Marshall in *Shaffer v. Heitner*: "[Litigants] have simply had nothing to do with the State of Delaware." *Id*. (quoting *Shaffer*, 433 U.S. 186, 216 (1977)).

44. *See infra* notes 47–48 and accompanying text. Such claims are referred to as "product liability claims asserted by a third party." 15 FLETCHER, *supra* note 4, § 7123.05, at 266.

tween the claimant and a corporation that purchased all of the manufacturer's stock. (3) A corporate manufacturer that could not, by choosing to incorporate in a particular state, have limited the extent of its own products liability according to the laws of that state nevertheless, by incorporating in a state that followed the no successor liability rule of successor corporation products liability, completely shielded the corporation to which the manufacturer sold its manufacturing assets from all products liability on account of all the products it manufactured prior to the asset sale.[45]

No matter how desirable certainty and uniformity may be, the argument that a court should resolve a cause of action for a personal injury by the law of a state of incorporation is unpersuasive. The need for nationally uniform treatment of a corporation's internal affairs under the law of its state of incorporation may be justified by the impracticability of concurrently governing the relations inter se of a corporation and its shareholders, directors, and officers under the potentially conflicting laws of two or more states.[46] A successor corporation governed by the no successor liability rule in some lawsuits and by the product line approach in other lawsuits may suffer some inconvenience,[47] but the lack of nationally uniform treatment of its successor corporation products liability is not impracticable.

Once one concludes that successor corporation products liability is not an internal affair to be determined under the law of a state of incorporation, corporate law characterization serves no further choice of law purpose. Although the Corporations chapters of the First and Second Restatements do contain rules for determining which state's law governs the rights and liabilities of a corporation as to matters other than its internal affairs,[48] those rules require the forum to recharacterize the issues arising out of such other matters

45. Webb v. Rogers Mach. Mfg. Co., 750 F.2d 368, 374 (5th Cir. 1985); Shannon v. Samuel Langston Co., 379 F. Supp. 797, 801–03 (W.D. Mich. 1974); Brown v. Kleen Kut Mfg. Co., 714 P.2d 942, 947 (Kan. 1986).

46. According to Restatement II, the law of the state of incorporation must, as a practical matter, govern issues such as election of directors and officers, issuance of corporate shares, the holding of directors and shareholders' meetings, mergers, consolidations, and corporate reorganizations. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302. cmt. e, at 309 (AM. L. INST. 1971). *But see generally* the Kozyris article and the Stevens note, *supra* note 40.

47. That inconvenience, however, is no more onerous than the inconvenience of being governed by conflicting state products liability rules in different lawsuits involving the manufacture of its own products.

48. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 166 (AM. L. INST. 1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 301 (AM. L. INST. 1971).)

before the court can proceed.[49] A court emphasizing the existence of a relationship between the predecessor and successor corporations is more likely to recharacterize successor liability as an issue of contract,[50] whereas a court emphasizing the absence of any relationship between the injured claimant and the successor is more likely to recharacterize successor liability as an issue of tort.[51]

Under both Restatements, contract characterization and tort characterization might well point to different states for the source of the applicable "domestic" rule.[52] But neither Restatement, nor

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49. *See* RESTATEMENT OF CONFLICT OF LAWS § 166 (AM. L. INST. 1934). As to contracts, the law of the state where the agreement is made determines whether the corporation is bound. *See id*. § 166(a). When a corporation's agent commits a tort, the law of the state where the tort was committed determines the corporation's liability. *See id*. § 166(b). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 301, cmt. b (AM L. INST. 1971). The Comment explains that "corporations and individuals alike make contracts, commit torts and receive and transfer assets. Issues involving acts such as these when done by a corporation are determined by the same choice-of-law principles as are applicable to non-corporate parties." Sections 187–88 apply to issues of contract regarding a corporation and sections 145 and 174 apply to issues regarding torts committed by a corporation's agent.

50. *See, e.g.*, Bouley v. Am. Cyanamid Co., No. CIV.A.85-4368-Z, 1987 WL 18738, at *2 (D. Mass. Oct. 21, 1987) (holding that successor's liability is predicated upon its agreements underlying its purchase of predecessor's assets); Woody v. Combustion Eng'g, Inc., 463 F. Supp. 817, 821 (E.D. Tenn. 1978) (to hold the successor corporation liable would "greatly burden" business transfers and turn "ordinary business transactions into traps for unwary successor corporations").

51. *See, e.g.*, Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136, 141–42 (1979) (arguing the inequity of contract characterization which would disregard the effects "upon innocent parties, who neither know of, or are in any way related to, the contract").

52. According to Restatement I, the law governing a contract is determined by the law of the place where the contract is made, *see, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 322 (AM. L. INST. 1934); or the law of the place where the contract is performed. *See id.* § 358. Under Restatement II, contract issues are determined by the law chosen by the parties, *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 186 (AM. L. INST. 1971); or, when the parties have not specified an effective choice, by the state with the most significant relationship to the issue in question. *See id.* § 188(1). The relevant contacts to consider with regard to the most significant relationship are:

a) the place of contracting,
b) the place of negotiation of the contract,
c) the place of performance,
d) the location of the subject matter of the contract, and
e) the domicile, residence, nationality, place of incorporation, and place of business of the parties. *Id.* § 188(2).

With regard to tort, liability is determined under Restatement I by the law of the place of the wrong, i.e. the state "where the last event necessary to make an actor liable for an alleged tort takes place." *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (AM. L. INST.1934). Under Restatement II, the relevant contacts in tort are:

a) the place where the injury occurred,

the choice of law methodology embodied in each, provides any guidance as to whether it is more appropriate for a court to consider successor corporation products liability as an issue of contract or tort.[53] I turn now to evaluating those characterizations.

2. *Contract Law Characterization*

The articulated rationale for contract characterization[54] is that a corporation contracting in a particular state to purchase manufacturing assets should have the same liability to all persons who subsequently may be injured by its predecessor's products regardless of where the injuries occur.[55] Even accepting this rationale,[56] an obvious criticism is that contract characterization does not necessarily lead to uniform treatment of each asset acquisition. Courts already have utilized contract characterization to choose the applicable "domestic" successor corporation products liability rule according to the dictates of four different contract choice of law rules: the law chosen by the parties;[57] the law of the place of making of the asset

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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.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 145(2) (AM. L. INST. 1971).

53. Courts that have selected one or the other have divided evenly between the two characterizations. *See, infra* cases cited in sections I.A.2. and I.A.3.

54. A number of courts have utilized contracts characterization without articulating a rationale. *See, e.g.*, Hendrix v. Celotex Corp., No. CV479-327, slip op. (S.D. Ga. Apr. 28, 1981) (concluding summarily that the issue was one of contract); Wessinger v. Vetter Corp., 685 F. Supp. 769, 772 (D. Kan. 1987) (distinguishing summarily between lex loci delicti—Kansas' conflicts rule for tort cases—as governing plaintiff's claims against predecessor corporation, and the law of the place of asset transfer, as governing successor liability); *In re* Asbestos Litig., 517 A.2d 697, 699 (Del. Super. Ct. 1986) (ruling summarily that Delaware law would apply to the negligence issues, while the legal effect of the asset transfer would be determined by the law of Pennsylvania, with the "most significant relationship to the transaction").

55. *See* Bonee v. L & M Constr. Chem., 518 F. Supp. 375, 379–80 (M.D. Tenn. 1981) (defining the basic issue of the case in terms of the legal effect of the sale of the assets of one corporation to another); Brown v. Kleen Kut Mfg. Co., 714 P.2d 942, 945 (Kan. 1986) (quoting *Bonee* as authority on the rationale of uniform application of the substantive law).

56. Courts articulating this rationale did not explain why uniform treatment of each asset acquisition without regard to where the personal injuries subsequently occur is more important than uniform treatment of all claimants injured within a single state by various predecessor corporations' products regardless of where the asset sale contracts occurred.

57. *Hendrix*, slip op.; Bouley v. Am. Cyanamid Co., No. CIV.A.85-4368-Z, 1987 WL 18738, at *2 (D. Mass Oct. 21, 1987) (absent agreement between the parties, the law of the place of making applies); Woody v. Combustion Eng'g., Inc., 463 F. Supp. 817 (E.D. Tenn. 1978).

sale contract;[58] the law of the place where the transfer of assets occurred;[59] and the law of the state with the most significant relationship to the transaction.[60] Not only might these different contract choice of law rules point the forum to the "domestic" rules of different states in the same case,[61] different courts following any one of these contract choice of law rules might well apply the rule differently to the facts of the same asset acquisition.[62]

A more serious criticism of the articulated rationale, however, is its failure to distinguish disputes between parties to the asset sale contract from disputes between one contracting party and a stranger to the contract. The asset sale contract ordinarily contains provisions allocating the predecessor's liabilities between it and the successor.[63] Contract characterization of the parties' disputes about which of them ultimately is responsible for particular liabilities, especially when coupled with contract choice of law rules that respect the autonomy of contracting parties to choose the state whose law is to resolve those disputes,[64] is fair to both parties because the predecessor and successor voluntarily enter into the contract with

58. Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817, 820 (D. Colo. 1968); Wells v. Raymark Industries, Inc., No. CIV.A.84-11-Civ-J-14, 1985 WL 6638, at *1 (M.D. Fla. Mar. 13, 1985); *Bonee*, 518 F. Supp. at 379–80 (applying law intended by the parties, with parties presumed to have intended the law of the state where the contract was entered into when nothing to the contrary is specified); *Brown*, 714 P.2d at 945.

59. *Wessinger*, 685 F. Supp. at 772.

60. Gibson v. Armstrong World Indus., 648 F. Supp. 1538, 1540–41 (D. Colo. 1986); *Asbestos Litig.*, 517 A.2d at 699.

61. See, e.g., *Wessinger*, 65 F.Supp. at 772, in which the court looked to the law of Illinois, the place where the asset transfer occurred. The successor was not liable because Illinois follows the no successor liability rule. As the successor was a California corporation the parties might have made the contract there (the opinion does not identify the place of making). Had the court looked to the law of California, the successor would have been liable because California follows the product line approach. *See, e.g.*, *Bonee*, 518 F. Supp. at 379–80 (Ohio law, law of state where contract entered into, governs successor liability).

62. See, e.g., *Univ. of Chi. v. Dater*, 270 N.W. 175, 175–76 (Mich. 1936) in which the contract choice of law rules for Illinois and Michigan pointed their respective courts to the place of making. In holding a contract to have been made in Illinois, the Michigan court noted that had the same case been before an Illinois court that court would have held the contract to have been made in Michigan. *Id.* at 661–62.

63. An example of this is "Schedule J" of the contract between predecessor and successor corporation in *Kloberdanz*, specifying the liabilities and obligations to be assumed by the successor. 288 F. Supp. at 819.

64. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. L. INST. 1971) states: "The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue."

the expectation of being mutually bound to a single set of rights and obligations.[65]

A person subsequently injured by the predecessor's product, however, is a stranger to the asset sale contract and, indeed, probably is unaware of its existence until attempting to sue the (by then dissolved) manufacturer.[66] Contract characterization is unfair to the products liability claimant because it enables the predecessor and successor to choose the law of a state with which they are connected[67] not only to allocate rights and obligations between themselves, but also to negate the successor's liability to all subsequent products liability claimants without regard to whether any particular claimant also has any connection to the chosen state.[68]

Courts do not allow a manufacturer to limit its own potential liability for its defective products according to the law of a particu-

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65. Contract law protects "the justified expectation of the parties" so that they may accurately predict their rights and duties under the contract. *Id.* § 187 cmt. e. Allowing parties to choose the law governing the contract's validity is most likely to secure certainty and predictability. *Id.*

Party autonomy will not, however, "be given effect if one party's consent was obtained by improper means, such as by misrepresentation, duress, or undue influence, or by mistake." *Id.* § 187 cmt. b.

Even choice of law rules other than party autonomy rules effectively enable the parties to choose the governing law by entering into the contract or performing the contract in the chosen state.

66. The products liability claimant often has no contacts with the state whose law was chosen by the parties or the state to which the forum's contract choice of law rule otherwise would point. *See, e.g.*, *Wessinger*, 685 F. Supp. at 771–72 (holding that Illinois law, which is the law of the place of transfer, governs on the issue of successor liability for Kansas plaintiff injured in motorcycle accident). The court notes that there is "injustice" in the Illinois approach to successor liability because shareholders of dissolved corporations can escape liability too easily. *Id.* at 773. Still, Illinois adheres to this system despite its "shortcomings," and the court declines to depart from it. *Id.*

67. The predecessor and successor make this choice either by a choice of law provision in the contract or by entering into or performing the contract in the chosen state.

68. Restatement II might view the successor corporation's liability to subsequent products liability claimants as a question that the parties to the asset sale contract could not have determined by an explicit agreement between them, and subject to the same choice of law rule as "capacity, formality, and substantial validity." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. d (AM. L. INST. 1971). For example, "A person cannot vest himself with contractual capacity by stating in the contract that he has such capacity." *Id.* The parties' power to choose the applicable law is subject to two qualifications, *Id.*; there must be a reasonable basis for the parties' choice, *id.* cmt. f; and the law must not be opposed to a fundamental interest of the state within which the law will be applied. *Id.* cmt. g. *See also* Litawowich v. Wiederkehr, 405 A.2d 874, 877 (N.J. Super. Ct. Law Div. 1979) ("The corporate parties chose a body of local law to govern themselves, but they cannot thereby shut out a tort claimant whose concerns were unrepresented in the acquisition arrangements.").

lar state by contracting in that state to purchase its manufacturing assets. Why, then, should courts allow the same manufacturer to negate its successor's potential liability to claimants injured by its defective products by contracting with the successor for a cash purchase of those same manufacturing assets in a state following the no successor liability successor corporation products liability rule rather than the product line approach?[69]

One might argue that contract characterization is appropriate because the position of a products liability claimant who seeks damages from a successor corporation is analogous to the position of a non-contracting party who seeks to enforce a contract against the promisor.[70] But the analogy is not apt.

Contracting parties agree to confer a benefit upon a non-contracting party because the promisee intends either to discharge an existing obligation to such party—a creditor beneficiary[71]—or to make a gift to such party—a donee beneficiary.[72] An alleged creditor beneficiary who is not permitted to enforce the contract nevertheless retains all pre-existing rights against the promisee.[73] And an alleged donee beneficiary who is not permitted to enforce the contract may be disappointed at not receiving an anticipated gift but

69. Or alternatively, why should courts allow manufacturors to negate its successor's liability to injured claimants through a choice of law contractual provision?

The *Korzetz* court raised these very issues, commenting: "To ground in contract questions of successor liability . . . would give support to the proposition that the party who benefited from the bargain can escape liability even though the party who transferred the benefit would have been liable had not the contract been consummated. Recognition of such freedom of contract notions and, moreover, recognition of such powers of contract without regard to their consequential effects upon innocent parties, who neither know of, or are in any way related to, the contract, are better left in the nineteenth century." Korzetz v. Amsted Indus., Inc.,, 472 F. Supp. 136, 141–42 (E.D. Mich. 1979).

70. Williston defined a contract for the benefit of a third person as one where "the promisor engages to the promisee to render some performance to a third person," without regard to whether the promisee entered the contract for his own benefit or for that of the third person. It is an exception to the contract principle that only parties to a contract may enforce it. 2 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 347 (3d ed. 1959).

71. A third party beneficiary is a creditor beneficiary if "no intention to make a gift appears from the terms of the promise, and performance will satisfy [a] . . . duty of the promisee to the beneficiary. *Id*. § 356.

72. A third party is a donee beneficiary "if the purpose of the promisee in obtaining the promise . . . is to make a gift to the beneficiary, or to confer upon him a right against the promisor to some performance [not already due]." *Id*. §§ 825–26.

73. One of Williston's examples illustrates this point: A conveys a ranch to B in return for B's promise to pay $5000 to D, to whom A owes that amount of money. *Id*. §§ 827–28. If D were not able to enforce the contract against B, that would not change the fact of A's debt to D, which D can still enforce against A.

has not been deprived of rights enjoyed independent of the contract.[74]

In the creditor and donee beneficiary contexts, determining the non-contracting party's status under the third party beneficiary rule of the state with which the promisor and promisee established their contractual relationship does not enable the contracting parties to negate any cause of action the non-contracting party otherwise might have against the promisee under the law of another state. In the successor corporation products liability context, however, the predecessor's and successor's choice to establish their contractual relationship in a no successor liability rule state, coupled with contract characterization, enables them to negate any cause of action the products liability claimant otherwise might have against the successor under the product line approach of a state where the claimant purchased the product or where the product caused the claimant's injury.

The forum state had contacts with the claimant and injury in every reported decision utilizing contracts characterization.[75] By either omitting these contacts[76] or giving them short shrift,[77] the courts neglected to consider the unfairness of determining the

74. In Williston's example, described in note 73, *supra*, the conveyance of A's ranch to B also was in consideration of B's promise to pay $5000 to A's wife, C, upon whom A wished to make a financial settlement. *See id*. If C were not able to enforce the contract against B, she would not have been deprived of anything to which she was entitled without regard to the contract.

75. *See* cases cited in this section I.A.2.

76. Bouley v. Am. Cyanamid Co., 1987 WL 18736 (D. Mass. 1987); Gibson v. Armstrong World Indus., 648 F. Supp. 1538 (D. Colo. 1986); Wells v. Raymark Ind., Inc., 1985 WL 6638 (M.D. Fla. 1985); Woody v. Combustion Eng'g., Inc., 463 F. Supp. 817 (E.D. Tenn. 1978); Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968).

77. *Wessinger* simply states that the law of the place of wrong governs plaintiff's tort claims against defendant and the law of the place of transfer governs in cases of corporate transfer and successor liability. *See* Wessinger v. Vetter Corp., 685 F.Supp. 769, 772 (D. Kan. 1987). *Asbestos Litigation* similarly distinguishes between the tort claim and the focus on the contractual transaction in the successor liability issue. *See In re* Asbestos Litig. (Bell), 517 A.2d 697, 699 (Del. Super. Ct. 1986). *Hendrix* presents the either-or alternative of contract or tort, then opts for contract, noting that the courts of Georgia have not been active in expanding tort theory. Hendrix v. Celotex Corp., No. CV 479-327, slip op. at 2 (S.D. Ga. Apr. 28, 1981). *Bonee* comes the closest to engaging in any analysis, admitting that applying contract characterization on the issue of successor liability and tort law to determine the nature of the tort liability may seem "disjointed," but reasoning that this will promote "the uniform application of substantive law," so that the assumption of liability will be the same for personal injuries wherever the injury occurs. *See* Bonee v. L & M Const. Chemicals, 518 F. Supp. 375, 379–80 (M.D. Tenn 1981). *Brown* follows the *Bonee* analysis. *See* Brown v. Kleen Kut Mfg. Co., 714 P.2d 942, 945 (Kan. 1986).

claimant's rights against the successor under the law of a state with which the claimant had no contacts. Tort characterization, by contrast, at least holds out the prospect that courts in the state where the product was purchased or caused injury will be mindful not only of a claimant's contacts with the forum state but also of the claimant's lack of contacts with the state whose law otherwise governs the asset sale contract. In the next subpart, I evaluate the appropriateness of tort characterization.

3. Tort Law Characterization

Tort characterization directs the forum to the state of wrong or injury as the source of the "domestic" rule governing whether the products liability claimant has a cause of action against the successor corporation.[78] This shift in direction away from the state with which either the predecessor alone[79] or the predecessor and successor together[80] voluntarily established a relationship to a state with which the claimant has no connection redresses the fundamental inadequacy of corporate and contract characterization.[81] The predecessor and successor also might have connections with the state of injury.[82] From a conventional choice of law perspective, therefore, the temptation is to conclude that tort characterization is correct because it directs the forum to the only jurisdiction whose "domestic" rule should apply. But that conclusion would be too simplistic.

Even from a conventional choice of law perspective, tort characterization of successor corporation products liability is problematic. If the forum follows the First Restatement's *lex loci delicti* rule, tort characterization is, of course, subject to the general criti-

78. Restatement I § 384 provides that the existence of a cause of action for tort depends on the law of the place of the wrong. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 384 (AM. L. INST. 1934). The place of the wrong is the place where the last event necessary to create a cause of action occurs. This ordinarily is the state of injury. Restatement II § 146 cmt. c provides for the local law of the state of injury as a presumptive rule. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 cmt. c (AM. L. INST. 1971).

79. *See* discussion *supra* Subpart I.A.1.

80. *See* discussion *supra* Subpart I.A.2.

81. *See* discussion *supra* Subparts I.A.1, I.A.2.

82. The predecessor that manufactured a product may have sold and delivered it to the state of injury. After the asset sale, the successor may have serviced the product in the state of injury. Much weaker connections, but perhaps adequate for constitutionality of choice of law even though not likely adequate for personal jurisdiction, might be that the predecessor's product found its way into the state of injury by resale and the successor had the opportunity to inquire into the location of the predecessor's products before purchasing the manufacturing assets.

cism that the state of injury may be fortuitous or adventitious.[83] Given that many successor liability cases involve workplace injuries,[84] this criticism is relatively insignificant.

If the forum follows the Second Restatement's most significant relationship test,[85] tort characterization is likely to minimize the ameliorating effect that test was intended to have on the inflexibility of the *lex loci delicti* rule. Although the general principle for torts directs courts to take account of contacts other than the place of claimant's residence and injury,[86] once a court has adopted tort characterization it probably will not regard contacts with the predecessor, the successor, and their contract as more significant than contacts with the claimant and the injury.[87]

Both Restatements are also subject to a criticism that the successor's connection with the state of injury may be more apparent than real, especially when that state follows the no successor liability rule, which unlike the product line approach takes no account of the predecessor's goodwill. A successor having no liability to a claimant injured by a product manufactured by the predecessor has as tenuous a connection to the state of injury as a claimant has to the predecessor's state of incorporation when a court utilizes corpo-

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83. *See*, *e.g.*, Kilberg v. Northeast Airlines, Inc., 172 N.E.2d 526, 527 (N.Y. 1961) (fortuitous); Tooker v. Lopez, 249 N.E.2d 394, 400 (N.Y. 1969) (adventitious).

84. Of the cases cited in this article, only about a dozen appear to involve non-workplace injuries. *See* Elmer v. Tenneco Resins, Inc., 698 F. Supp. 535, 536 (D. Del. 1988); Giraldi v. Sears, Roebuck & Co., 687 F.Supp. 987, 988 (D. Md. 1988); Ede v. Mueller Pump. Co., 652 F. Supp. 656, 657 (D. Colo. 1987); Bouley v. Am. Cyanamid Co., No. Civ. A.85-4368-Z, 1987 WL 18738 at *1 (D. Mass. Oct. 21, 1987); Hickman v. Thomas C. Thompson Co., 592 F. Supp. 1282, 1283 (D. Colo. 1984); Harris v. T.I. Inc, 413 S.E.2d 606, 607 (Va. 1992); Nissen Corp. v. Miller, 594 A.2d 564, 565 (Md. 1991); Kramer v. Weedhopper of Utah, Inc., 562 N.E.2d 271, 272 (Ill. App. Ct. 1990); Martin v. Abbott Lab'ys, 689 P.2d 368, 371 (Wash. 1984) (en banc); Bernard v. Kee Mfg. Co., 409 So. 2d 1047, 1048 (Fla. 1982); Tift v. Forage King Indus. Inc., 322 N.W.2d 14, 15 (Wis. 1982); Litarowich v. Wiederkehr, 405 A.2d 874, 875 (N.J. Super. Ct. Law Div. 1979).

85. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (AM. L. INST. 1971).

86. *Id.* § 145(2). The contacts to be considered include the place of injury, the place where the conduct occurred causing the injury, the domicile and residence of the parties, and the place where the relationship between the parties is centered. *Id.*

87. If a court regarded contacts with the predecessor, the successor, and their contract as more significant, the court probably would adopt contract characterization. Likewise, if a court adopts contract characterization, the court probably would regard the place of claimant's residence and injury as irrelevant. The Second Restatement's directive regarding the law governing contract issues in the absence of effective choice by the parties makes no mention of contacts with persons other than the predecessor and successor or with events other than the making and performance of the asset sale contract. *Id.* § 188(2).

rate characterization[88] or to the state of contract when a court utilizes contract characterization.[89]

Although tort characterization does not provide a sound theoretical foundation for choosing between conflicting "domestic" successor corporation products liability rules, it has, in practice, led to more satisfying decisions than either corporate or contract characterization. Despite courts having ruled both ways on the underlying substantive issue,[90] I find these decisions more satisfying because they are consistent in one important respect with my proposed approach to preponderantly multistate cases.[91] Every court that has utilized tort characterization has identified the forum state as the source of the applicable "domestic" rule.[92]

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88. *See* discussion *supra* Subpart I.A.1.

89. *See* discussion *supra* Subpart I.A.2.

90. *See, e.g.*, Leannais v. Cincinnati, Inc., 565 F.2d 437, 441 (7th Cir. 1977) (rejecting the product line theory); Travis v. Harris Corp., 565 F.2d 443, 446 (7th Cir. 1977) (insisting that tort characterization is appropriate, with the consequent application of Indiana (no successor liability) law). The Seventh Circuit, in *Travis*, asserted that choice of law was "irrelevant." *Travis*, 565 F.2d at. 446. Contract characterization would have made Ohio law determinative, but there were no significant differences between the substantive laws of Indiana and Ohio. *Id*. *See also* Hickman v. Thomas C. Thompson Co., 592 F.Supp. 1282, 1285 (D. Colo. 1984) (adopting tort characterization). The court applied the product line exception, the recovery rule in the case. *Id*. at 1286–87.

91. *See* discussion *supra* Introduction.

92. *E.g*., Jordan v. Hawker Dayton Corp., 62 F.3d 29, 31–32 (1st Cir. 1995), *cert. denied,* 516 U.S. 1113 (1996) (tort characterization, Maine forum, Maine law applied); Am. Nonwovens, Inc. v. Non Wovens Eng'g, S.R.L., 648 So. 2d 565, 567 (Ala. 1994) (tort characterization, Alabama forum, Alabama law applied); Kramer v. Weedhopper of Utah, Inc., 562 N.E.2d 271, 276 (Ill. App. Ct. 1990) (tort characterization, Illinois forum, Illinois law applicable). *See also* Ruiz v. Weiler & Co., 860 F.Supp. 602, 604 (N.D. Ill. 1994) *aff'd sub nom* Ruiz v. Blentech Corp., 89 F.3d 320 (7th Cir. 1996) (tort characterization, Illinois forum, Illinois law applied). The circuit court's characterization inquiry was more precise. It determined that corporate law applied to the successor liability question; however, it decided that Illinois tort law, rather than California corporate law, governed the nature of the tort liability.

Application of forum law by every court making a final decision adopting tort characterization contrasts sharply with application of non-forum law by every court making a final decision adopting corporate or contract characterization. But only one judge appears to have manipulated characterization to allow a local claimant to recover against a foreign successor under local law. In Hickman v. Thomas C. Thompson Co., 592 F. Supp. 1282, 1286 (D. Colo. 1984), the predecessor and successor corporations were based in Illinois, where the asset sale contract was made and performed. The claimant was a resident of Colorado where she purchased and used the product that caused her injury. *Id.* at 1282. The facts were not in dispute. *Id.* Judge Kane characterized successor corporation products liability as an issue of tort law. *Id.* at 1285. He predicted that Colorado would reject the no successor liability rule in favor of the product line approach and granted the claimant's motion for summary judgment. *Id.* at 1287

My satisfaction with this aspect of tort characterization is, however, limited to cases in which the products liability claimant brings suit against the successor corporation in the state of injury. If the claimant were to bring suit in the predecessor's state of incorporation or in the state of making or performance of the asset sale contract, tort characterization would direct the court away from the forum state's "domestic" rule. Notwithstanding the forum state's connection with one or more of the parties and events, the court would proceed as though the appropriate content of its "domestic" common law rule was irrelevant. Ultimately, therefore, tort characterization, like corporate characterization and contract characterization, is not a satisfactory step toward a rational choice of law process for successor corporation products liability.

B. Functional Methodologies[93]

Functional methodologies for choice of law are based on the theory that when a case involves facts connected to two or more sovereigns the potentially relevant legal rules of each sovereign are

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Two years later, Judge Kane characterized successor corporation products liability as an issue of contract law. *See* Gibson v. Armstrong World Indus., Inc., 648 F. Supp. 1538, 1541 (D. Colo. 1986). Using Colorado's choice of law rules for contract, he found the most significant contacts to be with Pennsylvania, where the asset sale contract was negotiated and implemented. *Id.* As Pennsylvania state courts followed the product line approach, he denied the successor's motion for summary judgment. *Id.* He noted that the successor would be liable if the claimants, who were local, satisfied the elements of their product liability claim for injury caused by the predecessor's product. *Id.* at 1543.

Only about two months later, Judge Kane "upon further consideration . . . concluded the appropriate choice of law rule to apply in issues of successor liability is the tort choice of law rule rather than the contract choice of law rule." Ede v. Mueller Pump Co. 652 F. Supp. 656, 658 n.1 (D. Colo. 1987). Under Colorado's choice of law rules for tort, he found the most significant contacts to be with Colorado, where the claimant resided, purchased the product and was injured. *Id.* at 659. As he previously had done in *Hickman*, 592 F. Supp. at 1286, he predicted that Colorado would follow the product line approach. *Ede*, 652 F.Supp. at 659.

93. See *supra* note 18 for the history of the term "functional analysis."

Brainerd Currie transformed the subject of conflict of laws when, in the late 1950s, he introduced the concept of analyzing state interests as a rational step in choosing the applicable law. *See* Brainerd Currie, *Married Women's Contracts: A Study in Conflict of Laws Method*, 25 U. CHI. L. REV. 227 (1958) *reprinted in* Brainerd Currie, SELECTED ESSAYS ON THE CONFLICT OF LAWS 89 (1963) [hereinafter CURRIE SELECTED ESSAYS]. *See also* Gottesman, *supra* note 40, at 5 (1991) (depicting Currie's "new approach" as a reaction to the "philosophical vacuity" and counterintuitive results under the First Restatement). Since then, interest analysis has become "an integral part" of the process used by most of the courts that purport to follow "modern" approaches to choice of law. *See* Symeon C. Symeonides, *supra* note 33, at *Choice of Law in the American Courts in 1993 (and in the Six Previous Years)*, 42 AM. J. COMP. L. 599, 611 (1994).

competing for applicability.[94] A state's *potentially* relevant legal rule is *actually* relevant if one or more of the functions that rule would serve when applied in cases wholly local to the state also would be served if it were applied in the multistate case.[95] If the forum deems two or more of the competing rules to be actually relevant,[96] the rule the forum applies will depend upon which of the functional methodologies it utilizes for choice of law.[97] Analysis of

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I use the term "functional analysis" rather than "interest analysis" or "policy analysis" in order to avoid the debate among scholars about the proper usage of the latter two terms.

94. Jurisdiction selecting rules, by contrast, are based on the theory that the states themselves, as sovereigns, are competing for legislative jurisdiction. *See supra* introduction to Section I.A., note 12.

95. When a state's rule is actually relevant, the state is said to have an "interest" in the application of that rule. *See* Herma Hill Kay, *"The Entrails of a Goat": Reflections on Reading Lea Brilmayers' Hague Lectures*, 48 MERCER L. REV. 891, 900–01 (1997); Colloquy, *Choice of Law: How it Ought To Be*, 48 MERCER L. REV. 639, 670–71 (1997) [hereinafter *Mercer Symposium*] (statements of Professor Herma Hill Kay) (arguing that interest analysis requires looking to whether applying the law furthers the purpose behind having the law). Although many scholars accept this definition, agreement is by no means universal. *Cf.* Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 403–04 (1980) (arguing that a state is "interested" only if its legislature intended its law to apply to particular facts).

96. This is what Professor Brainerd Currie dubbed a "true conflict." *See* Currie, *supra* note 93, at 259, CURRIE SELECTED ESSAYS at 116–17.

97. Academic commentators have proposed and courts have utilized various functional methodologies for choice of law. The earliest to be articulated systematically was Brainerd Currie's "governmental interest analysis" under which the forum first determines its interests and the interests of other states in having their respective laws applied. *See supra* note 94. If the forum concludes that an unavoidable true conflict exists, it decides the case according to forum law. *See generally* CURRIE SELECTED ESSAYS. The Oregon Supreme Court appeared to have adopted this approach very early on, *see* Lilienthal v. Kaufman, 395 P.2d 543, 547 (Or. 1964), but now appears to follow an amalgam of functional approaches. *See* Symeonides, *supra* note 33, at 19. Oregon's ultimate rejection of Currie's method of resolving true conflicts is consistent with what other courts following a functional approach have done.

Most of these courts, when faced with an unavoidable true conflict, have tried approaches that go beyond Currie's forum law solution. The most unstructured of the other approaches probably is best described as "interest weighing." The forum resolves true conflicts between the laws of interested states by weighing their respective interests and applying the law of the state whose interests are stronger. *See, e.g.*, Lewis. v. Lewis, 748 P.2d 1362, 1365 (Haw. 1988). Another somewhat unstructured approach is the comparative impairment analysis proposed by William Baxter. The forum resolves true conflicts not by weighing the respective states' interests but by applying the law of the state whose policy would be most impaired by non-application. California appears to be the only state to have adopted this approach. *See, e.g.*, Bernhard v. Harrah's Club, 546 P.2d 719, 725–26 (Cal. 1976), *cert. denied*, 429 U.S. 859 (1976).

Other functional approaches provide more structured methods by which to resolve true conflicts. Among these are Robert A. Leflar's "choice influencing considerations." *See generally* Robert A. Leflar, *Choice Influencing Considerations in*

the substantive content of the competing rules obviously is an integral part of the process.

In successor corporation products liability cases the potentially relevant rules competing for applicability are one state's no successor liability rule and another state's product line approach.[98] The situation in which both rules are actually relevant is when the no successor liability rule state has contacts with the predecessor and successor corporations and their asset sale contract and the product line approach state has contacts with the claimant and the injury.[99] None of the functional choice of law approaches includes objective standards to guide the court in choosing between a "domestic" rule that encourages free transferability of corporate assets and a "domestic" rule that compensates products liability claimants as though the predecessor corporation had remained in existence. This has led to some criticism of the functional approaches.[100]

Conflicts Law, 41 N.Y.U. L. Rev. 267 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584 (1966). As Leflar listed them, the considerations are: A. Predictability of results; B. Maintenance of interstate and international order; C. Simplification of the judicial task; D. Advancement of the forum's governmental interest; and E. Application of the better rule of law. 41 N.Y.U. L. REV. at 282, 54 CAL. L. REV. at 1586–87. Although Leflar said he did not intend any priority among the considerations from the order of listing, his approach has come to be most closely identified with "the better rule of law." *See, e.g.*, Milkovich v. Saari, 203 N.W.2d 408, 414 (Minn. 1973).

Restatement II, which combines a functional approach with jurisdiction selecting presumptive rules, states that the relevant choice of law factors include: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (AM. L. INST. 1971).

This list of functional approaches is far from exhaustive and makes no attempt to delve into the finer points of the approaches summarized. Such a discussion is beyond the scope of this article.

98. As specified in note 9, *supra*, "no successor liability rule" refers to that rule without the five possible exceptions in note 4, *supra*, and "product line approach" refers to that approach plus the five exceptions to the no successor liability rule.

99. In the context of strict products liability, McConnell says a "true conflict" exists when "[t]he plaintiff's state has an interest in gaining greater compensation for its injured consumers, but the defendant's state also has an interest in promoting manufacturing within its borders." McConnell, *supra* note 24, at 94.

100. One commentator has suggested that, in the strict products liability context, interest analysis contains an "anti-corporate bias." Goldsmith, *supra* note 40, at 610. According to this point of view, courts often fail to recognize such substantial state interests in corporations as: "protecting the economic well-being of a corporation as a means toward regulating the state's economy, maximizing corporate tax revenues, and protecting in-state employees and creditors. *Id.* at 607.

In the absence of objective standards, a court utilizing a functional approach to successor corporation products liability[101] essentially would have to engage in a process remarkably similar to characterization. The same unarticulated factors that probably would have led the court to corporate or contract characterization had it followed a jurisdiction selecting approach might well result in its choice of the no successor liability rule. Likewise, the same unarticulated factors that otherwise probably would have led the court to tort characterization might well result in its choice of the product line approach.

Ultimately, however, my criticism of the functional approaches is beside the point because any objective standards that might be incorporated into the approaches in response to my criticism would serve no independent purpose. Successor corporation products lia-

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"[P]laintiffs sue corporations in interest analysis fora with pro-plaintiff laws," and the trend in modern tort law adds to the deck-stacking by regarding corporations as "deep pockets and efficient risk-spreaders." *Id.* at 613, 615.

According to another commentator, interest analysis favors product liability claimants who sue in the state of their domicile and injury regardless of whether the claimant's state's law or the manufacturer's state's law allows for higher recovery. In the former situation, the forum would have no interest in applying its own pro-manufacturer law in favor of an out-of-state manufacturer and in the latter situation, if the case presents true conflict, two of the principal tiebreaking rules—applying forum law and applying the law most favorable to the plaintiff—favor the claimant. McConnell, *supra* note 24, at 94.

101. In practice, courts professing to utilize a functional approach rarely have been sufficiently thorough in their analyses. *See, e.g.*, Nelson v. Tiffany Indus., Inc., 778 F.2d 533 (9th Cir. 1985), in which the court sketchily identified the function served by California's product line approach—protection of its citizens from injury by defective products but made no mention of the functions served by the laws of the other states involved. *Id.* at 534. *See also* Lopata v. Bemis Co., Inc., 406 F. Supp. 521 (E.D. Pa. 1975), in which, after explaining New Jersey's interest in shifting the allocation of risk from injured individuals "to those entities better able to bear the losses," the court described a "matrix" of New Jersey contacts, which it denominated as interests: the (New Jersey) employer who paid workmen's compensation; the state's interest in allocation of risk in the employer-employee relationship; the interest of the insurance carrier who paid the compensation benefits; and the accountability of corporations for defective machines that cause injury and "disruption in employment." *Id.* at 523–24. Just how New Jersey's interests were affected by the workmen's compensation claim paid by the employer and the insurance carrier was not clear because the court made no mention of how the substantive content of New Jersey law would have furthered those interests.

Only in Litarowich v. Wiederkehr, 405 A.2d 874, 877–78 (N.J. Super. Ct. Law Div. 1979), did the court undertake a somewhat more thorough functional analysis. The court identified New Jersey, the state of plaintiff's residence and injury, as having an interest in providing a "meaningful remedy" for its workers and consumers who are injured by a defective product. *Id.* It defined the opposing interest as that of the corporations concerned (rather than of the state of incorporation, principal place of business, or manufacture of the product) in "an identifiable and reliable body of law by which to order their affairs." *Id.* at 877.

bility cases are preponderantly multistate. Hence the forum state's "domestic" rule—whether the no successor liability rule or the product line approach—already embodies its lawmaker's conclusion about the nature and relative strength of the forum state's policies both within the state and vis-a-vis the potentially conflicting policies of other states. Were the forum to engage in a functional choice of law analysis it would, in effect, be ignoring the choice of law inherent in the state's lawmaker's adoption of the state's nominally domestic rule having preponderantly multistate application.[102]

C. Applying Forum Law without Mentioning Choice of Law

To evaluate decisions applying forum law without mentioning choice of law under the heading "Judicial Approaches to Choice of Law for Successor Corporations Products Liability" may seem self-contradictory, especially in light of my basic observation that these cases present no choice of law issue. From a conventional choice of law perspective, however, some of these decisions exemplify a wholly inadequate judicial approach—the failure to take account of relevant connections with a state whose "domestic" rule would have yielded the opposite result. One of the Johnson Press cases[103] aptly illustrates this inadequacy.

Efrain Ramirez, who worked in New Jersey, was injured on the job while operating a Johnson Mechanical Press manufactured before Amsted Industries, Inc. acquired Johnson Machine and Press Company's assets.[104] Ramirez sued Amsted in New Jersey Superior Court. As New Jersey then followed the no successor liability rule,[105] the trial judge granted Amsted's motion for summary judgment.[106] The intermediate appellate court, unanimously rejecting the no successor liability rule and adopting the product line approach, reversed and remanded the case against Amsted for trial.[107] The New Jersey Supreme Court unanimously affirmed the intermediate appellate court's decision.[108]

The intermediate appellate court and supreme court opinions evidence thoughtful consideration of the advantages and disadvantages of the substantive content of the competing successor corpo-

102. *See supra* note 26 and accompanying text; *infra* notes 122, 131–32 and accompanying text; Subpart IV.A.

103. Ramirez v. Amsted Indus., 431 A.2d 811 (N.J. 1981).

104. *Id.* at 812–13.

105. *Id.* at 815 (citing McKee v. Harris Seybold Co., Div. of Harris Intertype Corp. 264 A.2d 98, 101–02 (N.J. App. Div. 1970).

106. *Id.* at 812–13.

107. Ramirez v. Amsted Indus., Inc., 408 A.2d 818 (N.J. App. Div. 1979).

108. *Ramirez*, 431 A.2d at 824–25.

ration products liability rules. Once those courts declared the product line approach to be New Jersey's "domestic" rule, however, a conventional choice of law issue arose. The law of New Jersey conflicted with the law of Delaware and Indiana, both of which followed the no successor liability rule. Yet despite the connections Johnson, Amsted, and the asset sale contract had with those states,[109] none of the opinions mentions this conflict.

From a conventional choice of law perspective, this omission is somewhat perplexing. The most likely explanation is that the intermediate appellate court and the supreme court did not look beyond New Jersey law because Amsted did not argue for the application of either Delaware or Indiana law.[110] Much more perplexing is why Amsted's briefs failed to include any choice of law arguments,[111] especially because the *Ramirez* litigation took place at about the same time as *Korzetz v. Amsted Industries, Inc.*,[112] a Johnson Press case in which Amsted argued the choice of law issue vigorously.[113]

A distinction between *Ramirez* and *Korzetz* is that Michigan, the state in which Linda Korzetz was injured, no longer followed the no successor liability rule by the time of her suit. A few years earlier, in *Turner v. Bituminous Casualty Co.*,[114] the Michigan Supreme Court had rejected that rule in favor of a precursor to the

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109. Amsted Industries was a Delaware corporation. Johnston v. Amsted Indus, Inc., 830 P.2d 1141 (Colo. App. 1992) (identifying Amsted Industries as a Delaware corporation in the case name). The asset sale contract was entered into in Indiana, and was between a predecessor Indiana corporation (Bontranger Construction Co.) and a subsidiary of Amsted formed under Indiana Law. *See Ramirez*, 431 A.2d at 814. The mechanical press involved in the case was manufactured by Johnson Machine and Press Co. in Indiana. *See id.*

110. Some choice of law theories require application of forum law unless the party who would be disadvantaged by that law argues for its displacement. *See*, *e.g.*, Leary v. Gledhiss, 84 A.2d 725, 728–29 (N.J. 1951) (placing burden on party to be benefited to raise the conflicts issue); Watts v. Swiss Bank Corp., 265 N.E.2d 739, 743 (N.Y. 1970) (holding that forum law should apply when parties fail to raise conflicts issue in absence of "manifest injustice"); *cf. Mercer Symposium*, *supra* note 95, at 645 (statement of Professor John Rees, Jr.) (arguing same).

111. Amsted's Supplemental Brief on Petition for Certification to the Superior Court, Appellate Division, states only, "It is to be noted that the substantive law of the states of Indiana and Illinois governs the rights of the parties to the purchase agreement involved in this litigation." Supplemental Brief of Defendant-Respondent-Petitioner Amsted Indus., Inc. at 17; Ramirez v. Amsted Indus., Inc., 431 A.2d 811 (1981) (No. C-436).

112. Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136 (E.D. Mich. 1979).

113. At the time, Michigan followed a jurisdiction selecting choice of law rule. Amsted argued for application of the law of the place of the asset sale contract under contract characterization rather than for the law of the place of injury under tort characterization.

114. Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich. 1976).

product line approach.[115] Hence, Amsted could not have prevailed without convincing the court to displace Michigan's recently adopted "domestic" rule with Illinois or Indiana law. As *Korzetz* was a diversity action,[116] the federal district court first attempted to ascertain whether a Michigan court would have displaced the Michigan rule.[117] The district court's frustration after examining the *Turner* opinion sounds a familiar note:

> In *Turner*, . . . the contract which transferred the assets of the predecessor to the successor corporation was apparently executed outside of Michigan. Michigan applied (*and created*) its own law regarding successor liability. However, the conflict issue . . . was not precisely before it. The reported opinion nowhere speaks of the Defendant pleading in the Supreme Court or below the application of . . . any other state law. It is noteworthy that the Michigan Supreme Court applied its own products liability law when, had the problem been characterized as contractual, some other jurisdiction's law of successor liability may have been relevant. Nevertheless, their silence regarding conflict of laws is deadening . . . . (*Emphasis added.*).[118]

By my conventional choice of law criticism of *Ramirez* and—by reference—*Turner* I do not intend to imply that the New Jersey and Michigan Supreme Courts should have displaced their respective state substantive "domestic" rules. Indeed, under my proposed approach, to have decided the successor corporation products liability issue according to other than forum law would have been improper in both cases. I do, however, intend to call attention to a possible unarticulated distinction each court may have made between a case in which the court being asked to adopt a state nominally domestic rule having preponderantly multistate application and a case in which the court would have been asked to choose between a state's truly domestic rule that already was in place and another state's conflicting truly domestic rule. As a matter of conventional choice of law theory, any distinction between a conflict of laws existing at the outset of litigation and a conflict of laws arising

115. The court expanded the "de facto merger" exception by expanding the definition of "continuation of enterprise" and contracting the importance of continuity of ownership. *See Turner*, 244 N.W.2d at 883–84. Under its test, continuity of enterprise existed if the purchaser intended to operate as similarly as possible to the original manufacturer. *See id.* at 882. The court looked to such things as use of the original manufacturer's name, goodwill, customers, products, and personnel to make this determination. *See id.*

116. 28 U.S.C. § 1332(a)(1).

117. *See* Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–97 (1941).

118. Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136 (E.D. Mich. 1979).

immediately upon judicial adoption of a domestic rule is meaningless. But as a practical matter a court that has just determined the appropriate substantive content of its state's domestic rule after carefully having analyzed the alternatives might seem unlikely, in the very same case, immediately to turn around and displace that rule in favor of another state's conflicting domestic rule. Even if this unlikelihood makes the omission of any reference to choice of law in the *Ramirez* and *Turner* opinions understandable, nevertheless it does not provide an analytically satisfying explanation for each court's complete failure to discuss connections with another state whose domestic rule would have yielded the opposite result.

D. Inadequacy of Existing Judicial Approaches to Choice of Law: A Summation

In this Part I have evaluated the choice of law methodologies under which courts have resolved conflicts between the no successor liability rule and the product line approach to successor corporation products liability. Although my basic criticism is that all these methodologies ignore the essential difference between typical domestic rules and nominally domestic rules having preponderantly multistate application, the existing judicial methods would be inadequate even if successor corporation products liability rules could be treated as typical domestic rules. The existing methods are inadequate in conventional choice of law terms because they do not provide objective standards (i.e. standards eliminating judicial discretion) by which to answer a question crucial to the choice of law analysis that each particular method requires. For courts that follow a jurisdiction selecting rule, the crucial question is whether successor corporation products liability should be characterized as an issue of corporate, contract, or tort law.[119] For courts that follow a functional approach, the crucial question is whether facilitating free transferability of corporate assets or compensating products liability claimants should be considered more "weighty."[120] Without objective standards, a court's answer to either question, although expressed as part of its choice of law analysis, inevitably reflects its

119. *See* discussion *supra* Subpart I.A.

120. *See supra* note 96 and Subpart I.B. The same question would exist if a court, guided by Professor Leflar's choice influencing considerations, were to attempt to determine whether the no successor liability rule or the product line approach is the better rule of law. *See supra*, note 97, ¶ 3.

unarticulated views about the relative merits of the competing "domestic" rules.[121]

I also have evaluated decisions adopting and applying forum law without mentioning choice of law. I explained that these decisions are inadequate in their *application* of forum law because the courts failed to take any account of relevant connections with a state whose "domestic" rule would have yielded the opposite result.[122] These decisions also are inadequate in their *adoption* of forum law because despite having given thoughtful consideration to the advantages and disadvantages of the substantive content of the competing successor corporation products liability rules, the courts probably treated such rules as though they were typical domestic rules rather than as nominally domestic rules having preponderantly multistate application.

In Part II, I explain why successor corporation products liability rules are nominally domestic rules having preponderantly multistate application, how state lawmakers should approach the adoption of such rules, and how courts should approach cases requiring the application of such rules.

II. ADOPTING AND APPLYING NOMINALLY DOMESTIC RULES HAVING PREPONDERANTLY MULTISTATE APPLICATION

A. The Preponderantly Multistate Nature of Successor Corporation Products Liability Rules

Nominally domestic substantive rules having preponderantly multistate application are intrinsically different from typical domestic substantive rules, I have observed, because (at least with respect to the reported cases) a preponderance of the circumstances under which the former apply involve parties and events connected with two or more states. In deliberating whether to adopt such a nominally domestic rule, state lawmakers cannot as a practical matter act on the basis of purely local concerns in the face of the overwhelming multistate implications of the prospective rule. On the contrary, the state lawmaker must, when deliberating, take account of the myriad potential law and fact patterns the state's court is likely to

121. A state legislature might well favor the no successor liability rule over the product line approach. "[T]he legislature may not be especially sympathetic to tort claimants. Their diffuse and largely unrepresented interests are more than counterbalanced in the legislative forum by well focused groups that would be hurt by successor liability rules." Roe, *supra* note 10, at 1596. The drafters of the relevant codes, such as the Model Business Corporation Act, are likely to have values such as the free transferability of corporate assets uppermost in their minds. *Id.*

122. *See* discussion *supra* Subpart I.C.

face when preponderantly multistate cases come before it in the future. As a consequence, a court should not analyze a case presenting a conflict between the nominally domestic rules having preponderantly multistate application of the states connected with the parties or events as a conventional choice of law case. The usual choice of law question—whether the multistate implications of applying the forum state's truly domestic rule require displacing it and applying the other state's conflicting truly domestic rule—has no meaning in such a preponderantly multistate case.[123]

Successor corporation products liability rules exemplify the intrinsic difference between nominally domestic rules having preponderantly multistate application and typical domestic rules. Of the 75 reported cases cited in this article in which the claimant was injured by a product whose corporate manufacturer sold all its assets to a successor corporation and dissolved, 70[124] involved parties and events connected with two or more states.[125] To regard state lawmakers who deliberated whether to adopt the no successor liability rule or the product line approach as though they had balanced only the relative costs and benefits of free transferability of the assets of local corporate manufacturers against compensation for local tort claimants, would, therefore, be wholly misguided. As may be inferred from my critique of the existing successor corporation products liability decisions in Part I, I disagree with any methodology that gives courts the option to displace the forum's preponderantly multistate nominally domestic law.

In the remainder of this Part II, continuing to use successor corporation products liability rules as an example, I develop my suggested approach to preponderantly multistate cases. Different institutional considerations govern a court's role with respect to such cases depending upon whether the state law is contained in a statute or in judicial decisions. Subpart B describes how state legis-

123. *See supra*, note 26 and following text; *see also supra*, notes 131–32 and accompanying text; *see infra* Subpart IV.A.

124. Only five appear to have involved purely local parties and events. *See* Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977); Tift v. Forage King Indus., Inc., 322 N.W.2d 14 (Wis. 1982); Hamaker v. Kenwel-Jackson Mach., Inc., 387 N.W.2d 481 (Neb. 1982); Bernard v. Kee Mfg. Co., 409 So. 2d 1047 (Fla. 1982); Harris v. T.I. Inc., 413 S.E.2d 605 (Va. 1992).

125. The factual connections included: claimant's domicile or habitual residence; where claimant acquired the product; where claimant regularly used the product; where claimant was injured; predecessor's state of incorporation; predecessor's commercial domicile or principal place of business; where predecessor manufactured the product; successor's state of incorporation; successor's commercial domicile or principal place of business; and where successor currently manufactures the same product line.

latures theoretically should deliberate the adoption of a nominally domestic statute having preponderantly multistate application and why, after its adoption, courts sitting in the state should apply the statute in every case to which the rule constitutionally may extend. Subpart C describes how state courts should carry out their dual roles of adopting and applying a nominally domestic rule having preponderantly multistate application. Subpart D explains how the Constitution affects my proposal that courts decide preponderantly multistate cases by applying the law of the forum.

B. State Statutes Having Preponderantly Multistate Application

1. Adopting a Successor Corporation Products Liability Statute

After Efrain Ramirez persuaded the New Jersey Supreme Court to replace its existing no successor liability rule with the product line approach to successor corporation products liability,[126] workers injured elsewhere by Johnson Mechanical Presses asked other state courts to follow New Jersey's lead.[127] Of the courts that declined, a few concluded that only the legislature should make such a major change to the state's common law.[128] In light of statutes governing a range of products liability issues,[129] that common

126. Ramirez v. Amsted Indus., Inc., 31 A.2d 811 (NJ 1981).

127. In addition to *Jones, Burr,* and *Fish* cited *infra* note 128, see, e.g., Johnston v. Amsted Indus., Inc, 830 P.2d 1141 (Colo. Ct. App. 1992); Manh Hung Nguyen v. Johnson Mach. & Press Corp., 388 N.E.2d 778 (Ill. App. Ct. 1982); Simoneau v. S. Bend Lathe, Inc., 543 A.2d 407 (N.H. 1988); McGaw v. S. Bend Lathe, Inc., 598 N.E.2d 18 (Ohio Ct. App. 1991).

128. *See*, *e.g.*, Jones v. Johnson Mach. & Press Co., 320 N.W.2d 481, 484 (Neb. 1982) (changing principles of corporate succession ought to be left to legislative determination); Burr v. South Bend Lathe, Inc., 480 N.E.2d 105, 109 (Ohio Ct. App. 1984) (issue is for legislative consideration); Fish v. Amsted Indus., Inc., 376 N.W.2d 820, 828 (Wis. 1985) (legislature is in better position to make broad policy decisions on strict liability). State courts have reached the same conclusion in other successor corporation products liability cases, as well. *See, e.g.*,Winsor v. Glasswerks PHX, L.L.C., 63 P.3d 140 (Ariz. App. 2003); Myers v. Putzmeister, Inc., 596 N.E.2d 754, 758 (Ill. Ct. App. 1992); Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989) (legislature's responsibility to balance competing interests implicated by products liability and corporate succession); Flaugher v. Cone Automatic Machine Co., 507 N.E.2d 331 (Ohio 1987).

129. About 60 percent of the states have some form of products liability statute. The statutes vary widely in the extent of their coverage and the specificity of their provisions. Most of the statutes provide that the manufacturer is not liable if the product represented the state of the art technology or complied with all applicable regulations at the time of manufacture or first sale. They differ as to whether the claimant or the manufacturer has the burden of proof on this issue. *Compare e.g.*, MISS. CODE ANN. § 11-1-63(f)(i) & (ii) (2014) (claimant has the burden of proof), *with e.g.*, ARIZ. REV. STAT. § 12-683.1 (2009) (manufacturer has the burden of proof). Several states have statutes of repose, the most common of which provide that no action may be brought more than ten years after the first sale of the

law rules continue to govern the issue of a successor corporation's products liability almost entirely is somewhat surprising.[130] The issue does, nevertheless, provide a useful frame of reference for discussing legislative adoption of nominally domestic statutes having preponderantly multistate application.

Theoretically, a complete legislative analysis of every prospective state statute on any subject would take account of the statute's potential effects on all parties and events with which the state ever might have relevant connections.[131] If the statute is a typical domestic statute, however, the analysis almost certainly would be limited to the statute's potential effects on parties and events within the state. The legislature might well be willing to leave to the state's judicial choice of law process the occasional situation in which a relevant party or event is connected to another state whose substantive rule differs.[132]

If, however, the prospective statute is a nominally domestic successor corporation products liability statute having preponderantly multistate application the legislature's theoretical analysis cannot ignore the likelihood that the vast majority of cases to which the statute will apply will have relevant connections with at least one other state. Relevant parties would include claimants, predecessor corporations, and successor corporations. Relevant claimant-related connections with the enacting state or another state would include domicile or habitual residence, acquisition of a product, regular use of a product, and injury caused by a defective prod-

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product. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-577a (a) (West 2017). A few statutes deal with punitive damages. *See, e.g.*, OR. REV. STAT. § 30.925 (1995). And one state specifically limits non-economic damages in products liability actions. *See* MICH. COMP. LAWS ANN. § 600.2946a (West 1996).

130. *See* 15 FLETCHER, *supra* note 4, at § 7123.05–7123.08 (citing cases). A Minnesota statute limits a successor corporation's liability for the predecessor corporation's debts to those it expressly agrees to assume in the contract with the predecessor. MINN. STAT. ANN. § 302A.661(4) (West 2010). The statute makes no reference to products liability. The General Comments to the statute, however, provide that it was designed to limit the successor's exposure to product liability claims for items manufactured by the predecessor. No state legislature appears to have adopted the product line approach.

131. Potential effects also include effects on the state's judicial system. Relevant connections are contacts with the state that would create state interests in the application of its law according to the full faith and credit aspects of the constitutional test for choice of law. *See infra* notes 159–61 and accompanying text.

132. Many states have adopted choice of law rules for a few specific types of cases. These include the validity of foreign executed wills, the Uniform Commercial Code, no-fault automobile insurance and borrowing statutes directing the forum when to dismiss claims under foreign statutes of limitations. See the discussion of these types of statutes and the problems associated with them in KAY, ET AL. CONFLICT OF LAWS, *supra* note 12, at 97–103.

uct; relevant predecessor-related connections would include incorporation, commercial domicile or principal place of business, and manufacture of a product; and relevant successor-related connections would include incorporation, commercial domicile or principal place of business, and manufacture of the same product line using assets acquired from the predecessor.

In some of those cases, another state's successor corporation products liability rule might differ. Hence, nearly every case will have the potential to present a choice of law. The legislature's analysis must, therefore, at the time of adoption, take account of the choice of law consequences of adopting either a no successor liability rule or the product line approach.

Once the legislature adopts one of the two rules it has, for the reasons described in Subpart II.B.2. below, made a choice of law decision integral to its substantive law decision. Whichever rule the legislature adopts should apply to every successor corporation products liability case that comes before the state's court.[133]

2. *Applying a Successor Corporation Products Liability Statute*

Once a state legislature enacts a successor corporation products liability statute, if a case presents contacts with one or more states with a conflicting statute or common law successor corporation products liability rule, judicial analysis of whether to apply the forum state's statute or displace it would not be justified. This would be so even if the court could not obtain any reliable information about whether or to what extent the forum state legislature actually had carried out the theoretical complete analysis of the statute's multistate implications I described in the previous subpart.[134] Substitution of the court's own judgment about the relevance of the contacts with the other state or states for the forum state's statute would be an improper usurpation of the legislative function, not a proper exercise of judicial authority over choice of law. Indeed, in every case involving a nominally domestic statute having preponderantly multistate application, the exercise of any judicial latitude over choice of law would be incompatible with respect for the legislature.[135] Appreciation of this incompatibility is enhanced by first considering why the exercise of considerable judicial latitude over choice of law *is* justifiable when a case involves a typical domestic statute.

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133. This includes a federal district court sitting in diversity. *See supra* note 11.

134. *See supra* notes 131–32 and accompanying text.

135. *See infra* notes 140–50 and accompanying text.

A typical domestic statute ordinarily is silent about whether, or, if so, when it should apply to a case that involves a party or event connected to another state.[136] Occasionally, though, a case to which such a statute might apply does present a relevant contact with another state whose typical domestic statute or common law rule conflicts with the forum state's statute. In that circumstance, the functional approaches to choice of law invite the court to draw, from the legislature's silence, some inference about the statute's applicability to the non-local party or event.[137] An inference that the legislature had limited its analysis of the statute to the state's local concerns would be reasonable because the legislature did not have to consider the statute's occasional multistate implications in order to address those overwhelmingly local concerns.[138] A court drawing that reasonable inference about the scope of the legislature's analysis would, therefore, legitimately take on the primary institutional role vis-a-vis the legislature in deciding whether and to what extent the forum state's typical domestic statute should extend to the non-local party or event in the case before it.[139]

When the case before the court involves a nominally domestic statute having preponderantly multistate application, however, an inference that the forum state's legislature had limited its analysis to the state's local concerns would not be reasonable. *Standal v. Armstrong Cork Co.*,[140] in which the court faced a conflict between the forum state's successor corporation products liability statute and another state's common law rule,[141] provides an ideal law and fact pattern for elaborating the ramifications of this assertion.

The claimant, a Minnesota construction worker, was exposed to asbestos-containing insulation manufactured by the predecessor in Pennsylvania. Thereafter, the successor bought the asbestos-related assets and continued to manufacture the same type of insulation. When the claimant subsequently manifested symptoms of asbestosis, he sued the successor in Minnesota state court.[142] Minnesota followed the no successor liability rule, which was embodied

136. *See supra* notes 25–26 and accompanying text.

137. Functional approaches deal with state "interests," "purposes" and "policies." *See supra* notes 18, 92, 94.

138. *See* Currie, *supra* note 93, at 232 n.16, CURRIE SELECTED ESSAYS, at 83–84 n.16.

139. *Id.*

140. Standal v. Armstrong Cork Co., 356 N.W.2d 380 (Minn. Ct. App. 1984).

141. Research in Lexis and Westlaw revealed no other such case.

142. *Standal*, 356 N.W.2d at 381.

in a statute.[143] Pennsylvania followed the product line approach, which was embodied in a judicial decision.[144] The trial court, applying Minnesota law, granted the successor's motion for summary judgment.[145]

The court of appeals reversed. Mistakenly, the court ignored Minnesota's statutory no successor liability rule.[146] Also mistakenly, the court treated the successor corporation products liability rules of both states as though they were typical domestic rules rather than nominally domestic rules having preponderantly multistate application. Instead the court undertook a functional choice of law analysis,[147] chose Pennsylvania law, and held that the claimant's action could proceed under the product line approach. Had the court correctly recognized the statute as the source of Minnesota's no successor corporation liability rule, and also correctly recognized the statute's preponderantly multistate application, suitable regard for the competence of members of a coordinate branch of state gov-

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143. The statute provides: "The transferee is liable for the debts, obligations, and liabilities of the transferor only to the extent provided in the contract or agreement between the transferee and the transferor or to the extent provided by this chapter or other statutes of this state." MINN. STAT. ANN. § 302A.661(4) (West 2010).

The reporter's notes to this section comment:

> Subdivision 4 of this section is aimed at limiting the civil liabilities of transferors assumed by transferees to those agreed to between the parties or imposed by law, even if the transferee is operating the corporation in exactly the same manner as it was operated by the transferor. This limits, for example, exposure to product liability claims for items manufactured by the transferor.

MINN. STAT. ANN. § 302A.661 note (Black 1981) (General Comment).

144. Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 110 (Pa. Super. Ct. 1981).

145. No published information appears to exist about the trial court's choice of law theory or about whether it cited the Minnesota statute.

146. As authority for Minnesota's adherence to the no successor liability rule, the court cited two Minnesota cases, State Bank of Young Am. v. Vidmar Iron Works, Inc., 292 N.W.2d 244 (Minn. 1980) and J.F. Anderson Lumber Co. v. Myers, 206 N.W.2d 365 (Minn 1973), both of which were decided before the statute was adopted. Inexplicably, the court did not even mention the statute in its opinion. In Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn 1989), the Minnesota Supreme Court cited the statute and the reporter's notes in support of its holding in favor of the successor. That case did not, however, involve a conflict of laws because Wisconsin, the state where the predecessor manufactured the product and the successor continued to manufacture the product, also followed the no successor liability rule.

147. The court utilized Minnesota's "choice-influencing considerations" method of analysis. 356 N.W.2d at 381. *See also* Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Robert A. Leflar, *Conflicts Law*: *More on Choice Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

ernment[148] would have required the court of appeals to have applied the Minnesota statute to affirm the summary judgment in favor of the successor.

My explanation of how the Minnesota Court of Appeals should have reached its decision in *Standal* is germane whenever a case involves a forum state statute having preponderantly multistate application. Almost every case that falls within the substantive terms of such a statute will involve relevant contacts with at least one state in addition to the enacting state.[149]

The state legislature, in enacting the statute, will therefore have taken account of various multistate distributions of relevant parties and events to which the statute potentially might apply.[150] Hence, a forum state's nominally domestic statute having preponderantly multistate application provides its own rule of decision in every case with which the state has any relevant contact, without regard to how the relevant parties and events in a particular case are distributed among the forum state and other states. When the case is before a court in the enacting state, the court's only legitimate role vis-a-vis the legislature apropos the statute is to determine whether its application would be constitutional.

C. State Common Law Rules Having Preponderantly Multistate Application

1. Adopting a Common Law Successor Corporation Products Liability Rule

In the absence of a statute, when successor corporation products liability is an issue of first impression in a state or when a party argues that the state's existing rule should be changed, the decision whether to adopt the no successor corporation liability rule or the product line approach must be made by the court.[151] The court essentially is in the same position as a state legislature. As the rule the court adopts will be a nominally domestic rule having prepon-

148. *Standal* was decided by a state court, which disregarded its own state legislature—a coordinate branch. If a federal district court exercising diversity jurisdiction had done what the Minnesota court did in *Standal*, its mistake would have been disregarding a statute of the state in which it was sitting, not disregarding a "coordinate branch."

149. *See* discussion *infra* Part IV, Subpart A.

150. *See supra* notes 131–32 and accompanying text.

151. Some courts have adopted the no successor corporation products liability rule by default, stating that adoption of the product line approach was a matter for the state legislature. *See supra* note 128 and accompanying text. Other courts have felt free to adopt the product line approach. See *supra* note 9 and accompanying text.

derantly multistate application, choice of law necessarily will be an integral part of the rule.[152] In considering the relative merits of the two substantive rules, the court should be aware that because either of the rules rarely will apply to a case involving parties and events limited to the forum state, the court is not adopting a typical domestic rule.[153] But even if the court does not explicitly take into account the inherently multistate consequences of whichever successor corporation products liability rule it adopts, the court's decision will become a nominally domestic rule having preponderantly multistate application. Choice of law, whether the court expressly undertook a choice of law analysis or not, should be treated as an integral part of the rule's adoption.

2. *Applying a Common Law Successor Corporation Products Liability Rule*

I previously have explained why a state court always should apply the forum state's successor corporation products liability statute.[154] Likewise, when a state court adopts a common law nominally domestic successor corporation products liability rule having multistate application, the state court should apply that rule to all successor corporation products liability cases that come before it.[155]

D. *How the Constitution Affects My Proposal That Courts Decide Preponderantly Multistate Cases by Applying Forum Law*

My proposal that preponderantly multistate cases be decided by the law of the forum presents no special constitutional problems. "[F]or 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."[156] As applied by the Supreme Court, that constitutional test for choice of law has a due process component and a full faith and credit component.

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152. *See supra* note 132 and following text.

153. *See supra* note 133 and accompanying text.

154. *See supra* notes 133–49 and accompanying text.

155. The state court should apply its common law rule unless it wishes to overrule a prior decision.

156. Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981). Although *Allstate* was decided by a plurality, the three dissenting judges essentially accepted this test of constitutionality. Their disagreement was over whether the test had been met.

1. Cases in Which the Product Line Approach Applies

The due process component focuses on fairness to the party against whom the forum state's law is sought to be applied.[157] When a state applies its product line approach against a successor corporation, the due process component for choice of law purposes almost certainly will have been met whenever the forum has personal jurisdiction over the successor. This is because the constitutional test for personal jurisdiction is more stringent in terms of contacts with the state than the test for choice of law.[158]

The full faith and credit component, for choice of law purposes, focuses on the interest the forum state has in the application of its own law. If the forum has a contact creating a state interest, it may apply its own law and need not give full faith and credit to the law of another state that also has a contact creating a state interest.[159] What follows addresses the full faith and credit component of the constitutional test.

Residence has significance for the full faith and credit component of the constitutional test. For purposes of the full faith and credit component, a state has an interest in applying its law in favor of a resident claimant injured in the state in order to protect the local resident and prevent that local resident from becoming a public charge.[160] For that constitutional purpose, therefore, a state following the product line approach always has an interest in applying that rule to allow a resident claimant who has been injured in the state to recover against a successor asset purchaser.

Once a state has adopted the product line approach residents of the state injured elsewhere and residents of other states will want to bring their successor liability suits in that product line state. Two potential claimants should be non-controversial for determining the state's interest for full faith and credit purposes: (1) the resident of the state who was injured elsewhere; and (2) the non-resident of the state who was injured in the state. As to the first claimant, the place of injury has no effect on the state's interest in that claimant's recovery because of the possibility that the claimant may become a public charge. As to the second claimant who was injured in the

157. Home Ins. Co. v. Dick, 281 U.S. 397 (1930). The same is true for the due process component of personal jurisdiction. *See infra* notes 162–70 and accompanying text.

158. *But see infra* note 179.

159. Pac. Emp's. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 502 (1939).

160. *See* BRAINERD CURRIE, SURVIVAL OF ACTIONS: ADJUDICATION VERSUS AUTOMATION IN THE CONFLICT OF LAWS (1958), *reprinted in* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 128, 143 (1963).

state, the state also has an interest in that claimant's recovery because that claimant may have incurred medical expenses in the state which may go unpaid if the claimant is unable to recover under the state's product line approach.[161]

For a product line state to compensate a non-resident claimant who was injured elsewhere may seem controversial for full faith and credit purposes because the state may have no interest in protecting that claimant. Under my proposed choice of law rule for preponderantly multistate cases, that claimant, too, constitutionally could have the benefit of the state's product line approach if: (1) the successor is incorporated or headquartered in the state; (2) the predecessor or successor had been either incorporated or headquartered in the state at the time of the asset purchase; (3) the predecessor manufactured the product in that state; or (4) the successor is manufacturing the product in the state. A state's interest is not limited to "protecting" its own individual and corporate residents by allowing them to recover damages. A state also has an interest in assuring compensation from its corporate residents to injured persons.[162]

2. Cases in Which the No Successor Liability Rule Applies

A resident claimant may bring suit in the state of injury and argue that the state should adopt the product line approach. Should claimant lose the argument and the state apply or adopt the no successor liability rule, claimant would lose both a due process and a full faith and credit challenge to the no liability rule. No due process problem would exist because the claimant chose to ask that state's courts to decide which successor corporation products liability rule to apply. No full faith and credit problem would exist because the state has an interest in protecting its corporate residents against liability to its injured residents. The state does not have to assure compensation from its corporate residents to its injured resident claimants. If the resident claimant injured in the state could not recover, the non-resident claimants injured either within the state or in another state also could not recover.

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161. *Pac. Emps. Ins. Co.*, 306 U.S. at 504.

162. *Cf.* Lopata v. Bemis Co., 406 F. Supp. 521, 524 (E.D. Pa. 1975).

III. LEGAL OBSTACLES THE PARTIES MAY FACE UNDER MY PROPOSAL THAT PREPONDERANTLY MULTISTATE CASES BE DECIDED BY FORUM LAW

A. Legal Obstacles Claimants May Face

Aside from any constitutional obstacles discussed in Subpart II.D., successor corporation products liability claimants may face two major legal obstacles if they sue the successor in a state that follows the product line approach. The first obstacle is obtaining personal jurisdiction over the successor. The second obstacle is the successor filing a reactive suit for a declaratory judgment of no liability in a state that follows the no successor liability rule. This Subpart examines these obstacles in two contexts: (1) claimant was injured at home in a state that follows the product line approach and sues the successor there; and (2) claimant was injured at home in a state that follows the no successor liability rule and sues the successor in a state that follows the product line approach.

1. Personal Jurisdiction over the Successor Corporation

Before a state court may apply its own law it must, of course, have personal jurisdiction over the defendant. *J. McIntyre Machinery v. Nicastro*,[163] the most recent Supreme Court case to consider personal jurisdiction, may have limited the circumstances in which claimant's home and state of injury constitutionally would have personal jurisdiction over the successor corporation. This case is especially relevant when the product is industrial equipment, which is involved in many successor corporation products liability cases.

Nicastro, a New Jersey resident, was injured in New Jersey by a metal shearing machine manufactured by J. McIntyre in England, where the company is incorporated and operates. J. McIntyre sold its machines to a United States distributor that Nicastro did not allege was under J. McInytre's control. J. McIntyre attended annual scrap metal conventions in the United States alongside the distributor, but no such convention was held in New Jersey. The record suggested that only one J. McIntyre metal shearing machine ended up in New Jersey although the plurality mentioned, without explanation, that as many as four such machines may have ended up there.[164]

The New Jersey Supreme Court had held that New Jersey courts could exercise personal jurisdiction over J. McIntyre because

163. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).
164. *Id.* at 878.

the injury occurred there; J. McIntyre knew or should have known that its products are distributed through a nationwide distribution system that might lead to its machines being sold in any of the fifty states; and J.McIntyre took no reasonable step to prevent its products from ending up in New Jersey. The New Jersey Supreme Court called this the stream of commerce doctrine of jurisdiction.[165]

Justice Kennedy, writing for a four justice plurality, rejected the New Jersey Supreme Court's description of the stream of commerce doctrine. He also rejected the rationale that due process, for personal jurisdiction purposes, principally is concerned with fairness to the defendant. Instead, he wrote, due process is based on the rationale of state power. He concluded that because J. McIntyre did not engage in any activities that revealed an intent to invoke or benefit from the protection of New Jersey's laws, the state lacked power to exercise personal jurisdiction over the corporation.[166]

Justice Breyer, writing for himself and Justice Alito, concurred only in the judgment and specifically rejected the plurality's state power rationale for personal jurisdiction.[167] He was, however, unwilling to accept the New Jersey Supreme Court's conclusion about the stream of commerce on the record before the Supreme Court. He did suggest that personal jurisdiction might have been constitutional if J. McIntyre had "delivered its goods in the stream of commerce 'with the expectation that they will be purchased' by New Jersey users." What was missing from the record, according to Justice Breyer, was the 'something more' that would support such an expectation. He gave the impression that he might well have been satisfied had the record shown advertising or even a list of potential New Jersey customers who might regularly have attended trade shows. Although he did not make this point directly, Justice Breyer appeared to have thought claimant's case was lawyered poorly.[168]

Justice Ginsburg, with whom Justices Sotomayor and Kagan joined, dissented. She viewed the case as an easy one for applying long arm jurisdiction under *International Shoe Co. v. Washington*[169] and subsequent decisions.[170] Importantly, as had Justice Breyer, she specifically rejected the plurality's state power rationale for per-

165. *See* Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 592–94 (N.J. 2010).

166. *J. McIntyre Mach.*, 564 U.S. at 882–84.

167. *See id*. at 890–91.

168. *See id.* at 889–90.

169. Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945).

170. *See J. McIntyre Mach.*, 564 U.S. at 893–94.

sonal jurisdiction. "[T]he constitutional limits on a state's adjudicatory authority" she wrote, "derive from considerations of due process, not state sovereignty."[171] As a consequence of Justice Breyer's concurrence and Justice Ginsburg's dissent garnering five combined votes, the plurality's power rationale for personal jurisdiction is not a constitutional requirement; the constitutional due process standard still is fairness.

Even if the plurality were willing to accept the dissent's long arm jurisdiction theory, however, personal jurisdiction raises an additional question if claimant sues the successor in the state of claimant's residence and injury which follows the product line approach. The predecessor may have advertised and sold the product nationwide in such a manner as to meet the requirements for personal jurisdiction set forth in *Nicastro*, but the successor purposefully may have avoided any contacts with states following the product line approach.

The claimant is likely to argue that the successor should be regarded by the state of injury as standing in the shoes of the predecessor for purposes of personal jurisdiction. When the successor purchased the predecessor's assets it also purchased the predecessor's good will, which, the claimant will assert, attached to all products sold by the predecessor wherever the products are located. That the successor benefited from the predecessor's goodwill would be one of the justifications for adopting the product line approach. Hence, a product line approach forum might well agree with claimant and exercise jurisdiction. The successor is likely to argue that the forum has no personal jurisdiction because the successor has not purposely availed itself of contacts with that state. A Westlaw review of all cases citing *Nicastro* revealed no case involving an attempt to obtain personal jurisdiction over a successor corporation.

2. *Successor's Reactive Suit*[172] *for a Declaratory Judgment*[173] *of No Liability*

If claimant's residence and state of injury follows the no successor liability rule and a state that has jurisdiction over the succes-

171. *Id.* at 899.

172. *See generally* Allan D. Vestal, *Reactive Litigation*, 47 IOWA L. REV. 11 (1961). A reactive suit is a second suit based on the same factual controversy that is the basis for the first suit but brought by a defendant in the first suit against the plaintiff in the first suit. *Id.* at 12–14. The defendant in the first suit brings the reactive suit in a different state where the law favors the party who is a defendant in the first suit and plaintiff in the second suit. *Id.* Both the original suit and the reactive suit are pending at the same time. *Id.* Although the successor is the plaintiff in the reactive suit for a declaratory judgment, I use the term "successor"

sor follows the product line approach, claimant may sue the successor in the latter state. Claimant could file suit either in state court or, based on diversity jurisdiction, in federal court. The successor could then file a reactive suit in the state court of claimant's residence against claimant seeking a declaratory judgment of no successor liability. This could present a virtually insuperable obstacle to claimant's ability to recover from the successor.

Should such a reactive suit occur, claimant most likely would want to ask the court in which claimant originally brought suit to issue an antisuit injunction preventing the successor from proceeding with the reactive suit. Although state and federal courts have power to issue antisuit injunctions,[174] some courts, on the basis of comity, have declined to issue them in cases involving reactive suits.[175] Other courts, however, have issued such injunctions ostensibly to protect their jurisdiction.[176] The authors of one well respected Conflict of Laws hornbook have summarized the cases thusly: "Antisuit injunctions, for instance, represent the most difficult use of the court's equitable powers, and will generally be invoked only if the foreign action would result in fraud, gross wrong or oppression. An injunction by a court to 'protect its jurisdiction' suggests a provincial pride that is most unfortunate in a federal nation."[177]

Even if the original court were to issue an antisuit injunction, the court in which the successor brought the reactive suit nevertheless could proceed.[178] Ordinarily, therefore, a race to judgment would ensue. The final judgment of the first court to reach a final

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to describe the plaintiff in the reactive suit and use the term "claimant" for the injured party.

173. 28 U.S.C. § 2201–40 (dealing with declaratory judgements in the federal courts). States have their own declaratory judgment statutes or rules.

174. A court that has personal jurisdiction over the defendant has power to issue an antisuit injunction. *See* PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS 1390–91 nn.89–90 (6th ed. 2018); John R. Phillips, Comment, *A Proposed Solution to the Puzzle of Antisuit Injunctions*, 69 U. CHI. L. REV. 2007, 2009 (2002).

175. *See, e.g.*, Advanced Bionics Corp. v. Medtronic, Inc., 59 P.3d 231, 236 (Cal. 2002); Auerbach v. Frank, 685 A.2d 404, 408 (D.C. 1996); Golden Rule Ins. Co. v. Harper, 925 S.W. 2d 649, 651 (Tex. 1996).

176. *See, e.g.*, James v. Grand Trunk W. R.R. Co., 152 N.E.2d 858, 865 (Ill. 1958); Medtronic, Inc. v. Advanced Bionics Corp., 630 N.W.2d 438, 455 (Minn. Ct. App. 2001). As filing of the reactive suit does not prevent the first suit from proceeding, the rationale of protecting the first court's jurisdiction seems specious.

177. HAY ET. AL., *supra* note 174, at 1391. None of the cases the authors cite define what is meant by fraud, gross wrong, or oppression in this context.

178. *Cf.* Baker v. General Motors Corp., 522 U.S. 222, 236 (1998). The second court also might issue an injunction banning claimant from seeking contempt proceedings in the original court. *See also infra* note 188.

judgment would be entitled to full faith and credit in the other court.[179]

When the first suit involves claimant's action for successor liability and the second suit involves the successor's reactive suit for a declaratory judgment of no successor liability, the court of the no successor liability rule state—in which the successor sues—almost always will win the race. Claimant's initial suit would require a trial, whereas the successor need only, at the time of filing its reactive suit, move either for summary judgment or for dismissal for failure to state a claim. A hearing on the successor's motion would occur much more quickly than a trial and, if the no successor liability rule was well established in the state, an appeals process following a judgment for the successor probably would be completed before a trial and the full appeals process in claimant's action.

B. Legal Obstacles Successors May Face

The legal obstacles successors may face when claimant is injured at home depend on whether the claimant's home state follows the product line approach or the no successor liability rule.

1. Claimant's Home State Follows the Product Line Approach

If claimant were injured at home in a state that follows the product line approach and that state was able to assert personal jurisdiction over the successor, a reactive suit for a declaratory judgment of no liability realistically would not be possible in most cases. The claimant is unlikely to be subject to personal jurisdiction in any other states associated with the predecessor, the successor, or their sale and purchase of assets.[180] Under my proposal, therefore, the successor would be liable for the predecessors products liability.

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179. U.S. CONST. art. IV, § 1 (applying the Full Faith and Credit Clause if both suits were pending in state courts). *See* Davis v. Davis, 305 U.S. 32, 40 (1938) (requiring federal courts to respect state court judgements). *See also* Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507 (2001) (providing that a federal court judgment has preclusive effect in state court).

180. For example, the successor might try to obtain transient jurisdiction by "tagging" the claimant in a no successor liability state where the claimant physically is present. *Burnham v. Superior Ct. of Cal.*, 495 U.S 604 (1990). But that state might not have constitutional power to apply its own no successor liability law against the claimant because to do so when the claimant had no other contacts with the state might make application of its law arbitrary and fundamentally unfair. Similar issues might arise if the injured claimant were able to "tag" the successor.

2. *Claimant's Home State Follows the No Successor Liability Rule*

If claimant were injured at home in a state that followed the no successor liability rule and sued in a product line state that had jurisdiction over the successor, the successor might face two legal obstacles if it were to bring a reactive suit for a declaratory judgment of no liability in a state court at claimant's home.

The first obstacle would be that the court in the product line state in which claimant sued might have granted claimant an antisuit injunction. A state court at claimant's home in which the successor sued might, on the basis of comity, then dismiss the successor's complaint for declaratory judgment.

If the successor sued claimant in federal court at claimant's home for a declaratory judgment of no liability, the federal court could stay the successor's suit until the claimant's suit had become final. The ground would be that under the federal Declaratory Judgment Act[181] the court has discretion to do so in order to avoid duplicative litigation.[182]

The second obstacle is that if claimant were to obtain an antisuit injunction from the court in the product line state in which claimant brought suit and the successor nevertheless proceeded with its reactive suit for a declaratory judgment of no liability, claimant might move in the first court to have the successor held in contempt if the successor were to return to that court to defend the original suit. If the successor did not return to that court, it would risk an adverse default judgment against it.[183]

IV. ANTICIPATED CRITICISMS TO MY PROPOSAL THAT PREPONDERANTLY MULTISTATE CASES BE DECIDED BY FORUM LAW

I anticipate three major criticisms to my proposal that preponderantly multistate cases be decided by the law of the forum: (A) My proposal treats legislative and judicial lawmakers as though

181. 28 U.S.C. § 2201.

182. Wilton v. Seven Falls Co., 515 U.S. 277, 285–86 (1995). The trial court's exercise of such discretion is subject to appellate review under an abuse of discretion standard. *Id.* at 289. Just as Professors Hay, Borchers, Symeonides, and Whytock have criticized state courts that issue antisuit injunctions, *see supra* note 174 and accompanying text, Professor Erwin Chemerinsky has criticized the Supreme Court's decision in Wilton. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION (7th ed. 2016). His reason, however, differs. Chemerinsky criticizes the Court for not giving district courts any guidance about when to abstain. *Id.* at 927.

183. *See* Phillips, *supra* note 174, at 2017.

they knew they were adopting nominally domestic rules having preponderantly multistate application; (B) Choice of forum law will lead to forum shopping; and (C) My proposal contains no standards by which to identify nominally domestic rules having preponderantly multistate application.

A. My Proposal Treats Lawmakers as Though They Knew They Were Adopting Nominally Domestic Rules Having Preponderantly Multistate Application

Even the most conscientious lawmakers are unlikely to be aware of every possible multistate situation that a nominally domestic substantive rule having preponderantly multistate application may cover. Nor can the lawmakers know, at the time of adoption, which contact or contacts in future cases will be with the adopting state and which will be with other states. Nevertheless, once the existence of the category of preponderantly multistate rules is brought to their attention, those lawmakers should be expected to be aware of when a substantive rule being considered for adoption will, in the large majority of cases, apply to parties and events connected to two or more states.

Moreover, lawmakers do not adopt substantive rules as abstract propositions; as any lawmaker or law clerk could affirm, lawmakers adopt substantive rules of law after considering the ways in which they will operate in the real world. Thus even before becoming cognizant of the issues this article raises, the deliberative process involving a choice between various possible substantive rules for a class of cases will itself have informed lawmakers when they were about to adopt a rule of law with the characteristics of a nominally domestic substantive rule having preponderantly multistate application.

In addition, having adopted such a substantive rule to govern all the possible variations of multistate contacts, the lawmakers automatically have made a choice of law decision: namely that the adopted substantive rule should govern in every multistate situation where that state's substantive rule can be applied. Effectively, the lawmakers have determined that their state court always is to apply the newly adopted substantive law in cases within the law's ambit whether the cases are wholly domestic or involve parties and events connected to two or more states.

B. Choice of Forum Law Will Lead to Forum Shopping

My proposal that courts decide preponderantly multistate cases according to the law of the forum undoubtedly will lead to some forum shopping. As I explain below, however, my proposal would not be the only source of forum shopping, and forum shopping is not necessarily undesirable. In any event, I believe that even with forum shopping, my proposal will result in a fairer system for deciding preponderantly multistate cases than that which exists under current choice of law rules.

1. Forum Shopping by Claimants

Professor Larry Kramer's[184] observation is well worth quoting here because it says exactly what I always have thought about forum shopping by plaintiffs.

> The assumption that it is unfair to allow plaintiffs to [forum shop] presupposes a "correct" or "fair" baseline defining how often the plaintiff's choice ought to prevail . . . . The argument that allowing plaintiffs to pick is unfair apparently assumes that the "correct" baseline is random distribution . . . . This is not the baseline used for choice of forum which is left entirely to plaintiffs . . . Why is choice of law different? Why are defendants entitled to anything other than the most unfavorable of the laws that can constitutionally be applied? Indeed, why is it not unfair to deprive plaintiffs of the benefit of the most favorable law that may constitutionally be applied?

Kramer goes on to say that he shares the intuition that it is unfair to give plaintiffs a free choice but that he is loath to rely on an intuition that he cannot defend satisfactorily.[185] Although Kramer says nothing further about his intuition, a possible basis for this intuition is the notion that fairness to the parties requires that for every event their rights and obligations should remain the same regardless of where a plaintiff is able to obtain jurisdiction over a defendant.

Some may consider that notion a laudable goal. It would, however, require every state to follow the same choice of law methodology and to apply it in exactly the same way to each plaintiff's case. The history of choice of law demonstrates that such treatment probably is unattainable. Courts frequently have rejected such treat-

184. Professor Kramer is now President of the William and Flora Hewlitt Foundation.

185. Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 312, 313 n.117 (1990).

ment by manipulating the state's choice of law rules in an effort to be fair to parties in accordance with the courts' own concepts of fairness in individual cases. And the Supreme Court expressly has construed the Constitution to permit two different states each to apply its own law to the same event provided that each state has sufficient contacts and a sufficient interest to do so.[186]

I disagree with Kramer and also disagree with those whose idea of fairness requires that for every event the parties' rights and obligations should remain the same regardless of where plaintiff is able to obtain jurisdiction over defendant. I believe it is fairer to give plaintiffs the benefit of the most favorable law that constitutionally may be applied. My rationale is that prior to the lawsuit defendant usually has the advantage of the status quo. A prospective plaintiff has to decide whether a lawsuit is worth pursuing. Prior to making that decision the prospective plaintiff, who believes he or she has suffered a compensable injury, must expend time, effort and sometimes money before bringing suit.

In the absence of a governing federal statute,[187] choice of law in successor corporation products liability cases will be constitutional if the forum follows the products line approach and the forum state is: the claimant's residence; the claimant's place of injury; the place where the claimant purchased the product; the predecessor's place of incorporation, headquarters, or manufacture; the successor's place of incorporation, headquarters, or manufacture; or the place where the predecessor and successor signed the asset purchase agreement. I believe none of these contacts with the forum objectively is less important than the others. Hence, courts and scholars should not regard the claimant as improperly having forum shopped by choosing, from among the states that have jurisdiction, to sue the successor in the state with the most favorable law that constitutionally may be applied.[188]

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186. *See generally* Pac. Emps. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493 (1939).

187. Enactment of such a statute would be pursuant to U.S. CONST., art. I, § 8, cl. 3 or art. IV, § 1.

188. If the successor learns about a prospective claimant's injury before claimant files suit and the successor is able to obtain personal jurisdiction over the prospective claimant, the successor may file suit first for a declaratory judgment of no liability in a jurisdiction that follows the no successor liability rule. This effectively would negate the prospective claimant's ability to shop for a favorable forum even if the prospective claimant subsequently sued the successor in a state that follows the product line approach. A race to judgment likely would be won by the successor. *Cf. supra* Subpart III.A.2.

2. Forum Shopping by Successors

A successor who brings a reactive suit for a declaratory judgment of no liability in a state that follows the no successor liability rule also is forum shopping. But the successor's forum shopping is not a consequence of my proposal for treating successor liability rules as nominally domestic rules having preponderantly multistate application and for treating successor liability cases as preponderantly multistate cases. Forum shopping by a defendant may occur in any type of case that involves choice of law. Whenever the state in which plaintiff sues has a choice of law rule that would point to a law favorable to plaintiff, a defendant may forum shop by bringing a reactive suit for a declaratory judgment of no liability in a state that has a choice of law rule that would point to a law favorable to defendant.

C. My Proposal Contains No Standards for How to Identify Nominally Domestic Rules Having Preponderantly Multistate Application

My definition of a nominally domestic rule having preponderantly multistate application is a rule in which the large majority of facially covered situations will involve parties and events connected to two or more states. Only occasionally will all the relevant contacts be with a single state.

One way to determine whether a rule meets my definition is to compare the number of reported cases involving the rule in which the relevant parties and events were connected to two or more states with the number of reported cases in which the relevant parties and events were local. The plaintiff seeking to rely on forum law would bear the burden of proof.

This procedure probably would work in successor corporation products liability cases because the total number of reported cases seems manageable enough that claimants' lawyers could review the cases to determine the location of their relevant contacts.[189] I believe that after seeing the results of such review a judge would be

189. In diversity actions in federal district court, the claimant and the successor always will be from different states. The only cases plaintiff's attorney would have to review would, therefore, be those brought in state court. Of the 75 successor corporation products liability cases cited in this article, 40 were decided by state courts.

convinced as a matter of law that successor corporation products liability cases are preponderantly multistate cases.[190]

The problem with this procedure, however, is that it risks limiting nominally domestic rules having preponderantly multistate application to a category consisting only of successor corporation products liability rules. As a practical matter it omits what I believe to be another, much more frequently litigated, type of rule that belongs in this category—rules governing products liability suits[191] against manufacturers[192] of allegedly defective products.

But using the same procedure to prove that the large majority of products liability suits against manufacturers involve parties and events connected to two or more states would put a burden on plaintiffs that would be very difficult to meet. The number of reported products liability cases is in the thousands.[193] A plaintiff's lawyer probably could not afford to review even all the reported state court products liability cases to determine the number of cases in which the manufacturer[194] was a defendant let alone the distribution of relevant contacts in those cases. Although a database containing this information could be developed, I am skeptical about the likelihood that this will occur so long as products liability cases against manufacturers continue to be treated as conventional choice of law cases. As a consequence, what is a common sense observation about products liability cases against manufacturers might never be established as a matter of law. I am persuaded that this consequence means putting the burden on the plaintiff to identify preponderantly multistate cases is not a good idea.

I am not familiar with enough products liability cases against manufacturers to decide that they constitute a category of preponderantly multistate cases. Judges, though, probably have enough experience with products liability cases to realize that the large majority of these cases against manufacturers involve parties and events connected to two or more states. Courts should, therefore, take judicial notice[195] that products liability cases against manufac-

190. Under my proposal, the next step would be to explain to the judge why preponderantly multistate cases should be determined by the forum's nominally domestic rule having preponderantly multistate application.

191. I am excluding international products liability cases against manufacturers from my proposal because I have not seen any indication that the large majority of them are connected to more than one country.

192. To the extent suits are against distributors or retailers, the contacts seem more likely to be limited to a single state.

193. HAY ET. AL., *supra* note 174, at 927 n.1428.

194. I specify manufacturer, rather than a distributor or retailer.

195. FED. R. EVID. 201; *see also, e.g.*, PA. R. EVID. 201(b)(2).

turers as well as successor corporation products liability cases are preponderantly multistate cases.

According to the thesis of this article, courts then would apply forum law—a nominally domestic rule having preponderantly multistate application. Just as application of forum law to successor corporation products liability would be preferable to any of the multitude of inconsistent choice of law decisions described in Part I of this article, application of forum law to products liability cases against manufacturers would be preferable to application of the current common law choice of law rules, the choice of law statutes adopted by two state legislatures,[196] and the choice of law proposals of some conflicts scholars.[197]

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196. Two states, Louisiana and Oregon, have adopted choice of law statutes for products liability. The Louisiana statute provides:

> Delictual and quasi-delictual liability for injury caused by a product, as well as damages, whether compensatory, special, or punitive, are governed by the law of this state: (1) when the injury was sustained in this state by a person domiciled or residing in this state; or (2) when the product was manufactured, produced, or acquired in this state and caused the injury either in this state or in another state to a person domiciled in this state.
>
> The preceding paragraph does not apply if neither the product that caused the injury nor any of the defendant's products of the same type were made available in this state through ordinary commercial channels.
>
> All cases not disposed of by the preceding paragraphs are governed by the other Articles of this Title.

LA. CIV. CODE art. 3545 (1992).

ORE. REV. STAT. § 15.435 (2011) provides:

> (1) Notwithstanding ORS 15.440 and 15.445, Oregon law applies to product liability civil actions, as defined in ORS 30.900, if:
> (a) The injured person was domiciled in Oregon and the injury occurred in Oregon; or
> (b) The injured person was domiciled in Oregon or the injury occurred in Oregon, and the product:(A) Was manufactured or produced in Oregon; or(B) Was delivered when new for use or consumption in Oregon.
> (2) Subsection (1) of this section does not apply to a product liability civil action if a defendant demonstrates that the use in Oregon of the product that caused the injury could not have been foreseen and that none of the defendant's products of the same type were available in Oregon in the ordinary course of trade at the time of the injury.
> (3) If a party demonstrates that the application of the law of a state other than Oregon to a disputed issue is substantially more appropriate under the principles of ORS 15.445, that issue shall be governed by the law of the other state.
> (4) All noncontractual claims or issues in product liability civil actions not provided for or not disposed of under this section are governed by the law of the state determined under ORS 15.445.

ORE. REV. STAT. § 15.435 (2011).

197. Professor David Cavers appears to be the first to have proposed a choice of law rule for products liability. *See* David Cavers, *The Proper Law of Producers's Liability*, 26 INT'L & COMP. L.Q. 703, 728–29 (1977). His proposal was:

(a) Where a person claims compensation from the producer of a defective product for harm it caused to the claimant or his property, the claimant should be entitled to the protection of the liability laws of the State where the defective product was produced (or where its defective design was approved).

(b) If, however, the claimant considers the liability laws of that State:

(i) less protective than the laws of the claimants' habitual residence where he had acquired the product or it had caused harm or

(ii) less protective than the laws of the State where the claimant had acquired the product or it had caused harm, then the claimant should be entitled to base his claim on whichever of those two liability laws would be applicable to his case.

(c) the claimant, however, should not be entitled to base his claim on the laws of one of the States specified in the preceding paragraph if the producer establishes that he could not reasonably have foreseen the presence in that State of his product which caused harm to the claimant or his property.

Nearly 25 years later, Professor Symeon Symeonides proposed a different rule. *See* Symeon Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 450–51 (2000). That proposal was:

(1) Victim's choice. Liability and damages for injuries caused by a product are governed by the law of the state chosen by the injured party, provided that that state has any two of the following contacts: (a) place of injury; (b) domicile of the injured party; (c) domicile of the defendant; (d) place of manufacture of the product; or (e) place of acquisition of the product. [For purposes of this choice, contacts situated in different states, whose law on the particular issue is substantially identical shall be treated as if situated in the same state].

The injured party's choice shall be disregarded if the defendant's products were not available in the chosen state through ordinary commercial channels.

(2) Defendant's choice. If the injured party is able but fails to make a choice under (1), the defendant may choose the law of a state that is both the state of injury and the domicile of the injured party.

(3) Residual choice. Cases not disposed of under sections (1) or (2) are to be governed by the law applicable under [the proposed sections applicable to torts conflicts generally].

Four years later Professor Symeonides changed his mind. *See* Symeon Symeonides, *Choice of Law for Products Liability: The 1990s and Beyond*, 78 TUL. L. REV. 1247, 1332 (2004). His second proposal was:

1. Liability

a. Liability for injury caused by a product is determined at the choice of the injured party, by the law of a state that has any 2 of the following contacts: (1) the place of injury; (2) the domicile or habitual residence of the injured party; (3) the place in which the product was made; or (4) the place in which the product was delivered to the first acquirer and final user.

The injured party's choice shall be disregarded upon proof that neither the product that caused the injury nor the defendant's products of the same type were available in the chosen state through ordinary commercial channels.

b. If the injured party fails to make a choice under 1(a), the defendant may choose the law of a state that has any 3 of the contacts listed in 1(a).

CONCLUSION

In this article I have identified, for choice of law purposes, a category of state law rules and a category of cases that previously have not been recognized by courts or scholars. I call the rules nominally domestic rules having preponderantly multistate application, and I call the cases to be decided by these rules preponderantly multistate cases.

Nominally domestic rules having preponderantly multistate application are substantive rules used to resolve issues that ordinarily arise in cases involving parties and events located in at least one state other than the adopting state. Only occasionally do such issues arise when all parties and events in a case are local. This is what makes the cases preponderantly multistate.

Once a lawmaker undertakes adoption of a nominally domestic rule having preponderantly multistate application, the lawmaker has to realize that out of state parties and events will be involved in most future cases to which the substantive rule may apply. Moreover, the lawmaker will have to adopt its rule not knowing at that time which contacts in a particular case will be local and which will be out of state.

A court of the adopting state should, therefore, understand the lawmaker's adoption of the nominally domestic substantive rule as automatically requiring its application to all cases brought in that state that raise the issue to which the rule is addressed—preponder-

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> c. Cases not disposed of under 1(a) or 1(b) are governed by the law chosen by the court under . . . [the general rules or approach for tort conflicts].
>
> 2. Damages.
>
> If the defendant is liable under 1, the injured party's right to compensatory or punitive damages and the amount of such damages shall be determined by the court under the law chosen under the general rules or approach for tort conflicts.

Professor Weintraub made yet another proposal. *See* WEINTRAUB COMMENTARY, *supra* note 18, at 477. That reads:

> To determine the liability and the measure of compensatory and punitive damages caused by a product, apply the law of the injured person's habitual residence, whether this law is more or less favorable than the law of other [states] that have contacts with the defendant and the product, except:
>
> 1. The injured person is not entitled to the favorable law of his or her habitual residence if the defendant could not reasonably have foreseen that the product or defendant's products of the same type would be available there through commercial channels.
>
> 2. Law of a [state] that is not the injured person's habitual residence, but is where the defendant has acted and is favorable to the injured person, should be applied when this is desirable to punish and deter the defendant's outrageous conduct.

antly multistate cases—regardless of the location of the parties and events in individual cases. Effectively, the substantive rule embodies its own choice of law rule. For a court in a preponderantly multistate case to embark on a conventional choice of law analysis would be to ignore the lawmaker's implicit choice of law. In such a case the forum always should apply its own substantive nominally domestic rule having preponderantly multistate application.

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