OREGON LAW COMMISSION

WORK GROUP ON CHOICE OF LAW FOR TORTS

CHOICE-OF-LAW FOR TORTS
AND OTHER NON-CONTRACTUAL CLAIMS
REPORT AND COMMENTS

Approved by the Oregon Law Commission
at its Meeting on January 23, 2009
and Introduced to
75th Oregon Legislative Assembly, 2009 Regular Session,
as Senate Bill 561

By
Symeon C. Symeonides
Chair and Reporter
and
James A.R. Nafziger
Reporter

CONFLICTS WORK GROUP
OREGON LAW COMMISSION

* * * * *

Kathryn H. Clarke, Portland
Jonathan Hoffman, Portland
Maury Holland, Eugene
Jack Landau, Salem
Hans Linde, Salem
Linda Love, Portland
Dom Vetri, Eugene
James N. Westwood, Portland
Leonard Williamson, Salem
Janice R. Wilson, Portland

LEGISLATIVE COUNSEL
David Heynderickx

OLC STAFF
Jeff Dobbins, Executive Director
Wendy Johnson, Deputy Director & General Counsel
Lisa Ehlers, Legal Assistant

A PROPOSED ACT ON CHOICE-OF-LAW FOR TORTS AND OTHER NON-CONTRACTUAL CLAIMS

INTRODUCTION

I. Background: The Traditional Choice-of-Law System and the Choice-of-Law Revolution

For more than one-hundred years, American courts, along with Oregon courts, followed a rigid territorialist rule-system for determining the law governing cases that had contacts with more than one state (conflicts cases). In tort and contract conflicts, this system mandated the application of, respectively, the law of the state in which the injury occurred (*lex loci delicti)* and the law of the place in which the contract was made (*lex loci contractus*), regardless of any other contacts or factors.

Over time, this system proved completely inadequate to rationally resolve the more frequent and complex conflicts brought about by increased cross-border activity and people mobility. Courts gradually began searching for oblique ways to avoid the often arbitrary and artificial results the traditional system dictated. By the 1960's, judicial dissension against that system acquired the dimensions and intensity of an open "revolution" as many courts began abandoning the *lex loci delicti* and *lex loci contractus* rules in favor of flexible open-ended "approaches." See S. Symeonides, *The American Conflicts Revolution in the Courts: Past, Present and Future* (2006).

Oregon was among the leaders of this new movement. In 1964, the Oregon Supreme Court became the second state supreme court in the United States to join the revolution. In Lilienthal v. Kaufman, 395 P.2d 543 (Or. 1964), the court abandoned the *lex loci contractus* rule and replaced it with an "approach" known as "governmental interest analysis" first advocated by Professor Brainerd Currie. See B. Currie, *Selected Essays on the Conflict of Laws* (1963). Three years later, Oregon completed the abandonment of the traditional system by discarding the *lex loci delicti* rule in tort conflicts and relying instead on the Restatement (Second) of Conflict of Laws (1971), which was then in draft form. See Casey v. Manson Constr. & Eng'g Co., 428 P. 2d 898 (Or. 1967).

In the rest of the United States, the choice-of-law revolution caught fire in the 1970s, spread in the 1980s, and declared victory in the 1990s, leading to the demolition of the traditional system, at least in tort and contract conflicts. By 2009, forty-one U.S. jurisdictions had abandoned the traditional system in contract conflict, and forty-two jurisdictions did likewise in tort conflicts. See S. Symeonides, Choice-of-Law in the American Courts in 2008: Twenty-Second Annual Survey, 57 *Am. J. Comp. L*. 269 (2009).

However, although the revolution has changed American conflicts law in many beneficial ways, it did not produce a new choice-of-law *system* to replace the old one. Rather than offering a unified vision for the future, the revolution offered conflicting

theories, which the courts have merged together, often adding their own variations. In its zeal to cleanse the system from all the vestiges of traditional thinking, the revolution careened to the other extreme of denouncing not only the particular rules of the First Conflicts Restatement (1934), but also all choice-of-law rules in general. Rules were replaced with "approaches," namely, flexible formulae that do not designate the applicable law but simply enumerate the many and often malleable factors to be considered in judicially selecting that law. Although these factors differ from one approach to the next, all such approaches are open-ended and call for an individualized, *ad hoc* handling of each case. The result was that, in relatively short time, American conflicts law began looking like "a tale of a thousand-and-one-cases" in which "each case [was] decided as if it were unique and of first impression." P. Kozyris, Interest Analysis Facing its Critics, 46 *Ohio St. L. J.* 569, 578, 580 (1985).

Oregon did not avoid this loss of certainty. In reviewing Oregon choice-of-law cases after *Lilienthal* and *Casey*, an experienced, long-time observer of the Oregon conflicts scene characterized them as "puzzling," "extraordinarily undisciplined," and "bewildering." J. Nafziger, Oregon's Project to Codify Conflicts Law Applicable to Torts, 12 *Willamette J. Int'l L. & Disp. Resol*. 287, 293, 304, 295 (2004). He noted that one version of Oregon's reliance on the Restatement (Second) engages in weighing the "interests" of the involved states and minimizes other factors. Another version employs "an arithmetic of contacts— a gravity-of-contacts approach—that minimizes competing interests," while a third version "sticks within the bark of territorialism to define the most significant contact or contacts without recourse to governmental interests, policies or other considerations." Taken together, the three versions present a "bewildering picture." Id. at 294-95.

Indeed, bewilderment is a common sentiment among lawyers contemplating—or seeking to avoid—litigation of choice-of-law issues in the United States today. The excessive fluidity of the various judicial choice-of-law approaches often makes it very difficult, if not impossible, to predict the outcome of a choice-of-law decision. While flexibility is preferable to uncritical rigidity, too much flexibility can be as bad as no flexibility at all. Among other things, it increases litigation costs, wastes judicial resources, and raises the possibility of judicial subjectivism. In turn, judicial subjectivism leads to dissimilar handling of similar cases, which in turn tests the citizens' faith in the legal system and tends to undermine its very legitimacy.

While conflicts law is in some respects a field apart, it is not so different as to risk ignoring these fundamental values for long. Polyphony and flexibility are both necessary and enriching in periods of transition and experimentation, but they should not be the ultimate destination goals. Four decades after the revolution began, it became evident that it had gone too far in embracing flexibility to the exclusion of all certainty, just as the traditional system had gone too far toward certainty to the exclusion of all flexibility. It was time for an exit strategy that would consolidate and

preserve the gains of the revolution, curtail its excesses, and turn its victory into success.

II. Oregon Takes the Lead, Once Again

Once again, Oregon took the lead in recognizing the need for a new way, an exit strategy from the anarchy of the conflicts revolution. This strategy called for a new breed of smart, evolutionary choice-of-law rules that would preserve the methodological accomplishments of the revolution while restoring a proper equilibrium between certainty and flexibility. To implement this strategy, the Oregon Law Commission undertook the ambitious project of drafting choice-of-law rules for enactment by the state's Legislature.

The first phase of this project produced a new comprehensive statute for contract conflicts. This statute, ORS 81.100 to 81.135, was drafted by the Commission in 2000, was unanimously adopted by both houses of the Oregon Legislature in 2001, and became effective on January 1, 2002. For a discussion of this statute, see J. Nafziger, Oregon's Conflicts Law Applicable to Contracts, 38 *Willamette L. Rev.* 397 (2002); S. Symeonides, Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis, 44 *Willamette L. Rev*.205 (2007).

III. The Attached Act

The attached draft Act represents the second phase of this project. The Act restores predictability in Oregon's conflicts law by providing specific rules for determining which state's law will govern most tort and other non-contractual claims arising from situations having contacts with more than one state. However, as explained below, the Act also provides a certain degree of flexibility and thus avoids the shortcomings of the traditional system whose rigidity had caused the revolution. Thus, the Act avoids both the excessive fluidity of modern choice-of-law approaches, in Oregon and other states, and the other extreme of the excessive rigidity of the traditional system. This new equilibrium between the need for legal certainty and the need for a certain degree of flexibility should serve Oregon well for the next generations and could well be a model for other states to follow.

The Act has been drafted under the auspices of the Oregon Law, during a process that lasted for the better part of 2008. The two reporters (Symeon C. Symeonides and James A.R. Nafziger) were assisted by a Work Group chaired by Symeonides and consisting of one retired supreme court justice (Hans Linde), one court of appeals judge (Jack Landau), one trial judge (Janice Wilson), five practicing attorneys (Kathryn H. Clarke, Jonathan Hoffman, Linda Love, James N. Westwood, and Leonard Williamson), and two law professors (Maury Holland and Dom Vetri).

Each section of the Act is accompanied by extensive explanatory comments, which have been written by Symeonides and approved by the Oregon Law Commission. The comments accompanied the bill when introduced to the Legisla-

ture.

1. Part One: Preliminary Issues. The Act consists of 14 sections, which may be grouped into three parts. The first part, consisting of sections 1-5, deals with preliminary issues. Section 1 defines certain terms used in the Act, including the term "non-contractual claim," which delineates the Act's substantive scope. A "non-contractual claim" is a claim, "other than a claim for failure to perform a contractual or other consensual obligation, that arises from a tort . . . or any conduct that caused or may cause injury compensable by damages, without regard to whether damages are sought."

Section 2 provides that the Act applies for determining which state's law will govern a non-contractual claim "when a choice between or among the laws of more than one state is at issue," namely, when the claim arises from events or circumstances that have pertinent contacts with more than one state and the laws of the contact states on the disputed issues are in material conflict.

Section 3 provides that the law of Oregon determines the scope and meaning of terms used in the Act, while section 4 provides that Oregon law also applies for resolving certain factual questions on which the application of the Act depends, such as where the injurious conduct or the resulting injury occurred. Section 5 provides certain rules for determining a person's domicile, which is a significant factor under other provisions of this Act.

2. Part Two: Claims Governed by Oregon Law. The second part of the Act, consisting of sections 6 and 7, provides for certain non-contractual claims that will be governed by Oregon law without any further inquiry. Section 6 lists the following claims: (1) actions in which the parties agree to the application of the law of Oregon, or in which none of the parties raises the issue of applicability of foreign law, or in which the party who relies on foreign law fail to assist the court in establishing that law's content after being requested by the court to do so; (2) actions against a "public body" of the State of Oregon; (3) actions against owners or possessors of Oregon real property seeking to recover for, or to prevent, injury on that property and arising out of Oregon conduct; (4) actions between an employer and an employee who is primarily employed in Oregon arising out of Oregon injury; and (5) actions for professional malpractice arising from services rendered entirely in Oregon by personnel licensed to perform those services under Oregon law. In all of the above cases, Oregon law governs, notwithstanding any other provisions of this Act.

Section 7 deals provides that Oregon law governs product liability actions in which Oregon has any two, or more, of the following contacts: (1) the domicile of the injured person; (2) the place of injury; (3) the manufacture or production of the product; and (4) the delivery of the product when new in Oregon for use or consumption in Oregon. For a table showing the various combinations, see the Appendix at the end. However, section 7 (unlike section 6) provides two exceptions

to the application of Oregon law: (1) the defendant may avoid the application of Oregon law by demonstrating that the use in Oregon of the product that caused the injury could not have been foreseen and that none of defendant's products of the same type were available in Oregon in the ordinary course of trade at the time of the injury; and (2) either party may avoid the application of Oregon law by demonstrating that the application of the law of a state other than Oregon to a disputed issue would be "substantially more appropriate" under the principles of section 9, which contains the general choice-of-law approach of this Act. If either of the exceptions are found applicable, or if Oregon lacks the above-specified contacts, the applicable law will be selected under the general approach of section 9.

3. Part Three: Choice of Law. The third part of the Act consists of section 8-11. Section 11 provides that, if, after the parties had knowledge of the events giving rise to the dispute, the parties agree to the application of the law of a state other than Oregon, the agreement is enforceable if it is otherwise valid under ORS 81.100 to 81.135, which governs choice-of-law agreements for contractual claims.

In the absence of such an agreement, the applicable law is determined under sections 8, 9, or 10. Section 8 applies for determining the applicable law in claims between the injured person and the person whose conduct caused the injury, section 10 applies to claims between or among third parties, and section 9 is the default rule which applies when not displaced by the other sections of the Act.

The Rules of Section 8. Under section 8, the choice of the applicable law depends in part on the location of four contacts: (1) the place of the injurious conduct; (2) the place of the resulting injury; (3) the domicile of the injured person; and (4) the domicile of the person whose conduct caused the injury. The applicable law is as follows:

> (1) If the parties are domiciled in the same state (or in different states whose laws produce the same outcome), the law of the domiciliary state governs, even if the conduct and injury occurred in another state, but subject to an exception in favor of the law of the latter state for determining the standard of care by which the conduct is judged.
>
> (2) If the parties are domiciled in different states and the laws of those states on the disputed issues would produce a different outcome, then:
>
> (a) If both the conduct and the injury occurred in the same state, the law of that state governs if either party was domiciled in that state;
>
> (b) If both the conduct and the injury occurred in a state other than the one in which either party is domiciled, the law of the state of conduct and injury governs, subject to an exception for cases in which the application of that law would not serve the objectives of that law; and

(c) If the conduct occurred in one state and the injury in another state, the law of the state of conduct governs, unless the injured person formally requests the application of the law of the state of injury and provided that the activities of the person whose conduct caused the injury were such as to make foreseeable the occurrence of injury in that state.

For a table illustrating the operation of section 8, see table in Appendix. For an exception to section 8, see below.

The "Approach" of Section 9. Section 9 enunciates the general approach of this Act, which applies when not displaced by the Act's other sections. The objective of this approach is to identify and apply the law of the state whose contacts with the parties and the dispute and whose policies on the disputed issues make application of its law the "most appropriate" for those issues. To attain this objective, one must: (1) identify the involved states by examining their relevant contacts with the parties and the facts that give rise to the dispute; (2) identify the substantive rules of each involved state that appear to be in material conflict with the corresponding rules of another involved state and ascertain the policies embodied in those rules; and (3) evaluate the "strength and pertinence" of these policies in light of, and "with due regard to": (a) the policies of "encouraging responsible conduct, deterring injurious conduct, and providing adequate remedies for the conduct," and (b) the needs and policies of the interstate and international systems, including the policy of minimizing adverse effects on strongly held policies of other states.

Although in the abstract the approach of section 9 may appear somewhat vague and indeterminable, it is much less indeterminable than the approach of the Restatement (Second) of Conflict of Laws, which Oregon courts have followed thus far. More importantly, however, section 9 simply establishes the *residual* or default approach which applies only when the more specific sections of this Act are either inapplicable or they refer an issue to section 9. As noted earlier, sections 6 and 7 provide for certain claims and issues that are automatically governed by Oregon law, while section 8 designates the law applicable to most other claims and issues.

While section 6 does not allow any exceptions, sections 7 and 8 contain two escapes anchored in section 9 and intended for exceptional cases. These escapes provide that, if a party demonstrates to the court's satisfaction that, under the principles of Section 9, the application to a disputed issue of the law of a state other than the state designated by sections 7 or 8 would be "substantially more appropriate," then that issue will be governed by the "most appropriate" law selected under Section 9. With this combination of black-letter fixed rules (sections 7-8) and exceptions tied to the flexible approach of section 9, this Act strikes an appropriate equilibrium between the need for legal certainty, on the one hand, and the need for flexible, equitable solutions in individual cases, on the other hand.

4. A Road Map and Check-List. This Act provides an easy road map (see

Appendix) that will significantly simplify the courts' task in resolving conflicts of laws in torts and other cases involving non-contractual claims. A court or other decision-maker encountering such a case may use the following checklist:

(1) If, after the events giving rise to the dispute, the parties agreed to the application of Oregon law, or if none of the parties raises the issue of applicability of foreign law, or the party who relies on foreign law fail to assist the court in establishing that law's content after being requested by the court to do so, Oregon law applies without a choice-of-law analysis. See section 6(1)-(3).

(2) If the action is one of those listed in Section 6(4)-(7), Oregon law applies without any further inquiry, and without any exceptions.

(3) If the action is a product liability action that fits the requirements of section 7, then Oregon law applies, unless the opposing party demonstrates that, under the principles of section 9, the application of the law of another state would be "substantially more appropriate."

(4) If the action is not one of those that must be governed by Oregon law under sections 6 or 7 and the parties have agreed to the application of the law of non-Oregon law after they had knowledge of the events giving rise to the dispute, the agreed law applies, if the agreement meets the requirements of section 11.

(5) In the absence of such an agreement, a distinction is made between, on the one hand, claims between the injured person and the person whose conduct caused the injury, and, on the other hand, claims between or among third parties. Section 8 provides for the first category of claims. The law designated section 8 applies unless the opposing party demonstrates that, under the principles of section 9, the application of the law of another state would be "substantially more appropriate."

(6) For claims between or among third parties, such as joint tortfeasors, the applicable law is selected under the flexible approach of section 9. See section 10.

(7) Section 9 applies only when none of the other sections of this Act are applicable, or when these sections expressly refer to section 9.

DEFINITIONS

COMMENTS TO SECTION 1

(a) Definitions. This section defines, for the purposes of this 2009 Act, certain terms used in Sections 2 through 12 of this Act.

***(b) "Conduct*."** Subsection (1) of Section 1 defines "conduct" as an act that has occurred or that "may" occur so as to include future conduct that may cause future injury, such as when one is preparing to undertake activities on property which may cause injury to, or on, nearby property. The conduct may also be an omission, such as when one's failure to exercise due care in the use of property causes injury to another.

Of course, in order to qualify as a constituent element of a non-contractual claim for the purposes of this Act, the conduct must have caused--or have the potential to cause--a compensable injury. Subsection (5) speaks of conduct that caused--or *may* cause--injury in order to cover situations in which a party seeks injunctive or declaratory relief for ongoing injurious conduct or to prevent future injurious conduct.

(c) "Domicile." This Act uses domicile as a pertinent contact or connecting factor for both natural and legal persons. Section 5 defines domicile and provides rules for determining the state in which a person's domicile is located.

(d) "Injury." Subsection (3) of Section 1 defines injury as a physical or non-physical (e.g., economic or emotional) harm to person or property. The injury may be present or future injury, but, to qualify as a constituent element of a non-contractual claim for the purposes of this Act, the injury must be potentially compensable by damages, even if the claimant does not seek damages in the particular case.

(e) "Law" and Renvoi. Subsection (4) of Section 1 is intended to exclude the phenomenon known as *renvoi*. This French word is generally used in the conflicts literature as short-hand for the practice by which the forum state applies the choice-of-law rules of another state, which may refer back to the law of the forum state (a "remission") or further to the law of a third state (a "transmission"). For practical and other reasons, Subsection (4) of section 1 is intended to avoid this practice by confining any reference to foreign law to the internal or substantive law of the foreign state, excluding its choice-of-law rules.

(f) "Non-contractual" claim. The term "non-contractual claim" delineates the substantive scope of this Act. The term is broader than a tort claim but excludes a claim for failure to perform a contractual or other consensual obligation. A tort claim is defined in the same way as in ORS 30.260(8), which defines tort as "the breach of a legal duty that is imposed by law, other than a duty arising from contract or quasi-contract, the breach of which results in injury to a specific person or persons for which the law provides a civil right of action for damages or for a protective remedy." Although statistically most non-contractual claims arise from torts, the definition of subsection (5) of section 1 encompasses not only tort claims but also claims (other than claims for failure to perform a contractual or other consensual obligation) that arise "from any conduct that caused or may cause an injury compensable by damages." Examples of such other claims are claims arising from racial discrimination, employment discrimination (beyond claims covered by employment law), unfair trade practices, breach of fiduciary duty, and restitution.

Under section 3(1), Oregon law determines whether a particular claim qualifies as a non-contractual claim so as to fall within the scope of this Act, even if the claim is ultimately governed by the law of another state.

(g) "Person." This Act uses the term "person" to include both a natural and a legal person. Subsection (6) of Section 1 defines person through reference to ORS 174.100, which provides that "'[p]erson' includes individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies." ORS 174.100(5).

(h) "Public body." Subsection (7) of Section 1 defines a "public body" of the State of Oregon through a reference to ORS 174.109, which states that "'public body' means state government bodies, local government bodies and special government bodies." Subsequent provisions define state governmental bodies (ORS 174.111-174.114), local governmental bodies (ORS 174.116), and special governmental bodies (ORS 174.117). Subsection (7) of this 2009 Act adds to this list of public bodies the Oregon Health and Sciences University and the Oregon State Bar because these two entities would otherwise not be covered by the Act because ORS 174.108(3) excludes them from the definition of public body. Under section 3(1) of this Act, Oregon law determines whether an entity qualifies as a "public body" for the purposes of this Act.

(i) "State." Subsection (8) of section 1 provides a definition of "state" for the purposes of this Act. The definition includes a foreign country and, in some instances, a territorial subdivision of a foreign country, such as a Canadian province or a Swiss canton, *if* that subdivision has its own system of law on the disputed issues. The same qualification applies to recognized Indian tribes and other Native American, Hawaiian, or Alaskan groups. To qualify as a state for the purposes of this Act, the subdivision or group must have its own system of laws on the disputed

issues. Conversely, a federation or a multinational entity, such as the European Union, may qualify as a single country —and thus as a "state" under this Act—if the federation or union has a single law on the disputed issue.

The definition of state also includes the United States "unless the context requires otherwise." The context does not require otherwise when the United States stands on equal footing with another country (as in a maritime tort case that involves contacts with the United States and a foreign country) so that a choice between federal law and foreign law is necessary. In contrast, the context does require otherwise when the United States stands in a hierarchically superior position *vis-a-vis* a state of the United States. In such a context, the demarcation of the line between federal law and state law is not a matter of choosing between the two laws but rather is a question of determining the reach of federal law, a question answered by federal law principles. If, under those principles, the case falls within the reach of federal law, then federal law preempts any contrary state law. This Act does not purport to apply to such "conflicts" between federal and state law.

APPLICABILITY

COMMENTS TO SECTION 2

(a) Applicability. This Act applies when it is necessary to determine which state's law governs a non-contractual claim "when a choice between or among the laws of more than one state is at issue." A choice of law is "at issue" when: (1) the claim arises from events or circumstances that have pertinent contacts with more than one state; and (2) the laws of the contact states on the disputed issues are in material conflict such that each law would produce a different outcome.

(b) Relation with other statutes. This Act is not intended to displace the provisions of other Oregon statutes that expressly designate the law applicable to a particular non-contractual claim. One important example of such a statute is ORS 12.410 to 12.480, which contains the Uniform Conflict of Laws- Limitations Act. That Act provides rules for choosing the applicable statute of limitation in cases that have contacts with other states. Another example, albeit on a subject that does not overlap with the scope of this Act, is ORS 81.100 to 81.130, which provides a comprehensive set of rules for determining the law governing *contractual* claims in cases presenting choice-of-law issues.

Both of the above-cited statutes are typical choice-of-law statutes in that they deal exclusively with cases presenting conflicts of laws. However, other (substantive) Oregon statutes also contain isolated provisions delineating the intended reach of those statutes to include or to exclude certain cases that have non-Oregon contacts.

For example, ORS 656.126(1) provides that Oregon's workers' compensation statutes apply to workers employed in Oregon and injured in the course of their employment while on a temporal assignment in another state. Conversely, ORS 656.126(2) excludes from the coverage of Oregon's workers' compensation statutes certain workers employed in another state and injured in Oregon while on temporary assignment in Oregon. These provisions are veritable choice-of-law rules, even though the provisions do not use such explicit terms. This Act is not intended to displace these and other similar rules found in other Oregon statutes.

PRELIMINARY ISSUES

COMMENTS TO SECTION 3

(a) Characterization. Subsection (1) of Section 3 provides that the scope and meaning of terms and concepts employed in this Act is to be determined under Oregon law. This is consistent with the generally accepted principle that "characterization"--namely, the classification of a given factual situation under the terms and categories employed by the forum's choice-of-law rules--is conducted under the law of the forum. See, e.g., Restatement (Second) of Conflict of Laws § 7(2) (1971) (providing that "[t]he classification and interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum").

Subsection (2) of Section 3 provides that the scope and meaning of terms employed by the law that is determined to be applicable under this Act—which may be the law of Oregon or that of another state—are determined under that law. Cf. Restatement (Second) of Conflict of Laws § 7(3). For example, if the law of State X is applicable under the provisions of this Act and that law conditions the plaintiff's recovery on proof of "gross negligence," the meaning of "gross negligence" will be determined under the law of State X. Likewise, if State X prohibits recovery against "charitable entities," the law of State X determines whether the entity involved qualifies as a "charitable entity."

(b) Non-contractual claim. According to Section 2, the applicability of this Act depends on whether the claim is "non-contractual." Section 3(1) provides that Oregon law (including this Act) determines whether a claim is "non-contractual." If the claim is "non-contractual" under Oregon law, this Act applies--even if, under this Act, the claim is governed by the law of another state that considers the claim contractual. Conversely, if the claim is contractual under Oregon law, this Act is inapplicable and instead ORS 81.100 to 81.130 is applicable--even if, under ORS 81.100 to 81.130, the claim is governed by the law of a state that characterizes the claim as non-contractual.

COMMENTS TO SECTION 4

(a) Localization. "Localization" is the process of determining the location of a contact or event upon which the choice of law depends, such as the location of the injurious conduct or the resulting injury. (For localizing a person's domicile, see section 5). Although in most instances this determination is a factual inquiry, it is guided by (and, in some instances, depends on) legal standards. Primarily for practical reasons and in the interest of judicial economy, Section 4 provides that this determination is to be made under Oregon law, even if the location of the particular contact is ultimately determined to be in another state.

Section 4 also provides specific rules to assist in the localization process in some cases, such as cases involving conduct or injury in more than one state (subsections (1) and (3)), or cases involving more than one injured person or more than one person whose conduct allegedly caused the injury (subsections (2) and (4)). Thus, under subsection (2), in a respondeat superior action filed against an employer for injury caused by an employee, both the employer and the employee are considered to be "persons whose conduct caused the injury" for the purposes of this Act. Likewise, under subsection (4), in a claim for wrongful death or for loss of consortium, both the claimant and the physically injured or deceased person are considered to be "injured persons" for the purposes of this Act.

(b) Factual questions and parties' allegations. In some cases, questions such as whether a person was actually injured, whether the particular conduct actually caused the injury, and whether a particular person was responsible for that conduct, and other similar questions, can only be answered after establishing the relevant facts. Until then, strictly speaking, there is only an "allegedly" injured person, an "allegedly" injurious conduct, and a person whose conduct "allegedly" caused the injury. In these cases, the quoted word is implied, even if it cannot be used in the text of the Act.

COMMENTS TO SECTION 5

(a) Domicile of a natural person. This Act uses domicile as a pertinent contact or connecting factor for both natural and legal persons. Subsection (1)(a) of Section 5 defines the domicile of a natural person as comprising two elements, both of which must concur at the same time: (1) the physical element of a person's actual residence in a given state; and (2) the mental element of that person's intent to make that state his or her home state for the time being and for an indefinite period thereafter. For a similar definition, see ORS 111.005 (14) (defining domicile as "the place of abode of a person, where the person intends to remain and to which, if absent, the person intends to return."). Under section 3(1), the question of where a natural person is domiciled is answered under standards established by Oregon law (including Section

5 of this Act), even if the person ultimately is found to be domiciled in another state. See also comment (a) under Section 4.

Subsection (1)(b) begins by restating the general principle that, domicile, once established, continues until it is superseded by a new domicile, that is, until both the physical element of residing in another state and the mental element of intending to make that state the person's home coincide again. See Restatement (Second) of Conflict of Laws § 19 (1971). The second sentence of subsection 1(b) deals with persons whose intent to change their domicile is legally ineffective, for example, because they are under legal compulsion (e.g. prisoners, soldiers), or because they lack the mental capacity to form the requisite intent regarding domicile (e.g. minors, mentally ill). Subsection (1)(b) provides that, in such cases, the person's previously acquired domicile will continue to be the relevant domicile for the purposes of this Act.

Subsection (1)(c) deals with persons who are legally capable of forming the intent to have a domicile in a given state but whose actual intent cannot be determined. Subsection (1)(c) provides that, in such cases: (1) a person's residence shall be treated as his or her domicile; and (2) if that person resides in more than one state, the residence state that has the most pertinent connection to the disputed issue is deemed to be the person's domicile with regard to that issue.

(b) Domicile of a legal person. Subsection (2) of Section 5 defines the domicile of a person "other than a natural person" commonly referred to as legal person (e.g., corporations, associations, firms, partnerships, and other similar entities) as the state in which that person has its principal place of business. The question of where a legal person has its principal place of business is answered on a case-by-case basis through review of the person's total activity and connections under the standards established by Oregon law. See Section 3(1) and comment (a) under Section 4.

The second sentence of subsection (2) of Section 5 applies to situations in which a legal person has its principal place of business in one state, State A, and also has "a place of business" in another state, State B. That sentence provides that, if the dispute arises from that person's activities directed from State B (e.g., from its branch office located in State B), then either State A or State B may be treated as the legal person's domicile at the choice of the other party.

(c) Domicile and the issue of time. Subsection (3) of Section 5 provides that, for purposes of this Act, the domicile of a natural or legal person is determined as of the date of the injury for which the non-contractual claim is made, rather than at a later time, such as the time of the filing of the action or the time of litigation. However, when, a person changes domicile to another state after the time of the injury, the new domicile may be a "relevant contact" under Section 9, of this Act. See comment (d) under Section 9.

COMMENTS TO SECTION 6

(a) Applicability. In the interest of judicial economy, as well as in order to protect Oregon's policies or the parties justifiable reliance on Oregon law, Section 6 lists certain non-contractual claims that are governed by Oregon law, notwithstanding other provisions of this Act. If a claim falls within the list, the court or other decision-maker should apply Oregon law without having to conduct a choice-of-law inquiry.

Section 6 applies only as between the parties to the actions listed in section 6, namely the plaintiff (and those parties asserting claims through the plaintiff) and the defendant (and those responsible for defendant's conduct). For claims by or against third parties or between or among joint tortfeasors, see Section 10 of this Act.

(b) Express agreements for Oregon law. Subsection (1) of Section 6 provides that if, "after the events giving rise to the dispute," the parties agree to the application of Oregon law, the agreement, if otherwise valid, will be enforceable and Oregon law will govern the dispute. For cases in which the parties agree to the application of the law of a state other than Oregon, see Section 11 of this Act. For an explanation of the reasons for differentiating between agreements entered into before and after the dispute, see comment (c) under Section 11.

(c) Failure to plead or prove foreign law. Subsections (2) and (3) of Section 6 provide that Oregon law also governs if none of the litigants raises the issue of applicability of foreign law, or if the litigant or litigants who rely on foreign law fail to assist the court in establishing the relevant provisions of foreign law after being requested by the court to do so. Both of these provisions are consistent with current judicial practice in Oregon and other states of the United States.

(d) Actions against the State of Oregon or other Oregon public bodies. Subsection (4) of Section 6 provides that Oregon law applies in actions for non-contractual claims filed against the State of Oregon or any of its agencies or subdivisions or other public bodies as defined in Section 1(7), unless the application of Oregon law is waived by a person authorized by Oregon law to make the waiver. Under Section 3(1), Oregon law (including this 2009 Act) determines whether an entity is an agency or subdivision of the State of Oregon or a "public body." For a similar provision regarding certain contractual claims by or against the State of Oregon and other Oregon public bodies, see ORS 81.105(1).

(e) Actions for injury on real property situated in Oregon. Subsection (5) of Section 6 provides that Oregon law governs actions filed against the owner, lessor, or possessor of land, buildings, or other real property situated in Oregon and seeking to recover for injury occurring on such property, if the injurious conduct also occurred in Oregon. Oregon law also governs actions seeking to prevent injury on

such property if the impending or threatened conduct is expected to occur in Oregon.

(f) Actions between Oregon employers and employees. Subsection (6) of Section 6 provides that Oregon law governs actions for non-contractual claims between an employer and an employee "primarily" employed in Oregon, if the claim arises from injury in Oregon. Whether the employment meets this condition is a question of fact to be decided under Oregon law. By way of comparison, ORS 656.126 (Oregon's workers' compensation statute) applies to workers "employed in this state," even if the workers are injured elsewhere (ORS 656.126(1)), and, subject to certain conditions, exempts certain workers "from another state" when injured in Oregon. ORS 656.126(2).

(g) Actions for professional malpractice. Subsection (7) of Section 6 provides that Oregon law applies to non-contractual claims in actions for professional malpractice arising from professional services rendered entirely in Oregon if the provider of services was licensed for such services under Oregon law. In such cases, professionals rendering services in Oregon must comply with, and be accountable under, standards established by Oregon law, even if the recipient of the services is domiciled in another state.

COMMENTS TO SECTION 7

(a) Applicability and scope. Section 7 applies to "product liability civil actions" as defined in ORS 30.900. The latter provision defines a "product liability civil action" as

> a civil action brought against a manufacturer, distributor, seller or lessor of a product for damages for personal injury, death or property damage arising out of: (1) Any design, inspection, testing, manufacturing or other defect in a product; (2) Any failure to warn regarding a product; or (3) Any failure to properly instruct in the use of a product.

ORS 30.900.

Section 7 applies to *non-contractual* claims in product liability civil actions. For contractual claims, the applicable choice-of-law statute is ORS 81.100 to 81.135.

Section 7 applies only to non-contractual claims *of injured persons* as defined under Section 4 against a manufacturer, distributor, seller or lessor of a product. Section 10 applies to non-contractual claims by or against third parties or between or among joint tortfeasors.

Section 7 applies "[n]otwithstanding sections 8 and 9" of this Act. For claims falling within its scope, Section 7 is more specific than, and thus prevails over, Sections 8 and 9.

Section 7 applies only to cases in which Oregon has the contacts enumerated in Section 7. As stated in subsection (4), cases in which Oregon lacks these contacts are governed by the law selected under Section 9, the residual section of this Act. Depending on the circumstances, that law may be the law of Oregon or that of another state.

(b) Oregon's contacts. Under Section 7, the application of Oregon law depends on specified combinations of four Oregon contacts: (1) the domicile of the injured person; (2) the place of injury; (3) the manufacture or production of the product; and (4) the delivery of the product when new in Oregon for use or consumption in Oregon. Subsection (1) of Section 7 provides that (with only one exception, i.e., cases in which Oregon's only two contacts are the manufacture or production and the delivery of the product) Oregon law governs all cases in which any two (or more) of the above contacts are situated in Oregon. Thus, Oregon law applies under subsection (1):

(1) if, at the time of the injury, the injured person was domiciled in Oregon, and Oregon was also: (a) the place of injury; or (b) the place of the product's manufacture; or (c) the place of the product's delivery as new (seven possible combinations); or

(2) if the injury occurred in Oregon, and Oregon was also: (a) the place of the product's manufacture; or (b) the place of the product's delivery as new (three possible combinations).

For a table illustrating the operation of section 7, see table 1in Appendix.

As provided by Section 5(3), a person's domicile is determined as of the date of the injury concerning which the non-contractual claim is made. This is why subsection (1) of section 7 uses the past tense when referring to the domicile of the injured person. However, a post-injury change of domicile may be a relevant factor in determining whether to employ the escape clause of subsection (2)(b) of Section 7. See comment (d) under Section 9.

The phrase "delivered when new" for use or consumption in Oregon in subsection (1)(b) is intended to exclude second-hand products that first entered Oregon in used condition. This exclusion will make a difference only when the application of Oregon law *depends on this contact* because Oregon lacks other contact combinations for applying Oregon law under subsection (1). This will be the case if the product first entered Oregon in used condition and Oregon had only one of the other three contacts listed in subsection (1). In such a case, the claim will fall outside the scope of Section 7 and will be governed by the law selected under Section 9 of this Act.

(c) The exceptions. Subsections (2) and (3) of Section 7 provide two exceptions to the application of Oregon law under subsection (1). The first exception

operates for the entire claim, whereas the second exception operates on an issue-by-issue basis.

Subsection (2) provides the first exception to the defendant, who must carry the burden of persuasion for the exception's deployment. The defendant can avoid the application of Oregon law by demonstrating to the court's satisfaction: (a) that the use in Oregon of the particular product that caused the injury could not have been foreseen (this is an objective test); *and* (b) that none of the defendant's products of the same type were available in Oregon in the ordinary course of trade. If the defendant satisfies both of these requirements, the entire claim will be governed by the law selected under Section 9 of this Act.

Subsection (3) of Section 7 makes the second exception available to both defendants and plaintiffs. Either party can avoid the application of Oregon law under Section 7 by demonstrating that, under the principles of Section 9, the application of the law of a state other than Oregon to a disputed issue would be "substantially more appropriate" for that issue. In such a case, that issue will be governed by the law of the other state, while the remaining issues, if any, will be governed by Oregon law. The rationale of this exception is the same as that of a similar clause in Section 8(4), which is explained in comment (j) under Section 8.

(d) Unprovided for, or undisposed of, claims or issues. Subsection (4) of Section 7 provides that non-contractual claims or issues in product liability actions falling outside the scope of Section 7(1) are governed by the law selected under Section 9 of this Act. As noted earlier, these are cases in which Oregon lacks the combination of contacts required by subsection (1) of Section 7. The reference to Section 9 does not preclude the application of Oregon law under that section.

Subsection (4) also refers to Section 9 all claims falling within the scope of subsection (1) but "not disposed of" under subsections 1 to 3. These are the cases in which a party carries the burden of satisfying the requirements of one of the exceptions provided in subsections (2) or (3) of Section 7.

CHOICE OF LAW

COMMENTS TO SECTION 8

(a) Applicability. Section 8 provides the general rules for determining the law governing non-contractual claims not covered by the other sections of this Act, namely: Section 6, which provides for issues and claims governed by Oregon law; Section 7, which applies to certain products liability cases; Section 10, which applies to joint tortfeasors and third parties; and Section 11, which provides for certain choice-of-law agreements. These sections, being more specific on the subjects they cover, prevail over Section 8. Conversely, Section 8 is more specific and prevails

over Section 9, although Section 8 also contains two escapes (in subsections (3)(b) and (4)) that are anchored in Section 9.

(b) Scope. The rules of Section 8 apply only to claims and counter-claims between the "injured person" (and those parties asserting claims through that person) and "the person whose conduct caused the injury" (and those responsible for that person). The "injured person" and "the person whose conduct caused the injury" are determined under Oregon law as provided in Section 3(1) and (4). Section 4 also provides that Oregon law determines what constitutes "injurious conduct" or "conduct that caused the injury" and where that conduct and the resulting injury occurred. For claims by or against third parties or between or among joint tortfeasors, see Section 10 of this Act.

Under section 8, the choice of the applicable law depends in part on the location of four contacts: (1) the place of the injurious conduct; (2) the place of the resulting injury; and (3) the domicile of the injured person; and (4) the domicile of the person whose conduct caused the injury. For a table illustrating the operation of section 8, see Appendix.

(c) Common-domicile cases. Subsection (2)(a) of Section 8 provides that if, at the time of the injury, the injured person and the person whose conduct caused the injury were domiciled in the same state, the law of that state governs--even if both the injurious conduct and the resulting injury occurred in another state. The rules for determining the domicile of a natural person or a legal person are found in Section 5.

The common-domicile rule of Subsection (2)(a) conforms with the results reached by the majority of state supreme courts in the United States. Since the 1960s, in a movement known as the American choice-of-law revolution, forty-two states (including Oregon) have abandoned the traditional *lex loci delicti rule* (which mandated the application of the law of the place of the tort) and switched to other, flexible approaches. Thirty-two of those states made the switch in cases involving the common-domicile pattern covered by subsection 8(2)(a), and thirty-one of those cases applied the law of the parties' common domicile. See S. Symeonides, *The American Choice-of-Law Revolution: Past Present and Future* 146-57 (2006). In addition, virtually all recent choice-of-law codifications (more than a dozen) enacted in other countries have adopted a similar common-domicile rule. See id.157-58; E. Scoles, P. Hay, P. Borchers & S. Symeonides, *Conflict of Laws* 804-06 (2004).

The majority of the above-mentioned U.S. cases involved situations in which the law of the state of the parties' common domicile favored the victim more than the law of the state in which the conduct and/or the injury occurred. Courts and commentators unanimously characterized these cases as "false conflicts" (as opposed to "true conflicts") because only the state of the common domicile had an "interest" in applying its law, while the state of the conduct and injury did not have a

countervailing interest in applying its law.

In contrast, some commentators contend that, in the converse scenario--when the law of the state of the common domicile favors the defendant more than the law of the state of conduct/injury--the latter state does have a countervailing interest in applying its law. Nevertheless, more than two-thirds of the cases involving this pattern have applied the law of the parties' common domicile. See S. Symeonides, Choice-of-Law in the American Courts in 2008: Twenty-Second Annual Survey, 57 *Am. J. Comp. L.* 269 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1322168 Subsection (2)(a) adopts this position--namely, that the law of the parties' common domicile should govern not only when it favors the plaintiff, but also when it favors the defendant more than the law of the other involved state. Any resulting inequity in the second scenario can be addressed through the escape clause of subsection (4) of Section 8, in appropriate circumstances.

Subsection (2)(b) expands the scope of the common-domicile rule of subsection (2)(a) so as to include persons who are domiciled in different states which have laws that would produce the same outcome. The operation and rationale of subsection (2)(b) is explained in comment (e).

(d) Scope of the common-domicile rule. The second sentence of subsection (2)(a) introduces a limitation to the scope of the common-domicile rule by exempting from it the issue of determining the standard of care by which to judge the injurious conduct. That sentence provides that this issue is governed by the law of the state of conduct if the resulting injury also occurred in that state. If the injury occurred in a state other than the state of conduct, the applicable law is determined under subsection (3)(c), which allows the plaintiff to opt for the law of the state of injury under certain conditions. The rationale and operation of subsection (3)(c) are explained in comment (i).

This limitation to the scope of the common-domicile rule is in keeping with a distinction adopted in American case law between "conduct-regulating" and "loss-distributing" rules. See S. Symeonides, *The American Choice-of-Law Revolution* 124-40 (2006). In the words of the court that first articulated this distinction, conduct-regulating rules are those that "have the prophylactic effect of governing conduct to prevent injuries from occurring," Padula v. Lilarn Props. Corp., 644 N.E.2d 1001, 1002 (N.Y. 1994), while loss-distributing rules are those that "prohibit, assign, or limit liability after the tort occurs," id. at 1003, and thus distribute the resulting losses to classes of defendants or plaintiffs. Examples of conduct-regulating rules include:(1) "rules of the road," including civil sanctions for violating rules of the road, as well as presumptions and inferences attached to the violation; (2) rules prescribing safety standards for work sites, buildings, and other premises; (3) rules imposing punitive damages; and (4) rules that characterize as tortious conduct

defined as anticompetitive, or as "interference with contract," "interference with marriage," or "alienation of affections." Examples of loss-distributing rules include: (1) guest statutes; (2) rules that prescribe the amount of recoverable compensatory damages; (3) rules of interspousal immunity, parent-child immunity, workers' compensation immunity, and loss of consortium. All of the 32 cases (noted in comment (c), above) that have applied the law of the parties' common domicile involved conflicts between loss-distributing (rather than conduct-regulating) rules. In contrast, in conflicts involving conduct-regulating rules, courts continue to apply the law of the state or states of conduct and/or injury. See S. Symeonides, *The American Choice-of-Law Revolution* 210-36 (2006).

The second sentence of subsection (2)(a) of this section is intended to allow the same differentiation between conduct-regulating and loss-distributing conflicts by providing that the law of the state or states of conduct and/or injury determines the standard of care by which to judge the injurious conduct. This means, *inter alia*, that if, under the law of the state of conduct and injury, the actor would be judged *not* to have committed a particular tort, the actor may not be held liable for that tort under the law of the parties' common domicile. Conversely, if, under the law of the state of conduct and injury, the actor would be judged to have committed a tort—albeit one for which the actor would be immune from suit because of an intrafamily, charitable immunity, or other similar rule—then the actor may be held liable under the law of the parties' common domicile.

(e) Cases in which the parties are domiciled in states whose laws would produce the same outcome. Subsection (2)(b) deals with situations in which the parties are domiciled in different states that have laws that would produce the same outcome on the disputed issue or issues. Subsection (2)(b) provides that, in these cases, the parties should be treated as if they were domiciled in the same state "to the extent that" the laws of those states would produce the same outcome on the disputed issues. The rationale for this treatment is that these cases present what is known in the conflicts literature and case law as "false conflicts" because the result is the same regardless of which of the two laws is applied.

One effect of this provision is to facilitate the task of the court or other decision-maker in cases involving multiple victims or multiple tortfeasors. Another effect is that, in some cases, this provision may lead to the application of a different law than that designated by subsections (3)(b) and (3)(c) of Section 8. For example, if both the conduct and the injury occurred in State X, and the parties were domiciled in states Y and Z, respectively, then the case would fall under subsection (3)(b), which calls for the application of the law of State X (subject to an exception). However, if the laws of States Y and Z would produce the same outcome, then the court should reach that outcome, rather than the outcome produced by the law of State X. Similarly, if the conduct occurred in State A and the injury occurred in State B and the parties were domiciled in States X and Y, respectively, the case would fall

within subsection (3)(c), which calls for the application of the law of State A unless (under certain conditions) the injured person opts for the law of State B. However, if the laws of States X and Y would produce the same outcome, then the court should reach that outcome, rather than the outcome produced by the laws of either State A or State B.

Subsection (2)(b) does not define exactly when the two laws would produce "the same outcome," nor does it designate which of the two laws to apply. Both questions are left to judicial interpretation, but in most instances the questions will resolve themselves. For example, if both domiciliary states have an intrafamily or charitable immunity rule, then, on the issue of whether the defendant is susceptible to suit, both states' laws would produce the same outcome and it would make no difference which of the two the court applies; in either case the plaintiff's suit will be barred. If, in another case, one state imposes a $500,000 damages cap and the other state imposes a $1 million cap, the two laws would produce the same outcome "to the extent" that they both disallow unlimited damages and a different outcome "to the extent" that they allow different amounts. The rule of subsection (2)(b) would apply on the first issue and prevent unlimited damages (even if the state of conduct or injury, or both, do not limit damages), but not on the second issue of the exact amount for which the plaintiff will be eligible. The amount will then depend on which law would be applicable to this issue under the other provisions of Section 8.

(f) Cases in which the parties are domiciled in states whose laws would produce a different outcome. Subsection (3) of Section 8 provides for situations in which, at the time of the injury, the injured person and the person whose conduct caused the injury were domiciled in different states whose laws would produce different outcomes. Comments (g)-(i) address specific sub-categories of cases falling within the scope of subsection (3).

(g) Split-domicile cases in which the conduct and the injury occurred in one party's home state. Subsection (3)(a) deals with situations in which both the injurious conduct and the resulting injury occurred in the same state and either the injured person or the person whose conduct caused the injury was domiciled in that state. Subsection (3)(a) provides that, in such cases, the applicable law shall be the law of the domiciliary state in which both the conduct and the injury occurred. This result is consistent with the results reached by the majority of courts in other states. See S. Symeonides, *The American Choice-of-Law Revolution* 163-91 (2006).

This result is intuitively more appropriate when the law of that state favors the domiciliary of that state, but, for reasons of evenhandedness and other reasons, subsection (3)(a) takes the position that the same result is also appropriate even when that law favors the domiciliary of the other state. When a person is injured in her home state by conduct in that state, her rights should be determined by the law of that state, even if the person who caused the injury happened to be domiciled in another

state. The law of the latter state should not be interjected to the victim's detriment or benefit. By the same token, when a person acting within his home state causes injury in that state, he should be held accountable according to the law of that state, even if the injured person happened to be domiciled in another state. The law of the latter state should not be interjected to the actor's detriment or benefit.

(h) Split-domicile cases in which the conduct and the injury occurred in a third state. Subsection (3)(b) of Section 8 deals with situations in which: (1) at the time of the injury, the injured person and the person whose conduct caused the injury were domiciled in different states whose laws would produce a different outcome; and (2) both the injurious conduct and the resulting injury occurred in a third state other than the state in which either person was domiciled. Subsection (3)(b) provides that in such cases the applicable law is the law of the state in which both the conduct and the injury occurred, but subject to an exception. The exception provides that if a party demonstrates to the court's satisfaction that, under the circumstances of the particular case, the application of that law to a disputed issue will not serve the objectives or policies of that law, that issue will be governed by the law selected under Section 9, while the remaining issues, if any, will be governed by the law of the state of conduct and injury.

This exception is necessary (primarily, but not only) because, in some cases, the connections of the state of conduct and injury may be transient, fortuitous, or otherwise tenuous. Suppose, for example, that an airplane that was diverted by bad weather from its scheduled route over State A crashed in State B because of pilot error that occurred in the airspace of State B. Suppose further that State B, which has no other connections with the case, imposes a cap on the amount of compensatory damages for wrongful death, while other involved states do not impose such a cap. Depending on other factors and circumstances, this case may be a good candidate for the exception if the party opposing the application of State B law demonstrates that the objectives State B seeks to accomplish by imposing a damages cap (e.g., to protect defendants domiciled or based in that state) would not be served by applying the cap in this case.

Depending on the circumstances, other cases may not be good candidates for this exception, even if the connection of the state of conduct and injury are transient or fortuitous. Suppose, for example, that parties domiciled in States A and B, respectively, are involved in a two-car traffic accident in State X and one of the disputed issues is whether one of the parties was negligent in driving the car that caused the accident. In the absence of serious countervailing factors, this case would not be a good candidate for the above exception because that state's conduct-regulation policies or objectives would be served by applying State X's law for judging what constitutes negligent driving within its borders.

(i) Split-domicile cross-border cases. Subsection (3)(c) of Section 8 deals with

situations in which: (1) at the time of the injury, the injured person and the person whose conduct caused the injury were domiciled in different states that did not have the same law; and (2) the injurious conduct occurred in one state (often but not necessarily the home state of the person whose conduct caused the injury) and the resulting injury occurred in another state (often but not necessarily the home state of the injured person). Subsection (3)(c) provides that, in such cases, the applicable law is the law of the state of conduct, subject to an exception in favor of the law of the state of injury.

The exception applies if two requirements are satisfied. The first requirement is that the occurrence of the injury *in the state of injury* must have been a foreseeable result of the activities of the person whose conduct caused the injury. This is an objective, rather than a subjective, standard. Moreover, because subsection (3)(c)(A) is a choice-of-law rule rather than a substantive rule, the term "foreseeable"should be understood in a "spatial" sense and should not be confused with the foreseeability of substantive tort law. The pertinent question here is not whether one should have foreseen the occurrence of the injury, but whether one should have foreseen that the injury would occur *in the particular state in which the injury did occur*. For example, one who operates a factory in close proximity to the border with another state should foresee that any harmful emissions from the factory may cause injury in the other state because the wind may blow in that direction.

The second requirement is that the injured person must formally request, by pleading or amended pleading, the application of the law of the state of injury. If such a request is filed, it shall be deemed to encompass all claims and issues against the particular defendant. In other words, the injured person may not "pick and choose" the favorable and discard the unfavorable parts of the law of the state of injury.

The rule of subsection (3)(c) will produce the same result as that produced by the vast majority of U.S. state and federal cases involving cross-border tort conflicts and decided after the abandonment of the traditional *lex loci delicti* rule. As a recent study documents, these cases are evenly split between applying the law of the state of conduct and the law of the state of injury, but the overwhelming majority of all cases nation-wide have applied whichever of the two laws prescribed a higher standard of conduct for the defendant or of financial protection for the plaintiff. See S. Symeonides, Choice-of-Law in Cross-Border Torts, 61*Hastings Law Journal* (forthcoming 2009); earlier, longer version available(forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328191. The courts that decided these cases often have reached these results after laborious and often uncertain analysis. By adopting the rule of applying the law of the state of conduct but also allowing the injured person to opt for the law of the state of injury in narrowly defined circumstances, Subsection (3)(c) accomplishes the same result but in a much more efficient and cost-saving way that will provide predictability to prospective litigants and help conserve judicial resources.

The vast majority of recent choice-of-law codifications also have adopted the same solution, either for all cross-border torts, or for certain cross-border torts such as environmental torts or products liability. See S. Symeonides, Choice-of-Law in Cross-Border Torts, *supra*. Moreover, unlike subsection (3)(c), most of these codifications do not condition the application of the law of the state of injury to a foreseeability proviso. The same was true of the traditional *lex loci delicti* rule, still followed in ten states of the United States, which, unlike Subsection (3)(c), applies the law of the state of injury without regard to whether the occurrence of the injury in that state should have been foreseen.

It is important to stress that, although subsection (3)(c) may have the *effect* of favoring plaintiffs, the true *reason* for giving plaintiffs a choice between the laws of the state of conduct and the state of injury in this narrow circumstance is to effectuate the policies of those states in deterring wrongful conduct, preventing injuries, and providing adequate recoveries for those injuries. For the role and importance of these policies, see Section 9(3)(a), and comment (f) under Section 9. Moreover, the application of the law of the state of conduct is not unfair to defendants because it is a state with which they voluntarily associated themselves and which, more often than not, is also their home state. Likewise, because of the foreseeability proviso, the application of the law of the state of injury is not only constitutionally permissible but also appropriate from the choice-of-law perspective. It is a factor of sufficient weight to tip the scales in favor of applying the law of the state that is apt to experience the impact of the injurious conduct and a good response to any argument of unfair surprise by the defendant. By definition, tort conflicts involve conflicting value judgments of at least two states as to who should bear the social and economic losses caused by injurious conduct that at least one state considers tortious. In the final analysis, of the two parties involved in the conflict, the tortfeasor is the one who is likely to be in a better position to prevent the loss.

(j) The escape clause. Subsection (4) of Section 8 introduces an exception to all the choice-of-law rules provided in subsections (2) and (3) of Section 8. The exception is anchored in Section 9, because that section contains the general approach from which the rules of Section 8 have been derived.

Section 9 directs the court or other decision-maker to apply the law of the state whose contacts with the case and the parties and whose policies on the disputed issues make application of its law "the most appropriate" for those issues. Section 9 then lists the general principles and factors for identifying the "most appropriate" law. Relying on the same general principles, Section 8 designates in advance the "most appropriate" law in certain categories of cases. In so doing, Section 8 will provide prospective litigants with a measure of predictability and will unburden courts or other decision-makers from the laborious analysis Section 9 requires.

However, as with any *a priori* choice-of-law rules, the rules of Section 8(2) and

(3) may, in exceptional cases, produce a result that is incompatible with the principles of Section 9 from which these rules have been derived. In order to avoid such a result, Section 8(4) provides an "escape mechanism" from the *a priori* rules of Section 8. The escape clause becomes operable if a party demonstrates that, under the principles of Section 9, the application to a disputed issue of the law of a state other than the state designated by subsections (2) or (3) is "substantially more appropriate." In such a case, Section 8 must yield to Section 9 and the issue will be governed by the "most appropriate" law selected under Section 9, while other disputed issues, if any, will be governed by the law designated under the applicable provision of Section 8.

COMMENTS TO SECTION 9

(a) General and residual approach. Section 9 enunciates the general approach to choosing the law governing non-contractual claims. This approach applies "except as otherwise provided" in Sections 5 through 8, which prescribe specific rules derived from this approach, and Section 11, which provides for situations in which the parties have validly agreed on the governing law.

(b) The objective. The opening paragraph of Section 9 enunciates the objective of the choice-of-law process for non-contractual claims. The objective is to identify and apply the law of the state whose contacts with the parties and the dispute and whose policies on the disputed issues make application of its law the "most appropriate" for those issues.

(c) The process. The balance of Section 9 prescribes the process or method for achieving the objective enunciated in the opening paragraph. This process consists of three steps described below.

(d) Identifying the involved states. The first step is to identify the involved states—in addition to the forum state which is *ex hypothesi* involved—by examining their relevant contacts with the parties and the facts that give rise to the dispute. Subsection (1) of Section 9 lists some of the contacts that are usually relevant in conflicts involving non-contractual claims: the place of the injurious conduct, the place of the resulting injury, the domicile, habitual residence or pertinent place of business of each person, and the place in which the relationship (if any) between the parties was centered. This list of contacts is neither exhaustive nor hierarchical. Depending on the circumstances, other contacts may also be relevant. Moreover, not all the listed contacts will be relevant in all cases. Finally, the listing of these contacts should not be taken as an invitation for a mechanistic counting of contacts as a means of choosing the applicable law. That one state has more contacts than other states does not necessarily mean that its law should be applied to any or all disputed issues unless those contacts are of the kind that bring into play policies of that state which,

in light of the other policies and factors listed in Section 9, will make application of that law the "most appropriate."

The reference to the parties' domiciles or habitual residences in Subsection (1) is not accompanied by any specific time designation. This means that, although a party's domicile at the time of the injury remains the most relevant, the court is free to also take into account a party's domicile at the time of the choice-of-law decision if this factor is relevant in "evaluating the strength and pertinence" of the policies of the involved states. For example, a post-injury change of domicile by the injured person may reduce the pertinence of the compensatory policies of the state of the former domicile and bring into play the corresponding policies of the state of the new domicile. (See Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981), where the Supreme Court held that the plaintiff's post-accident good-faith acquisition of a new domicile in Minnesota was a factor implicating that state's interest in protecting the plaintiff.) Likewise, a post-injury change of domicile by a tortfeasor may reduce the pertinence of the policies of the tortfeasor's previous domicile in deterring or protecting tortfeasors and bring into play the corresponding policies of the new domicile. Consequently, in selecting the applicable law in cases decided under Section 9 -- or in deciding whether to employ the escape clauses found in Sections 7(3) and Section 8(3), both of which are anchored in Section 9 -- the court is free to take into account a party's domicile at both the time of the injury and the time of the choice-of-law decision.

According to Section 5(2), the domicile of a legal person is located in the state in which the person maintains its principal place of business. However, if the dispute arises from activities directed from another state in which the legal person maintains a place of business, either state may be deemed as the domicile at the choice of the other party. In addition, under subsection 1 of Section 9, a "pertinent place of business" (i.e., pertinent to the disputed issues) of a legal person—or, for that matter, a natural person—may be a relative contact in appropriate circumstances.

(e) Identifying the pertinent policies of the involved states. The second step of the process is to: (1) identify the substantive rule or rules of each involved state that appear to be in material conflict with the corresponding rule or rules of another involved state; and then (2) identify the policies embodied in those rules. As used in this context, "policy" means the objective the state seeks to accomplish by adopting or continuing to follow the particular rule. If the particular rule is a statutory rule, its policy is identified through the same process of statutory interpretation used in non-conflicts cases. If the rule is judicially created, its policy is identified in the same way one identifies the policy of any common-law rule.

(f) Evaluating the conflicting policies. The third step of the process is to evaluate the "strength and pertinence" of the conflicting policies of the involved states in light of, and "with due regard to," two sets of policies listed in subsection

(3)(a) and (b) of Section 9. The first set of policies are the general policies of the law of torts and non-contractual claims phrased in a most general way: "encouraging responsible conduct, deterring injurious conduct, and providing adequate remedies for the conduct."

The second set of policies are multistate policies derived from Oregon's membership in the interstate and international community. The admonition to evaluate the conflicting state policies in light of the "needs of the interstate and international systems" obviously goes beyond the self-evident requirement of complying with the minimal limits prescribed by the U.S. Constitution for state choice-of-law decisions. See especially Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981). In some instances, what may be constitutionally permissible may not necessarily be appropriate from the choice-of-law perspective. Courts should strive for decisions that not only stay within the limits prescribed by the Constitution, but also are deferential and sensitive to the needs and policies of the interstate and international systems.

Moreover, and more specifically, the court or other decision-maker should (1) always be mindful of the adverse consequences of the choice-of-law decision on the strongly-held policies of the involved states; and (2) choose the law of the state which, in light of its relationship to the parties and the dispute--and its policies rendered pertinent by that relationship--would sustain the most serious legal, social, economic, and other consequences of the choice-of-law decision.

(g) Policies and "interests." In general terms, a state may be said to have an "interest" in seeing that the policies and values embodied in its law are observed—or at least not disregarded—in cases that fall within the intended reach of that law. Nevertheless, Section 9 and this Act avoid using the term state "interest" in order to disassociate the approach of this Section and this Act from Professor Brainerd Currie's "governmental interest analysis" and other modern American approaches that seem to perceive the choice-of-law problem as a problem of interstate competition rather than as a problem of interstate cooperation in conflict avoidance. Instead, Section 9 calls for a focus on the *adverse* consequences of the choice-of-law decision on the policies of the involved states. Conflicts cases involve situations that fall, or appear to fall, within the reach of the laws of more than one state, and the choice-of-law process is called upon to resolve these conflicts of overlapping reach. Inevitably, when the overlap is real, the choice of one state's law will have some adverse effect on the policies of the other state. Even so, the choice-of-law process under Section 9 should aspire to resolve the conflict in a way that causes the least adverse consequences to the policies of the involved states.

(h) Issue-by-issue analysis and dépeçage. The repeated use of the term "issues" in Section 9 and this Act is intended to focus the choice-of-law-process on the particular issue as to which there exists an actual conflict of laws. When a conflict

exists with regard to only one issue, the court or other decision-maker should focus on the factual contacts and policies that are pertinent to that issue. When a conflict exists with regard to more than one issue, each issue should be analyzed separately, since each may implicate different states, or may bring into play different policies of these states. Seen from another angle, each state having relevant contacts with a given multi-state case may not be equally concerned with regulating all issues in the case, but may only be concerned with those issues that actually implicate its policies in a significant way.

This issue-by-issue analysis, which is an integral feature of all modern American choice-of-law methodologies, facilitates a more nuanced and individualized resolution of conflicts problems. One result of this analysis is that, in some cases, the laws of different states govern different issues in the same dispute. This phenomenon is known in conflicts literature by its French name of *dépeçage*. Although infrequently referred to by this name, this phenomenon is now a common occurrence in the United States. Section 9 does not prohibit *dépeçage*. However, *dépeçage* should not be pursued for its own sake. The unnecessary splitting of the case should be avoided, especially when it results in distorting the policies of the involved states.

(i) Relation to Sections 7-8. As noted earlier, Section 9 applies except as otherwise provided in Sections 7 and 8. Although the rules of Sections 7 and 8 have been derived from the general approach of Section 9, they prevail over Section 9 because they are more specific on the subjects they cover. However, as with any *a priori* rules, the rules of Sections 7 and 8 may, in exceptional cases, produce a result that is incompatible with the general objective of Section 9. In order to avoid such a result, Sections 7(3) and 8(4) each provide an "escape clause" that is anchored in Section 9. Moreover, Section 7--and, to a lesser extent, Section 8--do not cover the entire spectrum of cases or issues that might fall under the general headings of these sections. The remaining cases or issues are governed by Section 9 as the residual section. Thus, Section 9 is intended to perform a general as well as a residual role.

COMMENTS ON SECTION 10

(a) Scope. Sections 6, 7 and 8 of this Act apply to non-contractual claims between the injured person and the person whose conduct caused the injury. In contrast, Section 10 applies to non-contractual claims by or against parties other than the injured person and the person whose conduct caused the injury. Examples of claims falling within the scope of this section are claims between or among joint tortfeasors (or other similarly situated parties), and claims of employers or their insurers to recover compensation paid for injuries caused by an employee. These claims are governed by the law selected under the flexible approach of Section 9.

(b) Rationale. The reason for relegating these claims to the flexible approach of Section 9 is because their complexity and variability make them insusceptible to categorical choice-of-law rules. For example, there is no guarantee that the choice-of-law rules of Section 8 will produce sound results in all cases involving these third-party claims, although in some cases these rules can provide valuable pointers. In many cases, it may be appropriate to apply the same law to these claims as that which governs the claims between the injured person and the person who caused the injury, while in other cases it may be more appropriate to apply the law of another state. The approach of Section 9 provides courts with sufficient flexibility to evaluate in an individualized way the complexities and peculiarities of each claim and decide accordingly.

COMMENTS TO SECTION 11

(a) Applicability. Section 11 applies to cases in which the parties have agreed to the application of the law of a state other than Oregon. Cases in which the parties have agreed to the application of the law of Oregon are provided in Section 6(1).

When the parties have agreed that their dispute will be governed by the law of a state other than Oregon and the agreement is valid under the provisions of Section 11, the agreement prevails over the rules of Sections 8, 9 and 10, but not over the rules of Sections 6 and 7, which provide for certain claims and issues governed by Oregon law.

(b) Requirements for validity of agreement. In order to be valid under Section 11, the agreement: (1) must have been entered into *after* the parties had knowledge of the events giving rise to the dispute; and (2) must conform to the pertinent provisions of ORS 81.100 to 81.135, which establish the requirements for enforcing choice-of-law agreements and also preserves the applicability of other Oregon statutes regarding such agreements. For a list of these statutes, see Section 2, comment 1 of the official comments explaining HB 2414 (2001) (Section 2 now codified as ORS 81.102), published in James A.R. Nafziger, Oregon's Conflicts Law Applicable to Contracts, 38 *Willamette L. Rev*. 397, 419 (2002).

ORS 81.100 to 81.135 establish the requirements for enforcing choice-of-law agreements in cases involving *contractual* claims. ORS 81.120(1) provides that, subject to certain conditions and limitations specified therein, "the *contractual* rights and duties of the parties are governed by the law or laws that the parties have chosen" (emphasis added). The italicized word (which was deliberately chosen in drafting that provision) limits the permissible scope of a choice-of-law agreement to contractual issues. See official comments to Section 7, comment 1 accompanying HB 2414 (2001) (Section 7 now codified as ORS 81.120), published in James A.R. Nafziger, Oregon's Conflicts Law Applicable to Contracts, 38 *Willamette L. Rev*. 397, 420

(2002) (noting that the quoted provision "makes clear that the exercise of party autonomy within this Act extends only to contractual rights and duties of the parties and not to non-contractual rights and duties such as those arising out of the law of torts and property.").

(c) Differentiating between pre- and post-dispute agreements. Section 11 differentiates between pre- and post-dispute agreements because the parties' position in the two situations is qualitatively and significantly different. Before the dispute arises, the parties (assuming they are otherwise contractually related) usually do not--or should not--contemplate a future tort, and the parties do not know (a) who will injure whom or (b) the nature or severity of the injury. An unsophisticated party (or a party in a weak bargaining position) may uncritically or unwittingly sign a choice-of-law agreement--even when the odds of that party becoming the victim are much higher than the odds of that party becoming the tortfeasor. Thus, pre-dispute agreements may facilitate the exploitation of weak parties. In contrast, this danger is less pronounced in post-dispute agreements because, after the dispute arises, the parties are in a position to know their rights and obligations and have the opportunity to weigh the pros and cons of a choice-of-law agreement. This is why Section 11 permits choice-of-law post-dispute agreements but does not sanction pre-dispute agreements for non-contractual claims.

(d) Voluntary settlements. By resolving the choice-of-law aspect of a dispute, choice-of-law agreements can facilitate a voluntary settlement of the whole dispute without litigation. Even when litigation is not avoided, choice-of-law agreements can reduce the duration and costs of litigation and make it more predictable. Thus, choice-of-law agreements serve interests beyond those of the parties, such as the interest in conserving judicial resources. For this reason, Section 11 and Section 6(1) should be seen as expressions of a legislative policy in favor of choice-of-law agreements and an invitation to courts to encourage parties to reach such agreements. See J. Nafziger, Avoiding Courtroom "Conflicts" Whenever Possible, in J. Nafziger & S. Symeonides, *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren* 341 (2002); J. Nafziger, Making Choices of Law Together, 37 *Willamette L. Rev*. 209 (2001); J. Nafziger, Avoidance of Choice-of-Law Conflicts: An Introduction, 12 *Willamette J. Int'l L. & Disp. Res*. 179 (2004).

(e) Arbitration agreements. Section 11 does not prohibit parties from agreeing to submit a non-contractual dispute to arbitration. The validity of an arbitration agreement is governed by general contract principles. Moreover, when the arbitration agreement is valid, this Act is not binding on the arbitral tribunal, unless the agreement expressly provides otherwise. ORS 36.508 provides in pertinent part that the arbitral tribunal shall decide the dispute "in accordance with the rules of law designated by the parties as applicable to the substance of the dispute" and that the designation of the law of a given state "shall be construed, *unless otherwise expressed*, as directly referring to the substantive law of that state and not to its

conflict of laws rules." (Emphasis added.) As part of Oregon's conflicts law, this Act will be binding on the arbitral tribunal only if the arbitration agreement expressly provides to that effect. ORS 36.508 also provides that, if the arbitration agreement does not designate the applicable law, "the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute." In such a case, the tribunal may choose to be guided by the provisions of this Act in identifying the "appropriate" rules of law.

MISCELLANEOUS

COMMENTS TO SECTION 12

(a) The explanatory comments accompanying each section of this 2009 Act have been written under the auspices of, and have been approved by, the Oregon Law Commission. The comments have accompanied this Act when introduced to the Legislature.

APPENDIX

TABLE 1. PRODUCT LIABILITY CASES GOVERNED BY OREGON LAW UNDER SECTION 7

#	V's dom.	Injury	Delivery "as new"	Mnfg.	Appl. provision	Appl law
1	OR	OR	OR	OR	§7(1)	**OR**
2	---	OR	OR	OR	§7(1)	**OR**
3	OR	---	OR	OR	§7(1)	**OR**
4	OR	OR	---	OR	§7(1)	**OR**
5	OR	OR	OR	---	§7(1)	**OR**
6	OR	OR	---	---	§7(1)(a)	**OR**
7	OR	---	OR	---	§7(1)(b)(B)	**OR**
8	OR	---	---	OR	§7(1)(b)(A)	**OR**
9	---	OR	OR	---	§7(1)(b)(B)	**OR**
10	---	OR		OR	§7(1)(b)(A)	**OR**
11	---	---	OR	OR	§7(4) and § 9	?
12	OR	---	---	---	§7(4) and § 9	?
13	---	OR	---	---	§7(4) and§ 9	?
14	---	---	OR	---	§7(4) and § 9	?
15	---	---	---	OR	§7(4) and § 9	?
16	---	---	---	---	§7(4) and § 9	?

Cases ## 1-10 will be governed by Oregon law under Section 7(1). Cases ## 11-16 will be governed by the law selected under Sections 9, *if* an Oregon court has jurisdiction.

TABLE 2. CASES COVERED BY SECTION 8

		#	P's dom	Injury	Conduct	D's Dom
Subsection (2)(a)	Common Domicile cases	1	**A**	---	---	**A**
		2	**a**	---	---	**a**
Subsection (2)(b)	Cases analogous to common domicile	3	**A**	---	---	**C**
		4	**a**	---	---	**c**
Subsection (3)(a)	Split-domicile, but conduct and injury in one domiciliary state	5	**A**	**A**	**A**	b
		6	**a**	**a**	**a**	B
		7	a	**B**	**B**	**B**
		8	A	**b**	**b**	**b**
Subsection (3)(b)	Split-dom, and conduct and injury in a third state	9	C	**A**	**A**	b
		10	c	**a**	**a**	B
Subsection (3)(c)	Split-domicile, cross-border	11	**A**	**A**	b	b
		12	**A**	**A**	b	c
		13	a	a	**B**	**B**
		14	c	a	**B**	**B**

The letters in the last four columns represent states that have the contacts shown at the top of each column. The use of capital letters indicates that the state represented in that cell has a pro-recovery law while the use of lower-case letters indicates that the law of the state represented in that cell does not favor recovery. The dash "---" indicates that the law of that state is immaterial. Shaded cells indicate the state of the law applicable under Section 8.

Road Map in Applying this Act

<table>
<tr><th colspan="3">I. Issues automatically governed by Oregon Law</th></tr>
<tr><td>1. Preliminary issues: definitions; applicability; characterization; localization; determining domicile.</td><td>2. Actions listed in section 6, namely:(1) actions in which the parties agree to the application of the law of Oregon, or in which none of the parties raises the issue of applicability of foreign law, or in which the party who relies on foreign law fail to assist the court in establishing that law's content after being requested by the court to do so; (2) actions against a "public body" of the State of Oregon; (3) actions against owners or possessors of Oregon real property seeking to recover for, or to prevent, injury on that property and arising out of Oregon conduct; (4) actions between an employer and an employee who is primarily employed in Oregon arising out of Oregon injury; and (5) actions for professional malpractice arising from services rendered entirely in Oregon by personnel licensed to perform those services under Oregon law. In all of the above cases, Oregon law governs, notwithstanding any other provisions of this Act.</td><td>3. Product liability actions if Oregon has any two, or more, of the following contacts (1) victim's domicile; place of injury; (3) place of product's manufacture or production; (4) product's delivery pf product when new, unless a party satisfies the conditions for the escape, in which case the applicable law is selected under section 9.</td></tr>
<tr><th colspan="3">II. Issues not automatically governed by Oregon law, and thus subject to choice-of-law process</th></tr>
<tr><td rowspan="2">1. If parties validly agreed to application of non Oregon law, apply that law (section 11).</td><td colspan="2">2. If parties did not agree to application of non-Oregon law, then:</td></tr>
<tr><td>3. Between victim and tortfeasor — section 8:
(1) If the parties are domiciled in the same state (or in different states whose laws produce the same outcome), the law of the domiciliary state governs, even if the conduct and injury occurred in another state, but subject to an exception in favor of the law of the latter state for determining the standard of care by which the conduct is judged.
(2) If the parties are domiciled in different states and the laws of those states on the disputed issues would produce a different outcome, then:
(a) If both the conduct and the injury occurred in the same state, the law of that state governs if either party was domiciled in that state;
(b) If both the conduct and the injury occurred in a state other than the one in which either party is domiciled, the law of the state of conduct and injury governs, subject to an exception for cases in which the application of that law would not serve the objectives of that law; and
(c) If the conduct occurred in one state and the injury in another state, the law of the state of conduct governs, unless the injured person formally requests the application of the law of the state of injury and provided that the activities of the person whose conduct caused the injury were such as to make foreseeable the occurrence of injury in that state.</td><td>4. Between third parties — sections 10 and 9.</td></tr>
</table>