Case Four: Choice of Law Theory

INTRODUCTION

The following hypothetical is a variation of *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277 (N.Y. 1993). The actual facts presented to the panel have been summarized as follows.

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FACTS

Osgood Machinery, Inc., is a New York distributor and servicer of metal fabricating machinery used in assembly line operations. Around 1958, Manufacturer, another New York company, manufactured a bending roll (a machine which shapes large pieces of metal) which was sold by Osgood to Assembler, yet another New York company, for use in its Buffalo plant. Osgood assisted Assembler in the set up and operation of the roll during the first few months of operation. In 1961, Assembler closed its Buffalo plant. The roll's history became obscured until 1969, when Bidder sold the roll to Mueller, a Missouri employer and manufacturer. Mueller modified the machine by installing a foot switch. In October, 1978, plaintiff/employee Cooney, a Missouri resident, was seriously injured while cleaning the roll. At the time of the injury, the machine was running and the foot switch was wedged "on" by a piece of wood. Cooney was unable to turn the machine off and as a result was caught and physically mangled.

Cooney sued and collected full workers' compensation benefits from Mueller under Missouri law. Soon thereafter, Cooney sued Osgood in New York under a strict products liability theory. Assume that it would not have been possible under Missouri law to obtain personal jurisdiction in Missouri over Osgood. Osgood then impleaded Successor (the successor corporation to Manufacturer), Assembler, and Mueller. Personal jurisdiction was obtained over Mueller under the theory that it was doing business in New York. Mueller either did not raise or did not appeal any issues attacking personal jurisdiction. Mueller instead moved to dismiss the complaint against it on the basis that the payment of Missouri workers' compensation benefits was a complete defense. Under

Missouri law, the payment of workers' compensation benefits works as an absolute bar to all claims arising out of the same incident by an employee. New York, however, has adopted the minority position that employers remain liable for contribution to joint tortfeasors.

The trial court refused to dismiss and applied New York law to Osgood's claims against Mueller. The mid-level appellate court reversed.

As the highest appellate court of New York, instruct the lower court to respond to Mueller's motion to dismiss.

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BORCHERS, J.*: (affirming and remanding)

I *reverse* the trial court and *remand* with instructions to grant Mueller's motion to dismiss the third-party complaint against it.

This is a conflict between loss-allocating tort rules. The determinant in choosing the appropriate one in a multistate case is which rule is the fairest and best measured by modern standards of justice. The New York rule allowing contribution actions to proceed against employers who have satisfied their workers' compensation obligations is a severely minority one. In fact, New York appears to be the *only* state that allows contribution to the full proportion of liability that would exist if the employer were sued in tort. A few other states allow very limited contribution; the rest allow workers' compensation to operate as a complete bar. *See* Aaron D. Twerski, *A Sheep in Wolf's Clothing: Territorialism in the Guise of Interest Analysis in Cooney v. Osgood Machinery, Inc.*, 59 Brook. L. Rev. 1351, 1353 (1994).

The fact that New York is the only state to follow this rule is not dispositive of the choice-of-law question, because progressive trends in tort law have to get their start somewhere. But this New York rule does not appear to be the crest of a new wave. Rather, to continue the metaphor, it rests motionless in the backwater.

An examination of this case illustrates why. The societal compact struck by workers' compensation is that employers, by agreeing to compensate their employees swiftly and without a showing of fault, subject themselves to obligations that do not run to other civil defendants. The consideration for this societal bargain is that employers' liability (almost everywhere, anyway) is completely extinguished. New

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York's rule, by creating a side route around the liability bar, defeats the expectations of employers (like Mueller) without any corresponding benefits to employees.

The only arguable unfairness in not allowing contribution is to Osgood, but even this is speculative. If Missouri law applies to the other aspects of this case, Osgood will be subject to joint and several liability, with the right to obtain contribution from the other defendants for their share of fault. Mo. Ann. Stat. § 537.067(3) (Vernon 1988). If the share of one or more of the defendants proves "uncollectible"—which would presumably include Mueller's share—then Osgood will be able to "reallocate" the amount of this "uncollectible" portion amongst the other parties, including the plaintiff, in proportion to their fault. Mo. Ann. Stat. § 537.067(2) (Vernon 1988).

If New York law applies to the aspects of the case other than Osgood's claim against Mueller, then Osgood is subject to joint and several liability for only the economic damages. *Cf.* Linda Silberman, *Cooney v. Osgood Machinery, Inc.: A Less Than Complete "Contribution,"* 59 Brook. L. Rev. 1367 (1991) (*Cooney* decision can only be evaluated in light of the whole context of applicable tort rules). The only exception to this rule is if a defendant's fault exceeds 50% (which seems unlikely in Osgood's case), in which case that defendant is jointly and severally liable for all damages. N.Y. Civ. Prac. L. & R. 1601 (McKinney 1995, Supp.). Normally, Osgood—as a party impleading an employer exempt from direct liability under workers' compensation—would not benefit from New York's effort to clip back the use of joint and several liability. N.Y. Civ. Prac. L. & R. 1602(4) (McKinney 1995, Supp.). But, by having its impleader action dismissed, it can take advantage of these limitations because it is no longer in the posture of asserting a claim against the employer. Thus, if New York law applies to the other aspects of this case, Osgood's exposure, beyond its proportionate share of fault, is almost certainly limited to the economic portion of the plaintiff's damages.

The result is that whether New York or Missouri law is applied to the other aspects of this case, Osgood will at *most* be liable for relatively little beyond its proportionate share of fault. Osgood's risk of exposure beyond its fault is far less, therefore, than a defendant under a traditional joint and several liability system who has the bad luck to have judgment-proof co-defendants.

The New York rule is not worth exporting. I *reverse* the trial court, *affirm* the appellate division, and order dismissal of the complaint.

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KRAMER, J.*: (affirming and remanding)

I concur in the result reached by Judge WEINTRAUB: Osgood's claim for contribution from Mueller should be dismissed, but Osgood should be liable to Cooney for only the share of damages attributable to its conduct. I write separately to set forth my reasons for reaching this result and to respond to some arguments offered by other judges on this Court for reaching a different result.

I.

The problem before us is a product of two distinct causes of action: Cooney's claim for damages from Osgood, and Osgood's claim for contribution from Mueller.[1] The lower courts, as well as most of the judges on this Court, have examined only the latter claim-not surprising, since that is the claim that requires choosing between New York and Missouri law. But the claim for contribution is contingent on Osgood's liability to Cooney in the first place, hence we need to examine Cooney's claim against Osgood to see whether a problem exists at all. Moreover, as I shall explain below, understanding Cooney's claim against Osgood is critical to the proper disposition of Osgood's claim against Mueller.

It is clear, to begin with, that Cooney cannot recover damages from Osgood under Missouri law. Missouri can, of course, impose product liability on out-of-state distributors under appropriate circumstances, but to do so on these facts would violate the Due Process Clause of the United States Constitution. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). The nature of the "test" articulated in *Hague* and *Shutts* is, to be sure, uncertain. The Court talks about a "'significant contact or significant aggregation of contacts, creating state interests, such that choice of [a state's] law is neither arbitrary nor fundamentally unfair,'" *Shutts*, 472 U.S. at 818 (quoting *Hague*, 449 U.S. at 312-13), but it does not do much to fill in the meaning of this vague language. Presumably, in addition to contacts that give the state a legitimate regulatory interest, there must also be contacts that make it possible for a defendant rea-

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1. Mueller might have been able to argue that New York lacks jurisdiction over it, but the record shows that Mueller failed to raise this objection, which is therefore waived.

sonably to anticipate being subjected to the state's law. *See Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); *cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (due process requires "purposeful availment" of state benefits to protect defendants from unfair surprise when a state exercises personal jurisdiction). But whatever the precise notions of interest and fairness applicable in this area, they could not possibly be satisfied here, because Osgood has absolutely no connection to Missouri. It has no offices in the state, transacts no business there, and does not even sell to parties who could be expected to take Osgood's products into the state. This one particular bending roll was sold and resold until, more than a decade after Osgood last handled the product, it found its way to Missouri. But Osgood had no knowledge of this fact, could not control it, had no reason to foresee it. If constitutional limits on choice of law mean anything at all, they must prohibit the application of Missouri law in a case like this.

That still leaves New York law. Can Cooney recover damages from Osgood under our common law? New York gives persons injured by defective products a right to recover for two purposes: to compensate the victim and to deter the manufacturer or distributor. The first purpose is not available to Cooney. That is, Cooney cannot assert a claim under New York law based on an interest in receiving compensation. New York does not offer compensation to every injured person, for we are neither so arrogant nor so parochial as to think that this is our place. Rather, we limit the scope of our law, at least insofar as its purpose is to provide compensation, to those injured persons whose welfare is our concern—the citizens and residents of New York. Decisions about whether and how to compensate injured persons from other states we leave to lawmakers in those states.[2]

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2. In this case, for example, Cooney was able to recover damages from the employer, Mueller, under Missouri's workers' compensation scheme. Cooney could have obtained assistance from our courts in enforcing this law had it been necessary to do so. *See Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965).

Judge COX raises the possibility that limiting our law in this fashion could violate equality norms in the Equal Protection and Privileges and Immunities Clauses of the Constitution. But neither of these clauses (nor, for that matter, a sensible understanding of equality) prohibits the kind of line drawn here, for distinctions based on state citizenship are permissible if there are good reasons for making them and the lines drawn are reasonably related to those reasons. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985) (Privileges and Immunities Clause "does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective"). Deference to

Were this the only purpose behind New York tort law, then, Cooney would not be able to state a claim against Osgood and we would dismiss this complaint. But New York has a second reason for giving injured parties a right to recover: to deter manufacturers and distributors from making and selling defective products. In contrast to the compensatory purpose of our law, this purpose is furthered by allowing recovery without regard for the citizenship of the injured party, so long as he or she was injured by a product manufactured or distributed by a New York company. This is true, moreover, even if the plaintiff is a nonresident injured outside the state and even if we assume that New York's interest in this regard is confined to deterring injury in New York, for deterrence is the kind of general effect that is best achieved without drawing overly fine distinctions. Hence, since the product that injured Cooney was distributed by a New York company, that company may be sued for damages under New York law.

II.

Subject to this potential liability, Osgood asks for contribution from Mueller under N.Y. Civ. Prac. L. & R. 1401 (McKinney 1995, Supp.) (CPLR). Section 1401 codifies our decision in *Dole v. Dow Chem. Co.*, 282 N.E.2d 288 (1972), which authorized contribution to assure a fair and proper apportionment of responsibility for wrongful acts. *See also Sommer v. Federal Signal Corp.*, 593 N.E.2d 1365, 1372 (1992). Mueller responds that it already paid Cooney workers' compensation and that under Missouri law an employer who has paid benefits is "released from all other liability . . . whatsoever, whether to the employee or any other person." Mo. Rev. Stat. § 287.120[1] (1993). Osgood replies that under CPLR section 1401 contribution is owed "whether or not . . . a judgment has been rendered against the person from whom contribution is sought." Hence, as Judge SINGER observes, we appear to have "a classic true conflict." SINGER, *infra*, at 692.

Mueller seeks to avoid the conflict by arguing that it is unconstitutional for New York to apply CPLR section 1401 on these facts. And, in fact, Mueller does not seem to have had much more contact with New York than Osgood did with Missouri. There are, or rather, there *may* be sufficient contacts to allow New York to exercise general jurisdiction over Mueller (we do not know for sure, since the objection was

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lawmakers in other states is one such reason, and restricting New York law to cases affecting New York domestic interests tracks this reason perfectly. For elaboration of the argument, see the discussion of discrimination in Larry Kramer, *The Myth of the "Unprovided-For" Case*, 75 Va. L. Rev. 1045, 1065-74 (1989).

waived and there is no record on the question). But even assuming this is so, such contacts are unrelated to the claim at issue and thus do not justify applying New York's contribution rule. *See Shutts*, 472 U.S. at 797 (though defendant has contacts with Kansas sufficient to justify general jurisdiction, Kansas cannot apply its law to claims that are unrelated to the state).

Judge SINGER notes that Mueller may have purchased the bending roll from a New York seller (Bidder) and he concludes that we can reasonably find that Mueller "subjected itself to New York regulation by acting so as to enter the New York market by buying the product from a New York seller." SINGER, *infra*, at 697. This is an extraordinarily capacious understanding of "reasonable expectations." In buying a machine from a New York company, we are told, Mueller should have expected the possibility that one of its Missouri employees might be injured in Missouri while using the machine and sue the distributor in New York, who would then seek contribution from Mueller under New York law. Requiring Mueller to anticipate so much is particularly troubling here, since New York appears to be the only state in the Union that allows contribution in these circumstances. Perhaps the Court is prepared to say that a purchaser should, as a matter of course, plan to research the entire law of another state every time it purchases a product from that state. In my view, however, this is stretching notions of fairness and reasonable expectation too far.

In any event, I do not need actually to decide this question, because I take it that everyone, including Judge SINGER, would agree that New York could not apply its law if Bidder were not from New York. In fact, the record fails to indicate where Bidder was located at the time of the sale. But it is Osgood that wants to make a claim under New York law, and hence Osgood that has the burden of establishing the facts needed to recover (including that the defendant has an appropriate connection to the forum). So absent any evidence or indication that Bidder was from New York, I must agree with Mueller that New York cannot apply its contribution rule consistent with due process.

Judge SILBERMAN recognizes this possibility and suggests that it makes this "a constitutionally unprovided-for case," since the Constitution prohibits the application of both Missouri and New York law. SILBERMAN, *infra*, at 691. But, of course, the case is not unprovided-for at all. The Constitution prohibits the application of CPLR section 1401, but it does not prohibit the application of New York tort law and, as explained above, Cooney can recover from Osgood under that law. In most cases, to be sure, New York softens the blow by enabling the tortfeasor to seek contribution, a result the Constitution prohibits in

this case. But why is that more distressing here than in any other case in which the Constitution limits the power of a state to do what it wants? Would Judge SILBERMAN be similarly troubled if New York's contribution rule could not be applied because it violated the First Amendment, the Commerce Clause, or any other provision in the Constitution? States enact laws to implement their decisions regarding public policy. The Constitution constrains those choices. Here, due process makes the outcome different than if Mueller had more New York connections. There is nothing inappropriate or unusual about that.[3]

III.

That New York cannot apply its contribution rule may not be jurisprudentially problematic, but it does produce the following troublesome result: Osgood is liable for 100% of Cooney's damages under New York law but cannot obtain the benefit of New York's concomitant contribution rule. To the extent that these rules operate in tandem—to the extent, in other words, that New York imposes joint and several liability based on an assumption that contribution is available—the result seems harsh and unfair.

Faced with this outcome, Judge WEINTRAUB urges us not to sever New York laws that were designed to operate together and thus produce "an unintended and draconian effect on our businesses." WEINTRAUB, *infra*, at 683. If we cannot apply both our liability and our contribution rule, he concludes, we should make Osgood liable for only the percentage of damages attributable to its alleged misconduct. This respects Missouri's interest in protecting Mueller without, at the same time, undermining New York's interest by holding Osgood liable for more than its fair share of the damages.

Judge SINGER objects that this protects Mueller and Osgood only by treating Cooney unfairly. "Joint and several liability," he explains, "allows a victimized plaintiff to recover full compensation from any defendant who caused-or helped to cause-the harm." SINGER, *infra*, at 693. That's why New York uses contribution rather than comparative negligence: as between an innocent victim and a negligent defendant, it is the latter who should bear the risk of unavailable joint tortfeasors. Judge SINGER drives the point home by observing that we do not limit

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3. I explained why there is no jurisprudentially problematic category of "unprovided-for" cases in *The Myth of the "Unprovided-For" Case*, 75 Va. L. Rev. 1045 (1989). Despite this, judges and scholars continue to use the term as if it had some validity. Perhaps there is a mistake in my argument and I just don't see it. If so, I am perfectly willing to be corrected. But I'm waiting.

a plaintiff's right to recover where a joint tortfeasor "is *effectively* immune from liability because it is insolvent or judgment proof." SINGER, *infra*, at 693. Why then, he asks, should we limit Cooney's recovery because the joint tortfeasor is immune under Missouri's workers' compensation scheme?

This is, at first blush, a powerful argument.[4] Indeed, were it clear that New York had an interest in assuring Cooney full compensation, I might agree with Judge SINGER and reach the same result he does. As explained in Part I, however, Cooney's right to recover under New York law does not rest on an interest in assuring full compensation for all injuries. Rather, New York extends Cooney this right in order to deter Osgood from distributing defective goods, and New York's deterrence interest requires only that Osgood be held liable for damages attributable to its conduct. Indeed, the whole point of contribution is to prevent defendants like Osgood from being overdeterred through the imposition of excessive damages liability.

It may be, as Judge SINGER indicates, that we prefer overdeterrence to undercompensation where these two policies conflict. Hence, as he explains, we impose joint and several liability in wholly domestic cases even if some tortfeasors are not available to contribute. But where the right to recover is based on New York law and New York's reason for affording recovery is limited to deterrence, I see no difficulty in restricting the plaintiff's damages along the lines suggested by Judge WEINTRAUB.[5] On the contrary, giving Cooney full damages in these circumstances gives what is, in effect, a windfall benefit. It may be a benefit we are willing to extend when contribution is available to redistribute loss properly and thereby prevent overdeterrence. But there is no reason to provide this benefit when contribution is not available and joint and several liability would undermine New York's policy respect-

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4. The argument probably overstates the extent to which this choice among rules was deliberate and self-conscious. The configuration of our tort scheme is at least as much a product of historical accident and fortuity: New York's traditional common law rules provided for neither contribution nor comparative negligence, and the issue was first presented in *Dole* on facts that led the defendant for tactical reasons to ask for contribution rather than comparative negligence. That scheme apparently worked well enough that the contribution rule was endorsed by the legislature in N.Y. Civ. Prac. L. & R. 1401 (McKinney 1995, Supp.) [hereinafter CPLR], and there has been no reason to revisit the issue and ask whether comparative negligence might work better.

5. Judge SILBERMAN protests that this is "an act of sheer judicial legislation . . . ." SILBERMAN, *infra*, at 691. But tort and conflicts are matters of common law in New York, and it is our responsibility to shape the law in these areas.

ing the proper allocation of losses. We should interpret our laws in light of the purposes they are designed to achieve. Given the nature and sources of the conflicting rights asserted by the parties in this case, it is Cooney whose claim to full compensation is weakest and whose right should therefore yield.[6]

Several implications of this argument need to be spelled out to make it clear. First, I would only limit recovery under our tort law if contribution were not available. I would not limit Cooney's damages, for example, if New York law could be applied to Mueller and Missouri did not provide immunity. Second, I would make this adjustment whenever contribution is not available and the plaintiff's right to recover is conferred solely for deterrence purposes. Hence, I would reach the same result if Mueller could not contribute because, as suggested in Judge SINGER's opinion, it was insolvent or judgment proof. In that case as much as this one, limiting the plaintiff's recovery provides the best accommodation of the relevant policies underlying these interlocking laws. It is true, of course, that this means distinguishing on the basis of state citizenship: the precondition for limiting plaintiff's recovery is that its right is based solely on deterrence, and because New York's compensatory interest is defined in terms of residency, this will be true only when the plaintiffs are nonresidents. Judge COX worries that this might constitute invidious discrimination. As noted above, however, such "discrimination" is adequately justified and hence permissible and, in my view, sensible. *Piper*, 470 U.S. at 284; *supra* note 2.

Third, the truly difficult case—not presented here—arises if the plaintiff's right to recover is based on the law of another state and that state confers a right to further an interest in the plaintiff's compensation. That would have been the case here, for example, if Cooney had a claim under Missouri law and that law could constitutionally be applied to Osgood. Here, at last, is the "classic true conflict" case discussed by Judge SINGER. SINGER, *infra*, at 692. It would, in my view, be inappropriate in such cases automatically to modify New York law along the lines suggested above. First, it really does begin to look discriminatory if the plaintiff has a right to full compensation, and we ignore that right solely because it is based on the law of another state. Second, even if New York can constitutionally put its interests first in every

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6. It follows from this analysis that I would reach the same result even were it constitutional for New York to hold Mueller liable for contribution under CPLR section 1401. As between Cooney's claim for damages under New York law, Mueller's claim for immunity under Missouri law, and Osgood's claim for limited liability under New York law, it is Cooney whose entitlement is weakest.

case, it would be foolishly short-sighted to do so. We must respect and pay attention to the laws and policies of other states if we want them to respect and pay attention to ours.

I need not say precisely how I would resolve such cases, other than to make clear that I would reject a solution based on a preference for forum law, because that problem is not before us. Though I find much of Judge SINGER's analysis persuasive, there will be time enough to consider the issue when it is actually before the Court. For the reasons explained above, there is no real conflict in this case.

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MAIER, J.*: (affirming and remanding)

The motion to *dismiss* should be *granted.*

The law and policies of workers' compensation form a discrete system designed to protect the interests of the employer, of the employee, and of the state in which the employment relationship is centered. The elements of that system are interdependent and include components of both tort and contract law. The policies of both the Full Faith and Credit Clause and Due Process Clause of the United States Constitution forbid infringement on the elements essential to the operation of such a system by states having no significant interest in the employer-employee relationship.

First, a workers' compensation regime is designed to benefit the injured employee by providing a sum certain recovery for work-related injury without the risk and expense of regular courtroom litigation. The employee need not prove the employer's negligence, only that the employee's injury was related to the employee's job.

Second, the employer is relieved of the distractions and expense of courtroom litigation. Because compensation is normally set by a state agency, the employer is spared the need to self-insure or to pay large insurance premiums to protect against the possibility of an unpredictably large jury award. Rather, the employer pays regularly into the state workers' compensation fund. The premiums are calculated based on the experience of the employer's firm with respect to work related injuries. The amount of those premiums can be treated as a predictable cost to facilitate business planning.

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Third, the state in which the employer operates, benefits from the consistent application of the workers' compensation laws. Reduced costs to the employer are likely to be reflected in lower costs of the product or service to customers or in increased sales. Increased profits from those sales, in turn, enlarge the state's tax base. Also, the safety net that a workers' compensation regime provides for employees is designed to prevent persons injured in the work place who might otherwise lose contested law suits from becoming wards of the state and appearing on local welfare roles.

Each of these considerations reflects policies and interests of the state in which the employment relationship is centered and of the employer and employee in having that state's law govern their relationship. In order for these benefits to occur, the employer and the employee must be able to count on the effective and predictable functioning of the workers' compensation system. With respect to this case, to achieve these objectives, the state of Missouri necessarily makes payment of workers' compensation awards under its regime an absolute bar to any additional claims arising out of the same incident by the employee or any other person. Otherwise, the necessary predictability that is vital to the system is lost.

Cooney should not be able to recover additional tribute from Mueller by applying the law of New York. The record demonstrates contacts related to this cause of action between Mueller or its employees and the state of New York. Thus, to nullify Mueller's contract-related right to rely on the exclusivity of the state compensation system in planning and conducting its business would violate the Due Process Clause of the United States Constitution. *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930).

Furthermore, the Full Faith and Credit Clause requires New York to recognize the exclusive nature of Missouri's interest in governing the employer-employee relationship and any injuries resulting from it. This is not a case in which New York seeks to apply its own workers' compensation statute to an employment contract related to its body politic. *Cf. Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939). Nor is it a case in which the forum is also the state of either the employer's or employee's domicile. *Cf. Carroll v. Lanza*, 349 U.S. 408 (1955). Lastly, New York is not the state in which Mueller committed whatever tortious act allegedly created its liability to Osgood. If Mueller was guilty of negligence in restructuring the machine, that negligence occurred in Missouri, not in New York. *Id.* at 412.

Therefore, the Full Faith and Credit Clause requires recognition of the exclusivity provision in the Missouri compensation statute because

Missouri is the only state with a legitimate interest in the employer-employee relationship. Nothing in the record demonstrates any relationship between the state of New York and the injury to Cooney that generated any liability that Osgood may have suffered.

New York has already accomplished the policy goal of its strict liability statute with respect to Osgood by permitting Cooney to recover against Osgood in New York courts. To apply New York law in this case is a "forbidden infringement" on the interests of the state of Missouri. *Yarborough v. Yarborough*, 290 U.S. 202, 215 (1933) (Stone, J., dissenting).

Plaintiff's claim for contribution here simply cannot be governed by a New York law that would seriously injure the interests of the employer, the employee, and the state of Missouri in maintaining the important elements of their system of workers' compensation. Here New York does not have even the largely fictitious and analytically unsound interests claimed for the forum state in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

If New York wishes to subject Osgood to suit in its courts for a cause of action having no relationship to that state except the long ago manufacture of a piece of machinery, it may do so. That desire does not, however, provide a rationale for requiring contribution from Mueller who has already paid all that the only law relevant to its activities as employer requires. Not only do the New York courts lack jurisdiction to prescribe the law determining Mueller's liability to Osgood in this case, they should lack judicial jurisdiction to hear the case at all. This case illustrates the strange and illogical effect of retaining the principle of general jurisdiction—jurisdiction unrelated to the defendant's contacts with the forum state[1]—in a society in which neither personal nor business activity remains localized to the extent that it was in Nineteenth Century America. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222 (1957). The record does not show that Mueller's business contacts with New York were related in any way to the cause of action in the case at bar. A more rational approach to the judicial jurisdiction question would eliminate the opportunity for a forum having little or no interest in the cause of action on which the case before it is based to determine the result under the influence of a social, political, and legal milieu having no relevant relationship to either the parties or the cause of action before the court.[2]

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1. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984); *see* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 80-81.

2. *See generally* Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for*

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WEINTRAUB, J.*: (affirming and remanding)

Affirmed. The claim against Mueller is dismissed, but the other defendants are jointly and severally liable only for the percent of damages attributable to their conduct. For that liability they may have contribution between themselves.

Our law provides for contribution between tortfeasors in proportion to their fault in producing the injuries. Apparently, the major share of the fault here is that of Mueller, who modified the machine and made it far more dangerous to operate. Mueller claims, however, that it is not fair, perhaps unconstitutional, for us to apply our law to it, for Mueller has justifiably relied on the Missouri workers' compensation scheme. Moreover, New York's rule, permitting contribution claims against employers who have paid workers' compensation, is aberrational.

The fact that the New York rule is not followed anywhere else does not mean that it is an unreasonable response to a social problem. The no-contribution rule permits the employer to escape tort liability even though, as in this case, the employer bears the major responsibility for the injury to the worker. The manufacturer and others in the stream of distribution of the machine understandably view it as unjust that the full burden of liability is shifted to them. *See* Aaron D. Twerski, *A Sheep in Wolf's Clothing: Territorialism in the Guise of Interest Analysis in Cooney v. Osgood Machinery, Inc.*, 59 Brook. L. Rev. 1351, 1353-54 (1994). Good rule or bad rule, however, the fact that a state's law is unique has a bearing on whether a nonresident could reasonably have foreseen that it would be applicable to the nonresident's activities.

What of fairness to the New York defendants? Is it fair to apply Missouri law to them? Perhaps, it would be fair to apply Missouri law to a New York company that sold the machine to Mueller, but no such company is a party. Moreover, the argument that it is fair to apply Missouri law to a New York party that sold the machine to a Missouri user could be turned around. By the same reasoning, it is fair to apply New York law to a Missouri employer who buys the machine from a New York seller.

A possible response to this "fairness" standoff is that Mueller asks

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Judicial Jurisdiction and Choice of Law, 39 Am. J. Comp. L. 249 (1991).

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only to be left alone. The other defendants are liable under their own law. On the other hand, Mueller is subject to personal jurisdiction in New York because of its systematic and continuous contacts with New York. Osgood could not be sued in Missouri. Does a nexus with a state sufficient for personal jurisdiction affect the fairness of applying the law of that state? The answer would be "yes" if jurisdiction were specific, based upon or related to the very conduct giving rise to the cause of action. General jurisdiction may be the sword in the bed separating jurisdiction from choice of law. Although a tempting route out of our dilemma, we do not hold that the availability of general jurisdiction over Mueller makes it fairer to apply New York law to it than to apply Missouri law to the New York defendants.

We prefer a different path. Our laws on liability and contribution are designed to operate together. When, as here, they cannot, unless compelled to do so by statutory mandate, we will not distort their application to produce an unintended and draconian effect on our businesses. We discern no such mandate here. When our neighbor Ontario still shielded host automobile drivers from the effects of their ordinary negligence on guest passengers, others sued by the passenger could not obtain contribution from the host. Solomon-like, Ontario decreed that operators of other vehicles would not suffer because of the protection afforded hosts. The other drivers were liable only for that percentage of the damage caused by their negligence. R.S.O. c. 296, § 2(2) (1970).

Judge SINGER objects to mirroring the Ontario solution when one party is immune from contribution. He points out that we would not relieve a joint tortfeasor from full several liability when the other tortfeasor was insolvent and the theoretical right to contribution was in fact worthless. Yes, but many legal rules have tactical consequences unrelated to the rules' purposes. For example, in *Neumeir v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972), the Ontario National Railroad urged application of the Ontario guest statute. *Id.* at 455. This was probably because the railroad believed that a right to contribution against the host's estate would not insulate the railroad from more than its share of the liability.

There is nothing to prevent us from shaping our laws of liability and contribution to produce a result as sensible as that reached under the Ontario guest statute. *So ordered.*

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COX, J.*: (vacating and remanding or, alternatively, reversing)

Vacated and remanded. Because I do not believe, despite indications in the record to the contrary, that Mueller has waived jurisdictional appeals or otherwise consented to jurisdiction, I vacate the opinion below and instruct the lower court to entertain Mueller's explicitly reformulated motion to dismiss for lack of jurisdiction. In the event, however, this Court finds that Mueller has waived or abandoned *all* jurisdictional objections, I would *reverse* the decision below and *reinstate* the trial court ruling that Osgood may seek contribution or indemnity from Mueller.

I. JURISDICTIONAL PROBLEMS

This suit arises partly because of Cooney's alleged inability to bring suit in one forum against all defendants who arguably contributed to the injury. Personal jurisdiction could not, we are told, have been obtained over Osgood in Missouri. As a constitutional matter, this may be incorrect. Osgood, when it sold this bending roll to Assembler, could have reasonably foreseen that the roll might leave the state. If Cooney had sued Osgood in Missouri, the relevant question would be whether Osgood should expect Missouri style liability for dangers created by the machine in the condition it last left Osgood's hands. We are not, however, a Missouri court and we are told that Missouri could not obtain personal jurisdiction over Osgood as a matter of Missouri law.

Why Cooney chose to sue Osgood in New York, however, should not affect our analysis. The fact that Cooney might have been able to sue Osgood in Missouri should not defeat New York jurisdiction to hear this case;[1] nor should inability to sue Osgood in Missouri create

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1. Whether such factual reality might enhance a motion for *forum non conveniens* dismissal, and what should be the situations, if any, under which we should grant *forum non conveniens* dismissal constitute a very interesting jurisdictional inquiry, but one beyond the scope of this opinion. I generally am skeptical about *forum non conveniens*, viewing it as a band-aid often offered to cover what should be viewed as fatal jurisdictional wounds. *See* Stanley E. Cox, *Would that Burnham Had Not Come to Be Done Insane! A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, an Explanation of Why Transient Presence Jurisdiction Is Unconstitutional, and Some Thoughts about Divorce Jurisdiction in a Minimum Contacts World*, 58 Tenn. L. Rev. 497, 553-54 (1991) (citing Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 13 U. Pa. L. Rev. 781

an enhanced case for jurisdiction over all parties in New York.[2] The real question is whether courts in this state, regardless of plaintiffs' motives to initiate suit in New York, have jurisdiction over Cooney's employer, Mueller, whom Osgood attempts to implead for the purpose of applying New York contribution law.

Whether Mueller should be subject to our courts' jurisdiction for purposes of contribution or indemnity to Osgood is, I submit, very much before us. Despite the indication in the record that Mueller either did not raise or did not appeal any issues of lack of personal jurisdiction, I would find that Mueller may still explicitly argue that New York lacks any jurisdictional authority to bind it under New York law. Indeed, that is what it is doing by insisting that New York law cannot be applied against it.

We, unfortunately, have dichotomized the personal jurisdiction inquiry from the choice of law question in previous case law. Even worse, we have insisted that a defendant can be subject to our jurisdiction on a rather puny amount of "doing business." Despite the United States Supreme Court's explicit reminder that regular visits and purchases cannot alone support assertions of jurisdiction to adjudicate, *see Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 417-18 (1984), we blithely have assumed that if a defendant conducts what we term substantial business within our borders (and we are willing to construe a fairly small percentage of a business's total activities as substantial),[3] it becomes subject to our courts' all-purpose adjudicatory powers.

I believe our "doing business" statute, as applied to many assertions of personal jurisdiction, is unconstitutional. *Cf.* COX, *supra*, at 642. I would interpret Mueller's repeated insistence that it cannot constitutionally be made subject to New York products liability law as an attack on the power of New York courts to adjudicate against it. I therefore *va-*

(1985) (critiquing use of the doctrine); Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 Cal. L. Rev. 1259 (1986)).

2. I accordingly reject any doctrines of so called "jurisdiction by necessity" which would encourage this Court to take into account the fact that other forums will not assert jurisdiction as justification for *increasing* our own jurisdictional reach.

3. *See, e.g., Frummer v. Hilton Hotels Int'l, Inc.*, 227 N.E.2d 851 (N.Y. 1967) ("doing business" jurisdiction established on basis of publicity and sales through New York office of foreign corporation; underlying litigation involved slip and fall in London hotel; *Bryant v. Finnish Nat'l Airline*, 208 N.E.2d 439 (N.Y. 1965) ("doing business" jurisdiction established on basis of Finnish airlines public relations and publicity work out of New York office; plaintiff was employee of another airline allegedly injured by defendant's negligence in Paris, France).

cate and *remand* so that Mueller explicitly may argue and brief the issue of whether our courts have jurisdiction over it. My suspicion, on the facts at hand, is that we do not, and that a motion to dismiss should be granted.

II. APPLYING SUBSTANTIVE LAW, ASSUMING MUELLER HAS WAIVED OR CONSENTED TO NEW YORK JURISDICTION

Assuming that my colleagues do not share my views about Mueller having preserved jurisdictional objections and that they find that Mueller has waived or abandoned all jurisdictional objections, we would be presented with a very different sort of case. If Mueller had submitted itself to New York courts for purposes of determining what law should be applied to Osgood's contribution/indemnity claim against it, I do not think Mueller successfully could insist that Missouri law should govern Mueller's rights vis-a-vis other alleged tortfeasors. Accordingly, under this scenario, I would reverse the judgment of the lower appellate court and reinstate the trial court's ruling that New York law should govern Mueller's liability to Osgood.

I believe that our courts may apply only our own substantive law to cases brought before them, and that any cases to which our courts cannot apply our substantive law should be dismissed. Rather than short-sighted parochialism, I believe this theory that New York courts may apply only New York law promotes increased justice, and believe this case well illustrates the point.

First, consider the position of New York defendants Osgood, Successor, and Assembler. In the instant suit I assume that they are being sued under New York products liability law (either directly or indirectly) for injuries allegedly caused to Cooney in Missouri. Cooney will recover against any of these defendants in the court below only if New York law applies. On the instant facts, it appears that the primary "fault" for Cooney's injuries lies with Cooney (for wedging the machine "on") and/or with Mueller, Cooney's employer (for modifying the machine and/or encouraging Cooney to wedge it "on"). As Judge BORCHERS points out, these facts may mean that Osgood's liability is already limited under New York law. Nevertheless, to the extent New York law allows for *any* recovery against manufacturers, distributors or successor corporations under these facts, it may be more generous than would be possible in the state in which injury occurred.

Even if New York law does not provide for greater recovery as compared to other jurisdictions where Cooney may have brought suit, it is still the only law that should be available to plaintiff in New York to create defendant obligations. Thus, defendants subjected to personal

jurisdiction by our law should also have the right to use our law to defend themselves. As Judge WEINTRAUB correctly notes, "[o]ur laws on liability and contribution are designed to operate together." WEINTRAUB, *supra*, at 683; *see also* Linda J. Silberman, *Cooney v. Osgood Machinery, Inc.: A Less Than Complete "Contribution,"* 59 Brook. L. Rev. 1367, 1377-78 (1994). I would find it fundamentally unjust to expose defendant Osgood to liability under our law and then claim that our law does not determine how much liability he ultimately must bear.

Recognition of the fact that New York law applies to Osgood's contribution/indemnity claim does not, however, end our inquiry. The particular facts of this litigation invite us to remake our substantive law to ensure that it operates fairly on all parties involved. Thus, Mueller has the right to argue, not that Missouri law should protect it from additional liability, but that *New York* law should be clarified or modified to protect it. Judge WEINTRAUB apparently accepts this invitation to remake New York law and formulates a cap on New York defendants' liability, protecting them from situations where co-defendants are unavailable for full contribution or indemnity.[4] While I do not agree with this resolution, I do endorse the approach of using interstate facts to compel us to consider the possibility of remaking our law so that it will achieve the best substantive result possible.

In the instant case, I am comfortable with the current shape of New York law. If our defendants are occasionally deprived of full contribution or indemnity when our courts cannot obtain jurisdiction over employer tortfeasors (the possible result if Mueller is allowed to argue lack of jurisdiction), I believe the policy of permitting plaintiffs a chance at full recovery is the more important part of our substantive law. *See*, SINGER, *infra*, at 692. On the other hand, if Mueller is subject to our laws because of waiver or consent, I see no injustice in having it pay its full share of liability rather than the more meager portion which Missouri would impose.

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4. Whether the cap proposed by Judge WEINTRAUB applies only to situations involving foreign defendants is unclear to me. I argue against a cap that would apply even to "absent" New York defendants and thus read Judge WEINTRAUB's proposal even-handedly and broadly. If, however, Judge WEINTRAUB's proposal is meant to apply only to interstate situations, it may have additional problems of fairness to similarly situated parties which argue against its adoption. *See generally* Mark P. Gergen, *Equality and the Conflict of Laws*, 73 Iowa L. Rev. 893 (1988) (analyzing debate among conflicts commentators as to whether choice of law systems which favor forum residents violate the Constitution).

I am convinced, however, that the real issue in this case is lack of jurisdiction over Mueller, rather than what law should be applied against it. If Mueller were a Connecticut employer that recruited from the metropolitan New York area, who directly purchased the machinery involved in this injury from Osgood, and who then modified the bending roll in Connecticut with the same tragic consequences, I doubt that my colleagues would continue in their staunch support of an employer's near absolute right to rely on the workers' compensation protections of the state where an employee works and is injured. If a suit were brought in New York on such changed facts (either by Cooney against Mueller or by Osgood by way of impleader against Mueller), I believe more of my fellow New York judges would find a significant New York interest in having New York law applied to that case.

While traditional conflicts analysis easily could explain such a changed result based on a weighing of the comparative interests of the two potentially interested jurisdictions, I think the same result is more properly achieved by viewing the case unilaterally. In my changed hypothetical, New York would have some legitimate reason for holding the employer responsible in New York courts under New York law for the aftermath of injuries received by employees in Connecticut. In the actual case before us, I find that New York does *not* have any constitutionally cognizable interest in adjudicating the liability of an employer who had no litigation-related connections with this state.

If we persist in pretending that we can adjudicate against Mueller and then find that we do not have enough interest in the litigation to apply our law against it, we risk two forms of injustice. First, as noted above and elaborated upon by several of my fellow judges, we deprive New York defendants of the law to which they are presumptively entitled in New York courts. If we recognize, on the other hand, that Mueller is not subject to our personal jurisdiction, defendants such as Osgood will at least be free to attempt to seek contribution against Mueller elsewhere. Once we have ruled, however, that another state's law cuts off Osgood's ability to seek contribution, that contribution claim is barred forever. I do not see why we should thus go out of our way to "stick it to" our own, when our real reason for doing so is our discomfort with applying our own law against some *other* party in the case. If we instead recognized that this discomfort in applying our law is in reality the reason we have no jurisdiction over Mueller in the first place, we would more properly leave the parties where we found them.

The second form of injustice, while apparently not promoted, on these facts by this Court, is nevertheless a real possibility every time we allow our courts to take jurisdiction over parties and controversies

to which we cannot comfortably apply our law. Had we, on these facts, concluded that Missouri law governed Osgood's contribution claim against Mueller, but then interpreted Missouri law to permit the contribution claim, despite its apparently explicit protection for employers,[5] Mueller would then be unfairly deprived of opportunity *truly* to have Missouri law applied on its behalf. If we instead recognize that we are in reality always applying our New York version of law (regardless of what we say we are doing), we concomitantly allow our courts to exercise jurisdiction only when we unashamedly can apply our substantive law against or for the benefit of the affected parties. *See generally* Stanley E. Cox, *Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation - There Is No Law But Forum Law*, 28 Val. U. L. Rev. 1 (1993).

It seems clear to me that Mueller's objections are to our courts' jurisdiction over it. I vacate and remand so that Mueller explicitly may argue that its lack of litigation-related contacts deprive New York courts of legitimacy to bind it by our law. Only if this Court is willing to rule that Mueller's failure to object in this way to the issue of jurisdiction early in the proceedings constitutes a waiver of all later objections, would I permit Osgood's claim for contribution against this employer under New York law.

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SILBERMAN, J.*: (dissenting)

I would *reverse* the judgment of the appeals court and *affirm* the trial court's decision permitting Osgood's third-party claim against Mueller.

This conflict of laws problem involving Missouri's no-contribution and New York's contribution rule is particularly difficult because each party claims the benefit of its own rule based largely on its own domiciliary status and not on interstate relationships by the respective parties. *See* Aaron D. Twerski, *A Sheep in Wolf's Clothing: Territorialism in*

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5. Given the apparent lack of ambiguity in the Missouri statute, it may be difficult for even a creative judge to find ambiguity on these facts. *But cf. Sun Oil Co. v. Wortman*, 486 U.S. 717, 749 (1988) (O'Connor, J., dissenting) (emphasizing how Kansas court creatively found ambiguity in statutes and case law from other states where none probably existed); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984) (inventing national consensus law and asserting that each state from which actions were transferred would have applied such law to the facts at hand were the litigation still pending in those states).

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the Guise of Interest Analysis in Cooney v. Osgood Machinery, Inc., 59 Brook. L. Rev. 1351, 1355 (1994). Moreover, the question of the applicable law on the issue of contribution is inextricably tied to the question of what law controlled Cooney's original product liability claim against Osgood (*see* Linda J. Silberman, *Cooney v. Osgood Machinery, Inc.: A Less Than Complete "Contribution,"* 59 Brook. L. Rev. 1367 (1994) (*Less Than Complete*), an issue not addressed by the trial and appellate courts below. As the lower courts made clear, the intermediary seller Osgood had no connection with Missouri, and under existing constitutional standards, Osgood was not amenable to jurisdiction in Missouri.[1] Accordingly, Cooney—the Missouri employee—was forced to bring this product liability suit against Osgood in New York.

Missouri's inability to assert jurisdiction over Osgood informs the issue of the law applicable to the initial product liability claim by Cooney against Osgood. Although Missouri may have a regulatory interest in the application of its law as the state of the plaintiff's domicile and the place where the injury occurred, it has a more difficult task in justifying application of its rule to Osgood *in particular*. If Missouri lacks sufficient connections to assert adjudicatory jurisdiction over Osgood, it should a fortiori lack the power to have its own law applied with respect to Osgood.[2] Thus, New York law applies to the issue of Osgood's liability to Cooney as an initial matter.

New York's decision to impose joint and several tort liability upon Osgood must be seen as part of its overall tort package, including its particular scheme of contribution. New York apportions liability among

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1. I say "existing standards" because the better view might be to hold any participant in a chain of distribution subject to jurisdiction in the place where the injury occurred. *Compare, e.g.*, Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, EC O.J. c.189, Art. 5(3) (28 July 1990) (Brussels Convention); *and* Rules of the Supreme Court (England), Order 11, Rule 1(f) (1995). In addition, both the provisions of the Brussels Convention and of England's Order 11 provide for jurisdiction over other additional parties when jurisdiction is properly asserted over some defendants. *See, e.g.*, Brussels Convention, Arts. 6(1), 6(2); England's Order 11, Rule 1(c).

In the United States, however, constitutional limitations on jurisdiction established by the Supreme Court require purposeful activity with the forum state by the defendant. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

2. Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. Rev. 33, 88 (1978) ("[t]o believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether.").

all tortfeasors who are responsible for the injury, including an employer. My colleagues on the Court, specifically Judge BORCHERS and Judge WEINTRAUB, recognize the interrelationship between the general liability and contribution rules. But each avoids the inescapable conclusion that New York law must also govern the issue of contribution to hold Mueller responsible for a proportionate share of Osgood's liability. Judge WEINTRAUB would protect the Missouri employer by applying Missouri's immunity rule; then, in an act of sheer judicial legislation, he proceeds to rewrite New York's joint and several liability rule to hold Osgood responsible only for its proportional share of liability—a solution incidentally that does not comport with the law of any relevant state. Judge BORCHERS simply applies Missouri law to the contribution issue and takes some comfort that in this case (because it is "unlikely" that Osgood's fault is more than 50%) that Osgood's exposure would be limited to plaintiff's economic damage.

Both of these solutions fudge the difficult choice of law and constitutional dilemma that this case presents. If the New York defendant, Osgood, had no contact of any kind with Missouri, and the Missouri employer Mueller had no connection with New York with regard to the purchase of the machine, *see* Twerski, *supra*, at 1362-65, it is possible that we have a "constitutionally unprovided-for case."[3] *See* Silberman, *supra*, at 1377.

It is true, of course, that Mueller is subject to jurisdiction in New York. Judge WEINTRAUB argues—and I agree—that the existence of general jurisdiction by New York over Mueller does not itself provide a basis for the application of New York law to Mueller. But it is unclear just what Mueller's New York connections are, and under some circumstances, its activities may well bring it within the ambit of New York's regulatory authority.[4] As Judge SINGER notes, the case is easier if Mueller bought the machine from a New York seller; at that point the employer could foresee, even if the act of negligence occurred in Missouri, the liability of a New York defendant under New York law for which it might bear an obligation of contribution.

The facts here are somewhat more ambiguous. Nonetheless, the machine causing the injury was produced in New York and seems to have come from the Bidder in New York. New York law is the only

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3. The argument is that Missouri law cannot constitutionally reach Osgood and that New York law is unconstitutional as applied to Mueller.

4. *See, e.g.*, Linda J. Silberman, *Can the State of Minnesota Bind the Nation: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 Hofstra L. Rev. 103, 131 (1981).

basis on which liability could have been imposed on Osgood in the first instance. Mueller has made no showing that the ameliorating impact of New York's contribution rules are unconstitutional as applied to it. Under these circumstances, New York law applies and permits Osgood's claim for contribution against Mueller.

Reversed.

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SINGER, J.*: (dissenting)

This case presents a classic true conflict. Missouri's policy of protecting Missouri employers from direct tort liability to their employees and indirect liability through contribution to third-party tortfeasors in exchange for providing Missouri employees a sure workers' compensation remedy for on-the-job injuries would clearly be furthered by application of Missouri law in this case. New York's policy of allowing plaintiffs to obtain full compensation from any culpable defendant (joint and several liability) and then allowing such defendants to obtain contribution from other responsible tortfeasors who contributed to the harm–including plaintiffs' employer–would also be furthered in this case. Because defendant Osgood sold the machine in New York, New York has a strong interest in imposing strict liability to deter production and sale of dangerously defective machines in New York; that policy is implemented through allowing an injured victim to sue any responsible defendant for the full measure of damages. At the same time, New York legitimately seeks to ensure that such liability does not exceed the amount attributable to that defendant's wrongful conduct by granting that New York seller a right to contribution from other culpable defendants under our law.

Initially, I am attracted to Judge WEINTRAUB's solution to the problem. He would allow the Missouri employer, Mueller, to retain its immunity from tort liability to its employee–directly or indirectly by contribution as a third-party defendant–under the law of the place where it does business, employs the injured employee, where the accident occurred, and where it took out workers' compensation insurance. At the same time, he would protect the New York seller of the defective machine, Osgood, from more than its fair share of liability–a result encouraged under New York law which tempers joint and several liability by the right to obtain contribution from other responsible tortfeasors,

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including employers.

This solution is an ingenious one because it respects the sovereignty of both states and the rights of each party to claim protection under the law of the state in which they acted locally. I am not bothered by the fact that it creates a solution that would not be possible under the law of either state in a completely domestic case, given the fact that cases with interstate contacts are distinguishable from domestic cases when the laws of the affected states differ; such conflicts of law legitimately affect the rights of the parties.

However, I find that I cannot join him in this solution. My first reason has to do with the wisdom of limiting a New York tortfeasor's liability to its proportional share of negligence in this kind of case. Judge WEINTRAUB's solution would limit the amount this plaintiff can obtain from the New York defendant Osgood to Osgood's proportional share of the negligence causing the harm. This solution would treat differently a New York defendant whose joint tortfeasor is immune from liability under the workers' compensation law of another state and a New York defendant whose joint tortfeasor is *effectively* immune from liability because it is insolvent or judgment proof. Although I am perfectly happy to create distinctions between domestic and interstate cases –in order to protect the rights of the nonresident party and to respect the sovereign regulatory interests of the other affected jurisdiction–I am not convinced that the distinction drawn by Judge WEINTRAUB is fair.

Joint and several liability allows a victimized plaintiff to recover full compensation from any defendant who caused–or helped to cause–the harm. Under the principle that the defendant takes the plaintiff as one finds the plaintiff, a negligent defendant cannot ordinarily complain that the harm to the plaintiff is greater than the defendant anticipated. Similarly, as long as the defendant was a significant contributing cause of the harm, it is not clear why, as between the innocent, victimized plaintiff and the negligent defendant, the plaintiff should bear the cost of not being able to go after a judgment proof joint tortfeasor. Rather, I believe it is fair for the defendant who acted wrongfully to bear that cost.

I am not yet prepared to get rid of joint and several liability entirely. Perhaps a fair solution would be to protect a defendant that is less than fifty percent responsible for the injury from having to pay the whole bill; alternatively some lesser percentage, such as twenty-five percent may be more appropriate. In recent years, a number of tort reform acts have limited or abolished joint and several liability. In the absence of legislation abolishing joint and several liability in this state, I am not prepared to do so as a matter of common law.

Given this conclusion, it is not clear to me why a New York defen-

dant should be protected from having to pay the whole bill when the joint tortfeasor is putatively immune under the law of its home state, but not when the joint tortfeasor is effectively immune because it lacks assets and is judgment proof. The answer might be that choice-of-law policy explains the difference. However, it seems to me that although choice-of-law policy *may* explain *why the Missouri employer is immune from liability*, it cannot explain why the New York defendant is immune from full (joint and several) liability. If such protection is appropriate, we should either change the law by getting rid of joint and several liability or suggest that the legislature do so. In the absence of such a change in the law, I am not persuaded that it is sensible to impose full liability on a partially responsible tortfeasor when the joint tortfeasor is judgment-proof but to impose only partial liability when the joint tortfeasor is an out-of-state employer claiming immunity under the law of its own state.

The question then remains whether the Missouri employer's right to immunity under the workers' compensation law of Missouri should prevail over the New York supplier's right to contribution under New York law. Judge WEINTRAUB notes that the New York rule allowing contribution from negligent employers despite the presence of a workers' compensation system is an unusual and aberrational one. This is true. The vast majority of states eschews such a solution. One might argue that aberrational laws should be confined to domestic cases because aberrational laws are likely to be bad laws–or at least not as fair or wise as the majority rule–given the fact that they are almost universally rejected. If this is the case, applying the majority rule will confine the bad law to fully domestic cases, thereby limiting the externalities created by imposing bad law on the nation–in other words, both preventing a race to the bottom and preventing a rogue state from undermining the sensible policies of the rest by providing a free haven for scoundrels. Alternatively, one might argue that aberrational laws are likely to surprise parties not aware of them, especially when those parties act in other jurisdictions. Applying Missouri law here might therefore prevent New York's odd policy judgment from disturbing the more sensible workers' compensation systems of other states and would further protect the defendant Missouri employer from unfair surprise.

I am not so ready to assume either that aberrational law is bad law or that it should be systematically disfavored in the choice-of-law process. Judge WEINTRAUB has argued that, at least in the choice-of-law context, the fact that a law is aberrational provides an objective measure of whether it is the better rule of law. Russell J. Weintraub, *An Approach to Choice of Law That Focuses on Consequences,* 56 Alb. L.

Rev. 701 (1993). There are strong, sensible reasons to adopt such an approach. However, the arguments against this approach seem stronger to me. I am not prepared to make the prevalence of a law the measure of its justice. In many areas of law, rules that I am convinced are clearly inferior from the standpoint of both justice and efficiency nonetheless are widely shared by the states. In some cases, one can expect the law to move in the direction of the aberrational rule; in others, forum-shopping by plaintiffs may have the effect of putting pressure on the majority of states to reconsider their approach. Such a process does not always suggest a race to the bottom.

The defendant's legitimate need to predict what law will apply to its conduct does not mean that defendants have a right to ensure that their liability will be limited if they confine their conduct to defendant-protecting states. If a defendant cannot confine the harmful consequences of its conduct to the state in which it acts, the state in which the injury is suffered has a right to impose its higher standards of conduct on that defendant in order to protect its citizens from injury while inside its borders.

New York has adhered to the policy of allowing contribution from employers who acted negligently in contributing to the dangerousness of a product which injures the worker at the workplace despite the fact that most states reject this principle. Although this result alters the workers' compensation scheme promulgated by the legislature, thereby subjecting the employer to negligence liability from which it was supposed to be immune, we have concluded that it is the fairest result and the one that the legislature would want us to apply under the circumstances. The usual workers' compensation scheme involves a trade-off *between employers and employees.* The employer obtains immunity while the employee obtains a fixed, certain compensation. However, when a third party is involved, the fairness of the trade-off is lost. The employer wants continued immunity, while the third-party product manufacturer is socked with the whole bill, even though its negligence may have contributed only 5 percent to causing the harm and the employer's conduct was 95 percent responsible.

It is true that product manufacturers have no absolute claim to contribution. Responsible joint tortfeasors may be judgment proof. But this argument proves too much. *Any* defendant can be judgment proof. This argument would suggest that the tort policy of providing full compensation to plaintiffs is always a weak one when a defendant claims immunity under the law of some other state because a plaintiff injured by a domestic defendant is never sure that the defendant will be able to pay the bill. We do not accept this argument in the ordinary run of conflicts

cases when the defendant has some significant connection with the forum or should have foreseen that its conduct could cause injury in the forum. Instead, we count the interest of the place of injury (and the plaintiff's domicile) in compensation and deterrence as a very strong one.

In addition, our law provides that if the joint tortfeasor is not judgment proof, a right of contribution *does* exist. Allowing the plaintiff to obtain full compensation from any culpable defendant privileges the interests in compensation against the interest in fairness between defendants. However, allowing contribution mitigates that unfairness by allowing the culpable defendant to decrease its exposure by the amount attributable to other culpable defendants. This is not a weak policy, as some of my colleagues have suggested. Just as the plaintiff has a right to obtain compensation from a non-judgment-proof defendant, so does a tortfeasor have a right to contribution from a non-judgment-proof joint tortfeasor. *See Dole v. Dow Chem. Co.*, 282 N.E.2d 288 (N.Y. 1972).

Perhaps the answer is that choice-of-law policy justifies deferring to Missouri law to regulate the liability of a Missouri employer (indirectly) to a Missouri employee. Thus, the interstate case is distinguishable from the domestic case in which a New York tortfeasor can obtain contribution from a joint tortfeasor because of the reliance of the Missouri employer on Missouri law and New York's interest in deferring to the nonresident employer's justified expectations and the ability of Missouri to regulate employment relationships centered there. Does choice-of-law policy counsel deference to Missouri law in this situation?

This is, for me, a close case. On one hand, it seems sensible to propose a new choice-of-law principle (rule?) that employer immunity from direct *or indirect* suits alleging negligence toward employees should be governed by the law of the place where the employment relationship is centered (where the employee was hired and worked and where the employer is doing business) at least where the injury was suffered there as well. It also is relevant that a negligent New York defendant has no secure expectations that it will be able to obtain contribution from a joint tortfeasor given the possibility that such a defendant may be judgment proof. Justice Kaye argued, in support of the idea of deferring to Missouri law, that the reasonable expectations of the parties pointed toward Missouri law for just these reasons. *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277 (N.Y. 1993).

On the other hand, in this case, the New York defendant had no contacts of any kind with Missouri. It does no business there and is not amenable to suit there. It appears from the facts of the case that the Missouri employer expressly entered the New York market *by buying*

the machine in question from a New York seller. If employer Mueller in fact bought the machine from a New York seller, it may be the case that the reasonable expectations of the parties are exactly the opposite of what Justice Kaye suggests. First, while a negligent New York manufacturer or distributor knows that it faces joint and several liability–and may have to foot the whole bill if a responsible joint tortfeasor is judgment proof–it also knows that if the joint tortfeasor is not judgment proof that its share of liability is limited to the amount attributable to its negligence or wrongful conduct. When it does no business outside of New York, it should expect that it will be able to obtain contribution from another defendant that acted negligently inside New York. *See* Linda J. Silberman, *Cooney v. Osgood Machinery, Inc.: A Less Than Complete "Contribution,"* 59 Brook. L. Rev. 1367 (1994). Similarly, such a defendant should expect contribution from a joint tortfeasor that *subjected itself to New York regulation by acting so as to enter the New York market by buying the product from a New York seller.* In this kind of case, the Missouri employer cannot claim the same level of reasonable reliance on the immunizing law of Missouri.

It is all well and good for Missouri to place full liability on a Missouri product seller despite the fact that the bulk of the negligence was committed by a Missouri employer. It is also all well and good for Missouri to be willing to live with a marginally compensated employee in order to avoid the costs of tort litigation and to generate guaranteed workers' compensation. This trade-off between employers and employees and between negligent employers and product manufacturers is within the power of the Missouri courts and legislature to make.

However, when a Missouri employer–and the state of Missouri itself –attempts to externalize the costs of this scheme onto an out-of-state product distributor, the Missouri employer has no such reasonable expectation of continued immunity. As between the negligent Missouri employer who bought the machine from a New York seller and the New York distributor that has no contacts whatsoever with Missouri, the risk of liability should be on the party that voluntarily made the interstate contact. The employer should not be able to export onto this New York defendant, who acted locally, the consequences of its negligence in Missouri.

Would this result still obtain if the Missouri employer had purchased the machine from a Missouri seller? In such a case, it could be argued that application of New York law might very well be completely unforeseeable to the Missouri employer and could not constitutionally be applied to impose contribution liability on it to a New York product manufacturer or prior seller under *Allstate Ins. Co. v. Hague,* 449 U.S.

302 (1981). However, even in such a case, I believe it might be appropriate–and constitutional–to apply New York law. Such a case is very much like an ordinary multistate tort case in which the defendant acts in one state causing injury in another state. Unless the harm is totally unforeseeable–or if it is unforeseeable that it will occur in the place of the injury–the traditional conflicts rule would apply the law of the place of the injury. This rule remains the default rule advocated by both the Second Restatement and by the New York choice-of-law rules adopted in *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972). Defendant/employer allegedly committed negligence in Missouri which inflicted two injuries–an injury on the employee and liability on the New York product distributor. To the extent that the employer's negligence had the foreseeable effect of imposing a liability judgment on a New York distributor, the harm to the New York distributor is an injury which arguably occurs in the state of New York.

Courts traditionally apply the place of the injury rule unless this is fundamentally unfair to defendant. As I have argued, defendants have the right to the protection of their home state's laws if they can confine their conduct–and the consequences of their conduct–to their home state. Once their conduct spills over state lines, the multistate system kicks in and the place of the injury has the power to apply its laws to protect the rights of its citizens to be free from harm in their home state. It is no more a violation of the sovereignty of Missouri to apply New York law to the employer's claim to be immune from a contribution claim than it would be to apply Missouri law to allow a Missouri employer to commit negligence in Missouri in a manner that proximately and foreseeably caused injury to a New Yorker at home–including injury caused by the proximate and foreseeable imposition of a liability judgment on a New York product distributor that has never done any business outside the State of New York.

In other words, while it is important to be fair to defendants–and defendant-protecting states–it is also important to be fair to plaintiffs and to the policies of plaintiff-protecting states. While it may very well be unfair to impose New York law on a Missouri employer who could not anticipate that it would be applied to it, it is also unfair to apply Missouri law to immunize that employer from contribution to a New York product seller which has no contacts of any kind with Missouri. This kind of case represents a kind of tragic conflict which is impossible to adjudicate without doing injustice to someone. *See* Martha C. Nussbaum, *The Fragility of Goodness* (1986).

The only question is whether the unfairness to the Missouri employer of applying New York law outweighs the unfairness to the New

York seller of applying Missouri law to deprive it of a remedy. As between the innocent Missouri employee and the negligent New York product seller, it is fair to impose New York law to give the plaintiff a remedy under New York law. Similarly, as between the partially responsible New York manufacturer and the partially responsible Missouri employer, it is fair to share the liability rather than allowing one party to hide behind its immunizing law, effectively externalizing the costs of that law onto a citizen of another state that has no contacts with defendant's state of any kind.

In short, a negligent Missouri defendant who cannot confine the consequences of its conduct to Missouri can legitimately be governed by the law of a state where the harm is inflicted. A defendant may try to confine its conduct to the defendant-protecting state, but when it fails to do so, its unilateral action of locating in an immunizing state cannot prevent other states from applying their laws to protect citizens within their own borders from harm. In a sense, this case is very much like the dram shop cases in which it is clear to me that a tavern in a state that immunizes it from liability for serving liquor to an intoxicated patron can be fairly made subject to the liability-imposing rules of a state in which its negligent conduct causes injury. The state in which someone is killed by the actions of a tavern across the border has a power to protect its citizens from harm and such a defendant has no strong claim to absolute immunity from the reach of that protective law.

I recognize that imposing liability on the defendant in such a situation creates an injustice to the defendant that acted locally. For this reason, the facts of the particular case need to be examined closely to determine in which direction the calculus of fairness lies. To that end, I would eschew promulgating a rigid rule to govern situations of this type. On the other hand, as noted earlier, if the Missouri employer bought the machine from a New York seller, I find the case much simpler. Such an employer cannot act negligently in Missouri, foreseeably causing both injury to its employee and imposing a liability judgment on the New York seller and its predecessors in interest and expect to retain the immunizing protection of Missouri law.

This result comports with my general approach to choice-of-law questions. I recommend applying forum law, if it is constitutional to do so, unless doing so is manifestly unfair to the defendant, substantially interferes with the regulatory system of another state and furthers no strong interests of the forum, promotes an archaic, aberrational, or unjust rule of law which legitimately should be confined to domestic cases. Joseph William Singer, *Real Conflicts,* 69 B.U. L. Rev. 1 (1989); Joseph William Singer, *A Pragmatic Guide to Conflicts,* 70 B.U. L.

Rev. 731 (1990); Joseph William Singer, *Facing Real Conflicts*, 24 Cornell Int'l L.J. 197 (1991). In this case, application of New York law would not be unfair to the defendant employer if it bought the machine directly from a New York seller because the employer could not reasonably rely on Missouri law to immunize it from tort liability and then commit conduct that had the foreseeable effect of causing injury to its employee and subjecting the New York seller to liability. While application of the aberrational New York contribution law interferes in Missouri's workers' compensation scheme, application of Missouri's immunity law allows Missouri to externalize the costs of its workers' compensation system onto a New York seller with no contacts with Missouri.

I am not therefore convinced that application of New York law is either unfair to the Missouri employer or interferes in internal affairs in Missouri when the employer has voluntarily acted so as to contribute to imposing liability on a New York distributor. In that situation, I would resolve the case by applying forum law, aberrational as it is, given that the Missouri defendant both bought the product here and acted in a way that foreseeably caused harm to its employee and by necessary implication, to impose liability on the New York seller. That seller has a right, under New York law, to contribution from the Missouri employer.

If, on the other hand, the Missouri employer purchased the machine in Missouri from a Missouri seller with no knowledge of its New York origins, I would require the trial court to determine, under the circumstances of the case, whether the unfairness of imposing liability for contribution on the Missouri employer outweighed the unfairness of leaving the New York seller without a remedy against the Missouri joint tortfeasor. The fact that employer Mueller does substantial business in New York may tilt the fairness calculus in favor of applying New York law. This is so not because Mueller's substantial business here means that New York can apply its law to Mueller's business operations world-wide, but because it may be more foreseeable to Mueller that it might be liable to a New York product manufacturer when it misuses the manufacturer's products in Missouri so as to impose a liability judgment on the New York manufacturer. In addition, if the injured employee could determine that the product was initially manufactured and sold in New York so as to bring this action here, this information would almost certainly be available to the employer. If this is the case, the plea of ignorance by the employer would be unavailing and its claim to protection under Missouri law would consequently be weaker since it would know that its negligent conduct in Missouri could impose a liability judgment on a New York manufacturer, *i.e.*, that its

Missouri conduct would cause harm in New York. In such a case, New York is perfectly free to apply its law to protect its resident from such other-regarding, negligent conduct.

I recognize that this analysis makes it more likely that a New York court would apply New York law while leaving the Missouri courts free to apply Missouri law. In cases based on general jurisdiction, this difference not only promotes forum shopping but may promote a preference for forum law that gives plaintiffs the power to take advantage of plaintiff-protecting laws while limiting the ability of defendants to ensure that they receive the benefits of defendant-protecting rules. I have argued in the past that uniformity of result regardless of forum is not the preeminent virtue of a choice-of-law system and that, in any event, it has never been achieved under any choice-of-law system, including the First Restatement. Singer, *Facing Real Conflicts, supra*, at 197. Moreover, when one state immunizes a defendant from liability and another provides the plaintiff with a remedy, we have a case which cannot be adjudicated without doing some wrong to one of the parties. In such cases, it is appropriate for the forum to do substantive justice as it sees it between the parties by applying forum law unless the circumstances are such that the unfairness of allowing the plaintiff a remedy outweighs the unfairness of imposing such a remedy on the defendant. Such an inquiry would require weighing the forum's substantive policies against its choice-of-law or multistate policies of protecting the justified expectations of non-residents and eschewing interference in another state's regulatory framework without a strong reason. It may be appropriate to eschew forum law if the plaintiff-protecting rule is sufficiently aberrational, unusual or unjust or if application of that rule would interfere substantially with the regulatory system of the defendant-protecting state without advancing substantial interests of the plaintiff-protecting state. If this case were being heard in a Missouri court, it would be entitled and, in my view, required, to weigh its substantive policies against its multistate policies. We are entitled to no less.

Reversed and remanded for trial consistent with this opinion.