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Conflict of Laws - A Federal Court, Sitting in Diversity, Held Not Bound by Conflict of Laws Rules of the Forum State When a False Conflict is Found to Exist

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CONFLICT OF LAWS—A Federal Court, Sitting in Diversity, Held Not Bound by Conflict of Laws Rules of the Forum State When a False Conflict is Found to Exist.

The plaintiff-appellee, Don E. Lester, Jr., sole beneficiary of a policy insuring the life of Don E. Lester, Sr. brought suit against Aetna Life Insurance Company (Aetna) to recover the proceeds of the policy. Aetna had denied the claim on the ground that the policy had lapsed due to non-payment of premium. The suit was originally filed in a Louisiana state court, but timely removal[1] was made by Aetna to the federal district court; federal jurisdiction was founded on diversity[2] of citizenship.[3]

The principal question which the trial court[4] had to decide was whether the requirement of notice before lapse for non-payment of premium was governed by the law of Wisconsin, the state where the policy was issued, or the law of Louisiana, the state of residence of the insured at the time of his death.[5] The trial court rejected the *lex loci contractus* theory of conflict of laws, the approach traditionally taken by Louisiana courts. By noting the trend in other jurisdictions,[6] and the Third Circuit of the Louisiana Court of Appeal,[7] towards a "significant contacts" approach of resolving conflicts, the court concluded that the Louisiana Supreme Court would in a similar situation follow this modern trend.[8] The district court found the "significant contacts" were in Louisiana and since the notice required by Louisiana law[9] be-

1. 28 U.S.C. § 1441 (1964).
2. 28 U.S.C. § 1332 (1964).
3. Aetna Life Insurance Company is domiciled in Connecticut and does business in both Louisiana and Wisconsin.
4. Lester v. Aetna Life Ins. Co., 295 F. Supp. 1208 (W.D. La. 1968).
5. Under the law of Wisconsin Aetna would have had no obligation to give notice of the lapse since Wisconsin law contains no premium notice statute. Louisiana, on the other hand, does have a notice statute which requires that written notice be given before a policy can be declared lapsed due to default in premium payment.
6. Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wash. 2d 893, 425 P. 2d 623 (1967); Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P. 2d 906, 12 Cal. Rptr. 266 (1961); Boston Law Book Co. v. Hathorn, 119 Vt. 416, 127 A.2d 120 (1956); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).
7. Doty v. Central Mut. Ins. Co., 186 So. 2d 328 (La. App. 3d Cir. 1966) (concurring opinion) *cert. denied* 249 La. 486, 187 So. 2d 451 (1966); Blanchard v. Blanchard, 180 So. 2d 564 (La. App. 3d Cir. 1965) (concurring opinion); Universal C.I.T. Credit Corp. v. Hulett, 151 So. 2d 705 (La. App. 3d Cir. 1963).
8. 295 F. Supp. at 1213.
9. LA. REV. STAT. 22:177 (1958).

fore lapse of a policy for non-payment of premiums had not been given, Lester Jr.'s claim was upheld.

On appeal,[10] the Fifth Circuit Court of Appeals took note of a decision rendered by the Louisiana Supreme Court after the district court had decided *Lester*. That case, *Johnson v. St. Paul Mercury Ins. Co.*,[11] involved a classic conflict of laws situation arising out of tortious conduct. In it, the Louisiana Supreme Court held that *lex loci delicti* was to apply.[12] The court also went on to reject modern conflict theories and reaffirmed its acceptance of *lex loci* as a general approach to conflict of laws. The court of appeals pointed out that in view of this decision by the Louisiana Supreme Court, the basis for the trial court's decision was no longer valid. However, the court did not reverse the decision, but affirmed it on different grounds. Finding no Wisconsin interest present the court concluded that a "false conflict" existed, and, holding that Louisiana law controlled the case, affirmed the judgment of the district court.[13]

Lester v. Aetna Life Insurance Co. is significant because it is the first case in which a federal court sitting in diversity avoided application of the forum's conflict of laws rules by finding the existence of a false conflict.

Since the trial court based its decision on "significant contacts" and the appellate court based its decision on a "false conflict," certain facts are essential to an understanding of the case. On May 1, 1952, Aetna issued a policy, having a face amount of $50,000 to Lester, Sr. He was at that time a resident of Milwaukee, Wisconsin and he continued to reside in Wisconsin until 1957. In 1957, with full knowledge of Aetna, he moved from Wisconsin to Louisiana where he lived until his death in February of 1963. While a resident of Louisiana, Lester, Sr. made significant modifications in the policy[14] and paid the premiums in Louisiana as they became due from 1957 through 1961. From 1952 through 1961 premium payments totaling $22,525 were paid. On August 2, 1961, Lester, Sr. obtained a policy loan of $12,398.84 from Aetna; the loan was secured by the cash surrender value of the policy.

Yearly premiums of $2,252.50 were due on May 1 subject to a

10. Lester v. Aetna Life Ins. Co., 433 F.2d 844 (5th Cir. 1970), *cert. denied* 402 U.S. 909 (1971).
11. 256 La. 289, 236 So. 2d 216 (1970).
12. *Id.* at 311, 236 So. 2d at 224.
13. 433 F.2d at 888-91.
14. Lester, Sr. changed the beneficiary twice and obtained a policy loan.

thirty-one day grace period; after the expiration of the grace period the policy was to lapse. However, Clause 8 of the policy made available an automatic loan provision, the inclusion of which Lester, Sr. requested when the policy was issued. Under Clause 8 the amount of any premium due and not paid before the end of the thirty-one day grace period would automatically be loaned by the company and charged as an indebtedness secured by the policy. If the loan value[15] was insufficient to cover the premium due then an automatic premium loan would not be made and the provisions of Clause 7 would apply.

Clause 7 set out three options in the event the automatic premium loan did not become effective. If none of the options were selected by the insured then Option C was to apply under which insurance would be automatically continued as extended term insurance. If there were any indebtedness against the policy, the extended term insurance would be for the sum insured less the indebtedness, and for such a period of time as the cash surrender value less the indebtedness would purchase.

A notice was sent to Lester, Sr. indicating the amount of the indebtedness which was due, but the notice did not indicate that the automatic policy loan provision was ineffective.[16] On July 2, 1962, an additional thirty-one days after the thirty-one day grace period, Aetna issued a notice stating that the automatic policy loan provision was inoperative,[17] and that the policy had lapsed without value other than the right to apply for reinstatement. The policy had not been reinstated at the time of the death of Lester, Sr.[18]

The Fifth Circuit Court of Appeals began its analysis in *Lester* by noting that a federal court in a diversity case is bound by *Erie R. R. v. Tompkins*[19] to follow the substantive law of the state in which it is sitting. Furthermore, by *Klaxon Co. v. Stentor Electric Mfg. Co.*,[20] an apparent conflict between relevant laws of two or more states must be resolved by the conflict of laws principles of the forum state, but the

15. Clause 6 defined "loan value" and "net loan value" as:
"The loan value of the policy at any time shall be that amount which, with interest to the end of the current policy year or to the end of the current premium period if earlier, shall equal the cash value [i.e., cash surrender value] for the end of such policy year or period. The net loan value of the policy shall be the loan of the policy less any unpaid premium for the current premium period."
16. The record does not show when that notice was issued or received.
17. It was inoperative because the policy did not have sufficient remaining value to pay the premium by loan.
18. Upon being notified of the lapse Lester, Sr. sent Aetna a check for $2,703.68 (the yearly premium plus loan interest) but he did not comply with Aetna's request for a physician's statement and so Aetna returned the check.
19. 304 U.S. 64 (1938).
20. 313 U.S. 487 (1941).

court recognized that it is not always clear what the principles are, or how they should be applied. In such instances, the court reasoned, it must determine how the Supreme Court of the forum state would resolve the case.[21] The court of appeals noted that the district court, in keeping with the *Klaxon* rule, set out the applicable conflicts of laws principles of Louisiana.

The district court cited the first sentence of Article 10 of the Louisiana Civil Code,[22] and recognized[23] that from it evolved the rule that the law of the place where an insurance policy is delivered will ordinarily control.[24] However, the district court refused to ignore "the erosions and inroads made into traditional conflicts rules"[25] by recent decisions of the Louisiana Third Circuit Court of Appeal. Judge Tate, writing for that court in one case[26] and concurring in two others,[27] suggested[28] a line of reasoning which the district court adopted and expanded in *Lester.* This reasoning directed the court to find support for the "significant contacts" approach in the second paragraph[29] of Article 10 of the Louisiana Civil Code. The district court determined that the contacts occurring in Louisiana were too significant to be overridden by the delivery of the policy in Wisconsin—"a single fortuitous event."[30] The court concluded that the Louisiana Supreme Court would follow the modern approach and apply Louisiana law.

The court of appeals stated that while the district court's reasoning may have been compelling when written, it felt the Louisiana Supreme Court in *Johnson v. St. Paul Mercury Ins. Co.*, had ended speculation as to what it would do if faced with this choice of law problem. In

21. 433 F.2d at 887.
22. Article 10 of the Louisiana Civil Code provides in part:
"The form and effect of public and private written instruments are governed by the laws and usuages of the places where they are passed or executed. But the effect of acts passed in one country to have effect in another country is regulated by the laws of the country where such acts are to have effect."
23. 295 F. Supp. at 1210.
24. Davis v. Ins. Co. of North America, 286 F. Supp. 496 (E.D. La. 1967); Employers Mut. Liab. Ins. Co. v. Houston Fire & Cas. Ins. Co., 194 F. Supp. 828 (W.D. La. 1961); Prudential Ins. Co. v. Williams, 139 F. Supp. 202 (E.D. La. 1956); Metropolitan Life Ins. Co. v. Anderson, 101 F. Supp. 808 (E.D. La. 1951); Harmon v. Lumbermens Mut. Ins. Co., 164 So. 2d 397 (La. App. 2d Cir. 1964). For authority supporting the rule, but not relying on the Louisiana Civil Code see: Theye Y Ajuria v. Pan American Life Ins. Co., 245 La. 755, 161 So. 2d 70 (1964). See also Comment, *Conflict of Laws in Louisiana: Contract,* 38 TUL. L. REV. 726 (1964).
25. 295 F. Supp. at 1210-11.
26. Universal C.I.T. Credit Corp. v. Hulett, 151 So. 2d 705 (La. App. 3d Cir. 1963).
27. Doty v. Central Mut. Ins. Co., 186 So. 2d 328 (La. App. 3d Cir. 1966); Blanchard v. Blanchard, 180 So. 2d 564 (La. App. 3d Cir. 1965).
28. 186 So. 2d at 332.
29. *Supra,* note 22.
30. 295 F. Supp. at 1213 n.2.

that case the Louisiana Supreme Court rejected an opportunity to adopt a modern approach to conflict of laws.

In *Johnson*, the Louisiana owner-driver of an auto garaged, licensed, and insured in Louisiana, and his Louisiana guest began a journey in Louisiana and intended to return there. While in Arkansas they collided with an auto owned by an Arkansas resident and being driven by his son. The guest brought suit in Louisiana to recover damages for injuries sustained in the accident. Arkansas' guest statute required a showing of willful negligence on the part of the host before a guest could recover;[31] Louisiana had no guest statute and allowed recovery upon a showing of ordinary negligence on the part of the host.[32] The trial court adhered to *lex loci delicti* and denied the guest recovery. The appellate court, following the modern concept of significant contacts, reversed.[33]

In reversing the appellate court and reinstating the judgment of the trial court, the Louisiana Supreme Court left no doubt that *lex loci delicti* was the rule to be followed by Louisiana courts. The court stressed that *lex loci delicti* had been firmly established by citing three of its own decisions,[34] ten intermediate court decisions,[35] and three reported federal decisions.[36] In contrast to *lex loci delicti*, the court found that the theories advocated by the plaintiff—the "grouping of contacts" theory announced in *Babcock v. Jackson*[37] and the "significant contacts" theory of the Second Restatement[38]—were lacking both in clarity and certainty.[39] The court also found the solutions to conflicts in tort law advanced by Morris, Currie and Ehrenzweig deficient in one aspect or another, preferring instead the views of Beale and

31. ARK. STAT. ANN. § 75-913 (1947).
32. LA. CIVIL CODE ART. 2315.
33. 218 So. 2d 375 (La. App. 2d Cir. 1969).
34. Williams v. Pope Mfg. Co., 52 La. Ann. 1417, 27 So. 851 (1900); Matney v. Blue Ribbon, 202 La. 505, 12 So. 2d 253 (1943); Burke v. Mass. Bonding & Ins. Co., 209 La. 495, 24 So. 2d 875 (1946). See also Comment, *Conflict of Laws in Louisiana: Tort*, 39 Tul. L. Rev. 96 (1964).
35. Sanders v. Atlas Assurance Corp., 156 So. 2d 245 (La. App. 4th Cir. 1963); Honeycutt v. Indiana Lumbermens Mut. Ins. Co., 130 So. 2d 770 (La. App. 3d Cir. 1961); Watkins v. Cupit, 130 So. 2d 720 (La. App. 1st Cir. 1961); Blount v. Blount, 125 So. 2d 66 (La. App. 1st Cir. 1961); Smith v. Northern Ins. Co. of N.Y., 120 So. 2d 309 (La. App. Orleans Cir. 1960); Mondello v. Pastrio, 78 So. 2d 64 (La. App. 2d Cir. 1955); Cone v. Smith, 76 So. 2d 46 (La. App. 2d Cir. 1955); Mock v. Maryland Cas. Co., 6 So. 2d 199 (La. App. Orleans Cir. 1942); Polmer v. Polmer, 181 So. 200 (La. App. Orleans Cir. 1938); Surgan v. Parker, 181 So. 86 (La. App. 2d Cir. 1938).
36. Fry v. Lamb Rental Tools, Inc., 275 F. Supp. 283 (W.D. La. 1967); Totty v. Travelers Ins. Co., and J.D. Snee, 200 F. Supp. 34 (E.D. La. 1961); Hale v. American Fire & Cas. Co., 81 F. Supp. 273 (W.D. La. 1948).
37. 12 N.Y. 2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).
38. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (Proposed Official Draft Part II, 1968).
39. 256 La. at 298-99, 236 So. 2d at 219.

Story. Attention was then focused on choice of law problems in general; the Louisiana Supreme Court found that in addition to certainty, a generic *lex loci* approach also had the virtues of simplicity and ease of application.

The circuit court indicated that in light of *Johnson* the district court's anticipation of a modification in Louisiana conflict of law principles was no longer valid. In its analysis of the *Johnson* case, the court found the message to be "loud and clear"[40]—the Louisiana Supreme Court reaffirmed the *lex loci* approach.

It is interesting to note that the court was well aware that the case would not have arisen but for a small deficiency.[41] It also termed the consequences to Lester Jr. as "harsh" should the decision be against him.[42] This harsh result could have been avoided by interpretation of Louisiana law. The circuit court could have read the decision in *Johnson* as applying only to tort cases, leaving contract cases subject to selective application of *lex fori.* A Louisiana court of appeal applied this doctrine in *Universal C.I.T. Credit Corp. v. Hulett*[43] finding that the relevant contacts were all in Louisiana, and that the policy of Louisiana was to protect its residents. The court held Louisiana law governed the rights of the parties in the sale in Indiana of a repossessed automobile.[44] Since the purpose of the notice statute is the protection of Louisiana residents,[45] the circuit court could have concluded that a Louisiana court, relying on *Universal C.I.T.,* would have applied the notice statute had the *Lester* case come before it. However, the court,

40. 433 F.2d at 888.

41. 433 F.2d at 886. The total indebtedness of Lester, Sr. exceeded the cash surrender value of the policy by a mere 2¢. Yet this deficiency was enough to keep the automatic loan provision from taking effect which in turn led to the lapse of the policy. Had the cash surrender value exceeded the total indebtedness but not been greater than the premium due the policy would not have lapsed, instead extended term insurance would have been in effect.

42. "We are persuaded that if the Louisiana Supreme Court were faced with the case at bar, they would likewise apply the *lex loci contractus* rule notwithstanding the harsh consequences to the appellee, provided a conflict exists." 433 F.2d at 889 (footnotes omitted).

43. 151 So. 2d 705 (La. App. 3d Cir. 1963). Plaintiff sued to recover a deficiency due for the purchase price of an automobile which had been repossessed and then sold at a non-judicial sale. The automobile was sold in Indiana under a conditional sale contract executed in Indiana and immediately assigned to plaintiff's Indiana office. The face of the contract showed the defendants-purchasers were Louisiana residents and the car was to be brought to and kept in Louisiana. Under Louisiana law a creditor is not entitled to a deficiency judgment when he sells a repossessed automobile without an appraisement. LA. REV. STAT. 13:4106, 4107. Appraisement is not required by Indiana law.

The case appears to be unique in applying Louisiana law instead of *lex loci contractus* in a conflict of laws situation involving a contract.

44. 151 So. 2d at 711.

45. Boring v. Louisiana State Ins. Co., 154 La. 549, 97 So. 856 (1923).

perhaps influenced by the strong language and wholehearted approval of *lex loci* in *Johnson* did not follow this course. Instead, the court interpreted *Johnson* as a reaffirmation of the *lex loci* doctrine as a general principle applying to both tort and contract cases.[46]

In spite of its analysis revealing *lex loci* to be the rule in Louisiana, the circuit court affirmed the district court's judgment on different grounds. In its view a "false conflict" existed.[47] It has been suggested[48] that a court may reach the particular result it desires by merely labeling the situation a false conflict, when in fact a false conflict does not exist. Examination of the facts in *Lester* reveals that if the concept of a false conflict was properly applicable a false conflict did in fact exist. The absence of a notice statute in Wisconsin indicates a policy of promoting the insurance business by relieving Wisconsin insurance companies of this burden. However, Wisconsin does not have a valid interest in protecting non-domiciliary insurance companies in their dealings with non-resident policy holders.[49] On the other hand Louisiana has a valid interest in protecting its residents from lapse of an insurance policy due to mere non-payment of premiums.[50] Since Louisiana has a legitimate interest in the *Lester* case while Wisconsin does not, a conflict of laws approach which recognizes the concept of a false conflict[51] requires that Louisiana law apply. Applying the Louisiana notice statute, the circuit court found that the notice given by Aetna was deficient.

In support of its decision, the court went outside its own circuit and found apparent authority in other jurisdictions. The cases cited by the court dealt with the concept of a "false conflict", and found the existence of a false conflict in their respective fact situations. To this extent they lend support to the conclusion drawn by the Fifth Circuit Court of Appeals that a false conflict existed in *Lester.* However, none of the cases cited are authority for the principle that a federal court

46. 433 F.2d at 889.
47. *Id.*
48. A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 86-89 (1967). Ehrenzweig, *"False Conflicts" and the "Better Rule"; Threat and Promise in Multistate Tort Law*, 53 VA. L. REV. 847, 851 (1967).
49. An attempt by Wisconsin to regulate non-domicilary insurance companies could amount to a denial of due process or of full faith and credit. See Currie and Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L. J. 1323, 1324 (1960).
50. Dupuis v. Prudential Ins. Co. of America, 222 La. 446, 62 So. 2d 637 (1952).
51. For an explanation of the concept of a false conflict see Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 239-43 (1958); Traynor, *Is this Conflict Really Necessary?*, 37 TEX. L. REV. 657, 667-674 (1959). *But see* Ehrenzweig, *"False Conflicts" and the "Better Rule"; Threat and Promise in Multistate Tort Law*, 53 VA. L. REV. 847, 851 (1967).

hearing a diversity case may hold *Klaxon* inapplicable where a false conflict exists.

The first jurisdiction upon which the court relied for authority was the United States Court of Appeals, District of Columbia Circuit. The *Lester* court refers to portions of two cases decided by that court in setting forth its definition of a "false conflict."[52] These two cases, *Gaither v. Meyers*[53] and *Williams v. Rawlings Truck Line Inc.*[54] are in turn based on *Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense.*[55] In *Tramontana*, the court had accepted a modern approach to conflict of laws problems by interpreting *Richards v. United States*[56] as an indication by the Supreme Court that a strict adherence to *lex loci delicti* was neither required nor desirable.[57] However, in *Tramontana* the court's jurisdiction was not based upon diversity of citizenship, but rather upon the presence of the defendant in the District of Columbia.[58] Moreover, in *Richards* the Court's jurisdiction was based upon a federal statute,[59] and the Court expressly indicated that the decision did not apply to suits where federal jurisdiction was based upon diversity.[60]

In *Williams*, the Court of Appeals for the District of Columbia Circuit, relying on *Tramontana*, resolved a conflict of laws problem using a modern approach. The case involved District of Columbia traffic laws,[61] and although a false conflict was found to exist, jurisdiction was based on a Congressional grant[62] and not on diversity of citizen-

52. 433 F.2d at 890.
53. 404 F.2d 216 (D.C. Cir. 1968).
54. 357 F.2d 581 (D.C. Cir. 1965).
55. 350 F.2d 468 (D.C. Cir. 1965).
56. 369 U.S. 1 (1962).
57. 350 F.2d at 471.
58. D.C. Code § 11-306 (1961) now D.C. Code §11-521a (1967) as limited by D.C. Code § 11-755 (1961) now D.C. Code § 11-961 (1967). *See*: 2A Moore's Federal Practice ¶ 8.07(3) n.4. The United States District Court for the District of Columbia in addition to its other jurisdiction, and except in actions or proceedings over which exclusive jurisdiction is in other courts in the District, has original jurisdiction of all civil actions between parties where either or both of them are resident or found within the District and where offenses are committed within the District.
The District of Columbia Court of General Sessions has exclusive jurisdiction over civil actions in which the claim is less than $10,000.
59. 28 U.S.C. § 1346b (1964).
60. "[B]ecause the issue of applicable law is controlled by a formal expression of the will of Congress, we need not pause to consider the question whether the conflict-of-laws rule applied in suits where federal jurisdiction rests upon diversity of citizenship shall be extended to a case such as this, in which jurisdiction is based upon federal statute." 369 U.S. at 7 (footnotes omitted).
61. D.C. Code § 40-424 (1961) provides generally that when a person other than the owner operates a motor vehicle with the express or implied consent of the owner then the operator in case of accident is deemed the agent of the owner. Proof of ownership is prima facie evidence that the operator had the owner's consent.
62. D.C. Code § 11-306 (1961) now D.C. Code § 11-521a (1967). See note 58 *supra.*

ship. Similarly, no "real conflict" was found to exist in *Gaither*,[63] but again, federal jurisdiction of the case had not been based on diversity.[64]

The other jurisdiction in which the court found authority was the Northern District of California. Unlike the other cases referred to by the court, federal jurisdiction in *Denny v. American Tobacco Company*[65] was based on diversity of citizenship. The district court in *Denny* recognized that by *Klaxon* the conflict should be resolved according to the conflict of laws rules of the forum state. Then it determined that there was a false conflict since New York had an interest while California did not.[66] While both the *Denny* case and the *Lester* case were decided on the basis of a modern conflict of laws approach and jurisdiction in both cases was based on diversity, they are distinguishable in that the court in *Denny* applied the *Klaxon* rule while the court in *Lester* did not. The court in *Denny* was able to apply the *Klaxon* rule and still use a modern conflicts approach because prior to the decision, the courts of California had accepted a modern approach to conflict of laws problems.[67] Since the Supreme Court of Louisiana had rejected modern approaches, following the *Klaxon* rule in *Lester* would have resulted in application of *lex loci contractus*. The California district court applied state law and found a false conflict, whereas the *Lester* court found a false conflict and avoided application of state law. Upon this analysis, the authority relied on supports a finding that the facts of the *Lester* case create a false conflict, but does not lend support for a federal court sitting in diversity to refuse to apply *Klaxon* when the court determines that a false conflict is present.

The rule the Supreme Court announced in *Klaxon* was merely the logical extension of the decision in *Erie R.R. v. Tompkins*. Prior to *Erie*

63. 404 F.2d at 223-24. The court noted that the District of Columbia had an interest in preventing car theft and promoting public safety and financial responsibility. It expressed that interest by holding its resident liable for an accident occurring in Maryland after he left his keys in his car, notwithstanding an intervening theft. The court concluded this interest did not conflict with Maryland's interest in preventing thefts or limiting the liability of Maryland car owners.

64. Jurisdiction was based on D.C. Code § 40-424 (1961).

65. 308 F. Supp. 219 (N.D. Cal. 1970).

66. *Id.* at 222-24. Plaintiff a resident of California sent a letter to the defendant telling of a company that might be for sale. Plaintiff indicated that if defendant was interested it should contact him. Defendant never did, but subsequently it acquired the company.

New York's Statute of Frauds prohibits recovery of a "finder's fee" in a corporate acquisition absent a signed writing. The court found California's interest in a contract valid under its Statute of Frauds but invalid under a foreign state's was in upholding the reasonable expectations of its residents who were parties to the agreement. The court found, under the circumstances, that interest was not at stake; the plaintiff could have reasonably expected to be bound by New York law.

67. Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P. 2d 906, 12 Cal. Rptr. 266 (1961); People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 311 P. 2d 480 (1957).

federal courts hearing cases under diversity jurisdiction were not bound to follow the conflict of laws rules formulated by the forum state.[68] The facts in *Erie* suggested a conflict between the laws of two states.[69] But the Supreme Court's decision resolved merely the issue of whether federal common law or state substantive law would be applied by a federal court sitting in diversity. Immediately after *Erie*, federal courts, since they were without direction, divided on whether or not they were bound by the conflict of laws rules of the forum state.[70]

In *Klaxon*, the Supreme Court settled the question by holding that federal courts sitting in diversity should follow the conflict of laws rules of the forum state. The decision was to serve the same purpose as *Erie*: the possibility of forum shopping between the state courts and the federal courts within that state is eliminated when federal courts make their decisions on the basis of state rules. On the other hand, under *Erie* and *Klaxon*, a lack of uniformity among federal courts exists so that forum shopping between federal courts in different states becomes possible.[71]

The *Klaxon* doctrine has been criticized[72] not only because it allows forum shopping among federal courts, but also because it precludes federal courts from building a rational body of conflict of laws rules.[73] Federal courts, presumably disinterested in state disputes, are

68. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842); Boseman v. Connecticut General Life Ins. Co., 301 U.S. 196 (1937).

69. 304 U.S. at 69-70. The injury occurred in Pennsylvania but the railroad was a New York corporation and suit was brought in New York. However, the railroad contended that under a Pennsylvania rule established by the highest court of Pennsylvania it was not liable. Tompkins argued that such a rule had not been established by the Pennsylvania court and that liability was established by general law.

70. Stentor Electric Mfg. Co. v. Klaxon Co., 115 F.2d 268 (3d Cir. 1940). (Federal courts were not bound.) *Contra*, Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940); the opinion includes a comprehensive consideration of the effect of Erie R. R. v. Tompkins, 304 U.S. 64 (1938) on federal court choice of law and concludes that if state rules are not followed then the ghost of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) still walks. *Cf.* Mallory v. N.Y. Life Ins. Co., 103 F.2d 439 (1st Cir. 1939); Schram v. Smith, 97 F.2d 662 (9th Cir. 1938).

71. The Supreme Court felt this type of forum shopping was attributable to our federal system which allows states to pursue, within limits perscribed by the Constitution, local policies differing from those of neighboring states. 313 U.S. at 496. Professor Cavers has pointed out that the danger of forum shopping across the court house square is much more real than that of forum shopping across state lines. ALI, Study of the Division of Jurisdiction Between State and Federal Courts, 158-59 (Tent. Draft No. 1, 1963).

72. A. EHRENZWEIG, CONFLICT OF LAWS 29-30 (1959). Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 UCLA L. REV. 1191 (1967); Randall, *The Erie Doctrine and State Conflict of Laws*, 17 S.C. L. REV. 494 (1965); Weintraub, *The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L.J. 228 (1964).

73. It has been stated that because Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941) requires federal judges to follow forum conflict of laws rules some of the best legal minds in the country are prevented from participating in the development

perhaps in the best position to resolve conflicts between the laws of different states. The critics of the *Klaxon* doctrine have proposed various solutions to the problems which they feel are a result of the doctrine. Some strongly argue that the decision should be overruled,[74] while others seek to avoid undesirable consequences by limiting the interpretations of the doctrine.[75]

The *Lester* court did not rely on the one major exception to *Klaxon*: to the extent that the due process clause or the full faith and credit clause prohibit a state court from applying one of its own conflict of laws rules, federal courts are also prohibited from applying it.[76] Nor does it appear the exception is applicable to the *Lester* case. The court did not refer to any of the theories of limited interpretation advanced by the critics of *Klaxon*, nor formulate its own theory of limited interpretation. So also, the court did not rely on the established methods of avoiding application of state law. It did not involve itself in distinctions between substance and procedure,[77] apply an outcome determinative test,[78] or attempt to find countervailing considerations.[79] Instead, it simply found that the rule calling for application of state conflict of laws—admittedly a valid rule[80]—did not apply in the case before it. The situation necessary to trigger that rule—the existence of a conflict—was not present.

The result in *Lester* is attributable to the present unrest in the area of conflict of laws.[81] The situation is due to the development of modern approaches to conflict of laws which are seriously challenging traditional approaches. The approaches do not differ merely superficial-

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of conflict of laws theories. This is not accurate since the rule applies only in diversity cases; federal courts are developing conflicts doctrines in cases where jurisdiction is not based on diversity. *See* Richards v. United States, 369 U.S. 1 (1962).

74. A. EHRENZWEIG, CONFLICT OF LAWS 29-30 (1959). Baxter, *Choice of Laws and the Federal System*, 16 STAN. L. REV. 1, 41 (1963). *See also* Hart, *The Relations Between State and Federal Law*, 54 COL. L. REV. 489, 542 (1954).

75. Randall, *The Erie Doctrine and State Conflict of Laws*, 17 S.C. L. REV. 494, 504 (1965); Weintraub, *The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L.J. 228, 259 (1964).

76. Randall, *The Erie Doctrine and State Conflict of Laws*, 17 S.C. L. REV. 494, 497 (1965). Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953) (dissenting opinion).

77. Erie R. R. v. Tompkins, 304 U.S. 64, 78 (1938).

78. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

79. Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525, 537 (1958).

80. 433 F.2d at 889.

81. The term "conflict of laws" has been criticized since the situation it describes is not an actual struggle, except possibly in the mind of the judge who must decide which law applies. However, the term is now generally used. The "conflict" is said to be "resolved" when a choice is made of the law of a particular jurisdiction to decide the other issues in the case. § 2 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) refers to the subject matter of a body of conflict of laws principles as "that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state."

ly, but in fact, "there exists a deep split of judicial opinion concerning the most fundamental issues underlying choice of law."[82] While the premise that the law of one jurisdiction may be given force and effect in another jurisdiction[83] is essential to any conflict of laws approach, individual states have wide discretion in determining when effect is to be given to the law of another state.[84] Therefore, it is not surprising that approaches have developed which are based on entirely different conceptions of what circumstances require that effect be given to the law of another jurisdiction.

The particular facet of the unrest which led to the court's decision was the difference in traditional approaches and modern approaches as to when consideration should be given to the law of more than one jurisdiction. Only when each of the laws of two or more jurisdictions is supported by an acceptable argument that it should control, does a "conflict" exist. When a conflict does exist, a choice is made between the laws of the jurisdictions involved.

An approach to conflict of laws necessarily includes a determination as to what makes an argument acceptable.[85] Modern and traditional approaches do not find the same arguments acceptable. In *Lester*, under the traditional approach of Louisiana, a conflict was present; acceptable arguments to apply the law of Wisconsin and the law of Louisiana existed. Louisiana had determined that in such conflict situations, the choice of law to resolve the conflict was the law of the place of the contracting. However, modern approaches would find that there was no conflict, because there did not exist acceptable arguments for application of the laws of both jurisdictions, but rather only the law of Louisiana.

What the court in *Lester* failed to recognize is that the concept of a false conflict is based on an analysis of the interests of the states involved in applying their own internal law. Thus, it is an essential part of a modern conflict of laws approach and has no place in traditional approaches. Because the concept of a false conflict is unknown in tra-

82. R. CRAMPTON AND D. CURRIE, CONFLICT OF LAWS, p. XI (preface) (1968).
83. 15A C.J.S. *Conflict of Laws* § 1 (2) (1967).
84. Individual states are limited in conflict of laws situations by two Constitutional provisions. The first is the due process clause which prevents a state form enforcing a grossly unjust law; the second is the full faith and credit clause which guarantees that a minimum amount of respect be given by one state to the laws of another state. See Cheatham, *American Theories of Conflict of Laws; Their Role and Utility*, 58 HARV. L. REV. 361, 371 (1945).
85. Once the acceptable arguments have been articulated they become the basis of a set of conflict of laws rules which are used when the jurisdiction is presented with a conflict.

ditional approaches the use of it in analyzing the situation was a rejection of those approaches. However, Louisiana chose to retain a traditional approach and since the federal court was required by *Erie* and *Klaxon* to apply Louisiana law, the concept of a false conflict was properly inapplicable and the court erred in applying it in the case.

Under the modern theory which the *Lester* court used in finding a false conflict, the circumstances of the case called for applying the internal law of Louisiana. However, if no conflict exists, a court is not free to use any law it chooses, but must, by *Erie*, apply forum law. Where a false conflict exists because the forum state has an interest and the foreign state has none the court's choice of law is consistent with both reason and the *Erie* doctrine. However, a problem arises where a false conflict is found in circumstances differing from the *Lester* case. If a false conflict exists because the forum state has no interest in the matter, by the *Lester* court's analysis, the principle of *Klaxon* is inapplicable. By *Erie*, the court would seem obligated to follow the substantive law of the forum state. Thus, the court would be in the anomalous position of applying the substantive law of the forum after having found that law not relevant to the case.

It is possible to view the decision in *Lester* as a step in the federalization of conflict of laws rules. The establishment of a body of conflict of laws rules binding on both federal and state courts is possible under the Constitution,[86] primarily by the full faith and credit clause[87] and the due process clause.[88] However, the *Lester* court did not place its decision on a Constitutional plane, but rather on an analysis of the fact situation in terms of a modern approach to conflict of laws problems. If the decision is a step in the federalization of conflict of laws rules, it was not based on federal supremacy as one might expect, but on an independent adoption of a particular method of dealing with conflict situations, an unexpected basis.

Moreover, this basis can not be justified in light of the basic reasons for the decision in *Klaxon*. While on the surface, state conflict of laws rules merely set out the choice of law to be made in a particular

86. Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 600 (1953); Hart, *The Relations Between State and Federal Law*, 54 COL. L. REV. 489, 514 (1954).

87. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COL. L. REV. 1, 27 (1945); Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IA. L. REV. 449, 468-91 (1959). *See also* Hughes v. Fetter, 341 U.S. 609 (1951).

88. LeFalar, *Constitutional Limits on Free Choice of Law*, 28 LAW & CONTEMP. PROB. 706, 707 (1963); Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IA. L. REV. 449, 450-68 (1959).

situation, underlying them is a state's determination as to whether its own law, or that of another state, will control. It is this underlying expression which the Court sought to protect in expounding the *Klaxon* rule. The Court recognized that a state has a right to pursue its local policies and that it is not for federal courts to thwart these policies by enforcing a general law of conflicts independent of state conflict of laws rules.[89] It concluded "[s]ubject only to review by this Court on any federal question that may arise, Delaware [the forum state] is free to determine whether a given matter is to be governed by the law of the forum or some other law."[90] Thus, the Court felt that the requirement that federal courts in diversity cases follow state conflict of laws rules stems from the right of a state to decide whether its own law or foreign law will apply.

Modern approaches do not always find a conflict under circumstances where traditional approaches do, but in not finding a conflict they still address themselves to the basic question of whether or not one state should apply the law of another state.[91] Therefore, even if it determines a conflict does not exist, a federal court by using any conflict of laws rules other than that of the state in which it is sitting, has not recognized the right of a state to pursue its own policies. While finding no conflict present, the *Lester* court still made a determination as to the basic question of whether or not Wisconsin law should apply in Louisiana. By *Klaxon*, that question is to be decided only by the conflict of laws rules of the forum state.

Furthermore, the Supreme Court in deciding *Klaxon* referred to the desirability of uniformity in decisions by state courts and federal courts sitting in that state. In that respect, it serves the same purpose as the decision in *Erie*.[92] It felt that if federal courts did not use state conflict of laws rules, the accident of diversity would disturb equal administration of justice.[93] The decision in *Lester* makes forum shopping between the state courts of Louisiana and federal courts sitting in Louisiana possible, the very situation which *Klaxon* sought to avoid. Thus, the *Lester* court's ingenious evasion of *Klaxon*, by apparent adherence to the letter of the law, has violated the spirit of *Klaxon*, and frustrated its aims.

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89. 313 U.S. at 496.
90. *Id.* at 496-97.
91. Even where a false conflict is found (or as some courts find "no real conflict" is present) a determination is made as to whether or not forum law controls.
92. 304 U.S. at 74-75.
93. 313 U.S. at 496.