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Abstract: The traditional rule for conflicts statutes of limitation is that the forum applies its own limitation period. In 1983, Washington adopted the Uniform Conflict of Laws-Limitations Act (the "*Uniform Act*") and is now one of six states to have adopted the *Uniform Act*. The *Uniform Act* represents the culmination of years of independent judicial and legislative attempts to change the traditional rule so as to provide some rational basis for the application of a particular statute of limitation in a given case. However, the *Uniform Act* presents some interpretive difficulties with respect to the question of which state's law forms the "substantive base" for a particular claim, and for this reason courts have struggled to apply the *Uniform Act* in a consistent manner. This Comment discusses some of the interpretive problems facing the courts and advocates an approach that differentiates between the law which invokes the statute of limitation and the law which governs peripheral substantive issues. Under an approach which focuses on the law that invokes a particular statute of limitation, the *Uniform Act* will be applied in a manner which furthers its purpose and maintains uniformity in treatment of conflicts between statutes of limitation.

Suppose a corporation operates solely within State *A* but distributes products to customers throughout the United States. A customer in State *B* wants to sue the corporation under a statute unique to State *B* which imposes strict liability on manufacturers. It has been three years since the injury, however, and both State *A* and State *B*'s two-year statutes of limitation have expired. The customer does some research and discovers that State *C* has a six-year limitation period for tort actions. A court in State *C* accepts the case under its own, longer, statute of limitation, then applies the strict liability law of State *B* to hold the defendant corporation liable for the injury.

This hypothetical illustrates two of the problems that can arise when a forum applies its own statute of limitation regardless of its connection to the case or the substantive law governing the claim. First, this approach results in the anomalous situation where the plaintiff, aided by the courts, creates a new body of law more favorable to the plaintiff.[1] The plaintiff in the hypothetical is not in a position to file a successful suit under the internal law of any one of the states involved. The claim is barred in State *B* and does not exist in either State *A* or State *C*. Nevertheless, by

1. *See, e.g.*, Schreiber v. Allis-Chalmers Corp., 611 F.2d 790 (10th Cir. 1979) (allowing action by Kansas plaintiff against Wisconsin defendant served in Mississippi on Kansas tort claim that was barred under both Kansas and Wisconsin law); Lillegraven v. Tengs, 375 P.2d 139 (Alaska 1962) (applying Canada's law to find liability, but applying Alaska's longer limitation period to hold that suit was not barred).

combining State *B*'s unique strict liability law and State *C*'s unusually long limitation period, the plaintiff creates a legal framework under which the plaintiff prevails.

In addition to the problem of "law selection" described above, the hypothetical also demonstrates an instance of forum shopping.[2] The plaintiff files in State *C* solely to take advantage of that state's unusually long statute of limitation. State *C* may have no connection to the case other than the minimal contacts required for asserting jurisdiction over the defendant. In the above hypothetical, no injury occurred in State *C*, the company is not based there, and indeed the plaintiff might have no contact whatsoever with State *C*. Yet the suit is instituted and tried there.

Situations illustrated by the above hypothetical arose under the traditional common law rule for choosing an applicable statute of limitation.[3] Under the traditional Anglo-American approach, the general rule of conflicts law was that a court applied its own procedural rules.[4] Statutes of limitation were characterized as "procedural" rather than "substantive."[5] Therefore, courts were free to apply their own statutes of limitation to any claim over which the court had jurisdiction, regardless of the forum's relationship to the claim and regardless of the substantive law which governed the claim.

Both commentators and courts recognized the inequitable and inefficient results of the traditional approach.[6] Nevertheless, the constitutionality of the common law rule was upheld by the Supreme Court.[7] Thus, it was left to the courts and legislatures to develop techniques to avoid the problematic situations described above. The exceptions they developed led the National Conference of Commissioners on Uniform State Laws[8] to propose the Uniform Conflict

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2. This is a recurring problem, particularly in the well-known havens of Mississippi and New Hampshire which have relatively long limitation periods. *See, e.g.*, Keeton v. Hustler Magazine, 465 U.S. 770 (1984) (holding that libel suit was properly permitted in New Hampshire despite fact that it was only state whose limitation period had not run and plaintiff had never been to state).

3. *See, e.g.*, Nelson v. Eckert, 329 S.W.2d 426 (Ark. 1959). For other examples, *see supra* notes 1, 2. *See generally* Margaret Rosso Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 Ariz. St. L. J. 1, 15–17 (1980).

4. Grossman, *supra* note 3, at 10–11.

5. *Id.*

6. *See, e.g.*, Heavner v. Uniroyal, Inc., 305 A.2d 412, 415–16 (N.J. 1973); Lorenzen, *The Statute of Limitations and the Conflict of Laws*, 28 Yale L.J. 492 (1919).

7. *See* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988); M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839).

8. The first manifestation of the National Conference of Commissioners occurred on August 24, 1892, when representatives of six states met to promote uniformity between the laws of the states.

of Laws-Limitations Act.[9] The *Uniform Act* sets forth a consistent and rational method for selecting a statute of limitation in a conflict situation. It provides for application of the statute of limitation of the state upon whose law the claim is substantively based.[10]

This Comment will examine interpretive difficulties in applying the *Uniform Act* and the generally inadequate treatment of the *Uniform Act* by Washington courts. First, part I discusses the evolution of the *Uniform Act*. Next, part II sets forth the relevant text of the *Uniform Act* and introduces its essential features. Part III describes how Washington courts have handled conflicts between statutes of limitation under the *Uniform Act*. Part IV evaluates two methods of interpreting and applying the *Uniform Act*. Finally, part V illustrates how only an analysis that focuses on the law that invokes the statute of limitation yields results that are consistent with the goals of the *Uniform Act*.

I. HISTORY

The evolution of conflicts law concerning statutes of limitation has been treated in depth by several commentators.[11] For the purposes of this Comment a brief summary is sufficient.

Conflicts law has historically drawn a distinction between "procedural" and "substantive" law.[12] For reasons of sovereignty and efficiency a court was always free to apply its own procedural rules regardless of the law which governed the substantive claim in the case.[13] The rationale underlying this rule was that it would impose too great a burden on a court to force it to alter its procedural rules every time a foreign law was invoked.[14] England became the exception among the countries in Europe, however, when it characterized statutes of limitation as procedural in *Leroux v. Brown*.[15] England found support for its

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Today the National Conference of Commissioners includes Commissioners from each of the states, as well as from the District of Columbia, Puerto Rico, and the Virgin Islands. Frederick Miller et al., *Introduction to the Uniform Commercial Code Annual Survey: The Centennial of the National Conference of Commissioners on Uniform State Laws*, 46 Bus. Law. 1449, 1449–50 (1991).

9. *Uniform Conflict of Laws-Limitations Act*, 12 U.L.A. 61–65 (Supp. 1994).

10. *Uniform Conflict of Laws-Limitations Act* § 2(a)(1), 12 U.L.A. 61, 63 (Supp. 1994).

11. *See, e.g.*, Edgar H. Ailes, *Limitation of Actions and the Conflict of Laws*, 31 Mich. L. Rev. 474 (1933); Grossman, *supra* note 3; Lorenzen, *supra* note 6.

12. Grossman, *supra* note 3, at 9–12.

13. *Id.* at 11.

14. Heavner v. Uniroyal, Inc., 305 A.2d 412, 415 (N.J. 1973).

15. Leroux v. Brown, 138 Eng. Rep. 1119 (C.P. 1852).

position in the writings of Dutch jurists who advocated a more expansive use of the procedural characterization.[16]

The distinction between procedural and substantive law has never been clear. The distinction is sometimes described in terms of whether the law in question affects a right or a remedy.[17] Substantive law impacts the rights of the individual, whereas procedural law is merely one of many possible methods for providing a remedy.[18] In 1839, the U.S. Supreme Court employed the rights/remedy differentiation in *M'Elmoyle v. Cohen*, when it upheld the common law rule characterizing statutes of limitation as procedural.[19] With such distinguished support, this view continued to represent the majority view among courts in the United States.[20]

The common law rule was not, however, without critics.[21] The mechanical application of the forum's statute of limitation in all cases was viewed as arbitrary and unfair.[22] To avoid these problems the courts developed escape devices, and the legislatures enacted borrowing statutes. These judicial and legislative exceptions have sharply curtailed the application of the common law rule in most states.

1. Judicial Creations—Escape Devices

As mentioned above, characterization of statutes of limitation as procedural was often justified by means of the right/remedy distinction. However, this justification disappears when the statute of limitation becomes so closely tied to the foreign cause of action that the remedy becomes part of the right.[23] It is in this type of situation that courts have

16. Lorenzen, *supra* note 6, at 492.

17. Ibrahim J. Wani, *Borrowing Statutes, Statutes of Limitations and Modern Choice of Law*, 57 UMKC L. Rev. 681, 685 (1989).

18. *Id.*

19. M'Elmoyle v. Cohen, 38 U.S. (13 Pet. 312) (1839).

20. *Restatement of Conflict of Laws* §§ 585, 604 (1934).

21. The most noteworthy of whom was Professor Lorenzen who wrote:

> A right which can be enforced no longer by an action at law is shorn of its most valuable attribute. After the enforcement of the right of action is gone under the law governing the rights of the parties, it would seem clear upon principle that the same consequences should attach to the operative facts everywhere.

Lorenzen, *supra* note 6, at 496.

22. *Id.*

23. Grossman, *supra* note 3, at 12.

created exceptions to the common law rule and applied the foreign statute of limitation.

One such exception applies a statute of limitation specifically provided for in the statute creating the cause of action. Referred to as the "built in" test, this approach treats the limitation period as a limitation on the right created by the statute because the limitation period is specified in the statute.[24] Courts have applied this exception in cases involving wrongful death statutes.[25] Similarly, the "specificity" test allows a court to apply a statute of limitation which is specifically directed at a newly created liability because the limitation period can be viewed as a qualification of the liability.[26] The difference between these two tests is that under the specificity test the limitation period does not have to be included in the statute creating the right.[27] Yet a third test requires the court to determine whether the statute of limitation is in the nature of a substantive termination of the right rather than a procedural bar to the claim.[28]

2. *Legislative Enactments—Borrowing Statutes*

Legislatures, in addition to courts, have carved out exceptions to the traditional rule that a forum applies its own statute of limitation. One commentator identified seventeen different exceptions, collectively referred to as borrowing statutes.[29] A typical borrowing statute provides that an action barred by the law of the place where the action "accrued" is barred in the forum as well.[30]

Where a borrowing statute is in place, the choice of a forum will have less impact on the statute of limitation to be applied. Nevertheless, the

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24. *Id.* at 12–13.

25. *See, e.g.*, The Harrisburg, 119 U.S. 199, 214 (1886), *overruled on other grounds by* Moragne v. State Marine Lines 398 U.S. 375 (1970). *The Harrisburg* was the first case to make use of the "built in" test. *See also Moragne*, 398 U.S. 375. *But see* Gaudette v. Webb, 284 N.E.2d 222 (Mass. 1972) (holding that recovery for wrongful death was common law remedy and not one created by statute so that limitation was general and not tied to statute).

26. Grossman, *supra* note 3, at 12–13.

27. *Id.* at 13; *see also* Davis v. Mills, 194 U.S. 451, 454 (1904).

28. *See, e.g.*, Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 943 (2d Cir. 1930) (stating that if defense must be pleaded, it bars only remedy, but if it need not be pleaded then it is condition on right).

29. Dean H. Vernon, *Statutes of Limitations in the Conflict of Laws: Borrowing Statutes*, 32 Rocky Mtn. L. Rev. 287, 293–98 (1960); *see also* John W. Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. Fla. L. Rev. 33, 79–84 (1962).

30. Grossman, *supra* note 3, at 14.

sheer number of different borrowing statutes and the theories they represent demonstrates the lack of consensus on an appropriate rule of law in this area.[31] Differences in interpretation of key ideas such as the term "accrued" contribute to the disarray.[32] In addition, borrowing statutes rarely address all possible issues that might arise.[33]

The first attempt at establishing a uniform rule for selection of statutes of limitation was the *Uniform Statute of Limitation on Foreign Claims Act*, finalized in 1957.[34] It provided for the application of the shorter of the statute of limitation in effect where the action accrued or the forum's statute of limitation.[35] Only three states ever adopted this harsh and inflexible rule.[36]

In addition to the harshness of the rule, this first attempt at a uniform law governing statutes of limitation shared another flaw common to most borrowing statutes of the time. By their terms, the original borrowing statutes relied heavily on the interpretation of the term "accrual," a concept having its roots in the traditional "vested rights" approach to conflicts of law.[37] The definition of "accrual" varied, but generally it was held to mean the location where the last event necessary to create a cause of action occurred.[38] The doctrine of vested rights, and along with it the concept of accrual, was subject to a barrage of criticism from advocates of a new conflicts methodology.[39] These commentators put forth at least four new theories for choice of law in conflicts situations,[40] two of which

31. *See* Robert J. Nordstrom, *Ohio's Borrowing Statute of Limitations—A Quaking Quagmire in a Dismal Swamp*, 16 Ohio St. L.J. 183 (1955).

32. Vernon, *supra* note 29, at 300–06.

33. Grossman, *supra* note 3, at 15; *see also* Robert A. Leflar, *Choice-of-Law Statutes*, 44 Tenn. L. Rev. 951, 961 (1977).

34. *Unif. Statute of Limitation on Foreign Claims Act*, 14 U.L.A. 507 (1980).

35. *Unif. Statute of Limitation on Foreign Claims Act* § 2, 14 U.L.A. 507, 508 (1980).

36. The only states to adopt the proposal were Oklahoma, Okla. Stat. Ann. tit. 12 §§ 104–108 (West Supp. 1982–83), Pennsylvania, 42 Pa. Cons. Stat. Ann. § 5521 (Purdon 1981), and West Virginia, W. Va. Code §§ 55-2A-1 to 55-2A-6 (1981). *See* Robert A. Leflar, *The New Conflicts-Limitations Act*, 35 Mercer L. Rev. 461, 465 n.33 (1984).

37. Under the "vested rights" approach to conflicts of law, legal rights and duties vest at a certain place and time, and other sovereign jurisdictions merely recognize and enforce these obligations. The concept relies heavily on notions of territoriality. Wani, *supra* note 17, at 682.

38. *Restatement of Conflict of Laws* § 377 (1934).

39. *See generally* Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173 (1933).

40. Leflar, *supra* note 36, at 466.

emerged as dominant.[41] These two conflicts theories are the "most significant relationship"[42] test and "interest analysis."[43]

States are free to choose their own choice of law methodology, however, and some continued to follow the traditional vested rights approach.[44] Others adopted either the *Restatement*'s "significant relationship" test,[45] or professor Currie's interest analysis.[46] Still others employed some mixture of the old and new theories.[47] The second attempt of the Uniform Law Commissioners recognized and provided for the diversity of choice of law methods among the states.[48]

II. THE *UNIFORM ACT*

The second effort to establish a uniform system for selecting a statute of limitation resulted in the *Uniform Conflict of Laws-Limitations Act.*[49] Although different choice of law principles and methods were considered, the drafters rejected the idea of enshrining a particular choice of law rule in the *Uniform Act.* Instead, the *Uniform Act* calls for application of the forum's choice of law methodology to determine which state's substantive law governs the claim.[50] The state whose substantive law governs also supplies the statute of limitation.[51] The relevant portion of the *Uniform Act* provides as follows:

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41. Wani, *supra* note 17, at 709–14 (mentioning third theory as well, but giving it less consideration).

42. *Restatement (Second) of Conflict of Laws* § 145 (1971) (torts); *Id.* § 188 (contracts). The "most significant relationship" test of the *Restatement* requires the court to identify the contacts with related states and consider the significance of those contacts with respect to goals of a conflicts system and the policy interests of the states. For the purposes of this Comment, "*Restatement*" refers to the *Restatement (Second) of Conflict of Laws.*

43. *See generally* Currie, *supra* note 39; Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L.J. 171. Professor Currie's "interest analysis" calls for application of the law of the state with a legitimate state interest with respect to the issue. In the event that more than one state has a legitimate state interest, Professor Currie would apply the forum state's law.

44. Gregory E. Smith, *Choice of Law in the United States*, 38 Hastings L.J. 1041, 1051–1169 (1987) (discussing choice of law rule for each state and identifying several states that employ *First Restatement*'s vested rights approach).

45. *Id.*

46. *Id.*

47. *Id.*

48. Leflar, *supra* note 36, at 464–68.

49. *Uniform Conflict of Laws-Limitations Act*, 12 U.L.A. 61, 61–65 (Supp. 1994).

50. *Uniform Conflict of Laws-Limitations Act* § 2(a)(1), 12 U.L.A. 61, 63.

51. *Uniform Conflict of Laws-Limitations Act* § 2(a)(1), 12 U.L.A. 61, 63.

§ 2. Conflict of Laws; Limitation Periods

(a) Except as provided by Section 4, if a claim is substantively based:

(1) upon the law of one other state, the limitation period of that state applies; or

(2) upon the law of more than one state, the limitation period of one of those states chosen by the law of conflict of laws of this State, applies.

(b) The limitation period of this State applies to all other claims.[52]

As mentioned, the *Uniform Act* does not invoke any particular choice of law methodology. Each state is free to determine the substantive law governing the case based on its own choice of law determination.[53] The goal of the *Uniform Act* is not to establish a uniform approach to conflicts, but instead to tie the limitation period to the law upon which the case is substantively based.[54]

One commentator has referred to the *Uniform Act*'s approach to statutes of limitation as "substantive."[55] This is true to the extent that the *Uniform Act* rejects the traditional rule characterizing statutes of limitation as procedural and thus subject to forum law. A truly substantive issue, however, would not be tied to any other choice of law determination.[56] Under the *Restatement*, for example, the statute of limitation is handled as a separate issue to be determined independently under the "significant relationship" test.[57] Therefore, it would be possible under the *Restatement* to have one state's laws governing the substantive claim and another state's laws governing the limitation period.[58] The analytical method under the *Uniform Act* is more appropriately characterized by another commentator as a "unitary approach."[59] This

52. *Uniform Conflict of Laws-Limitations Act* § 2, 12 U.L.A. 61, 63.

53. *See* Leflar, *supra* note 36, at 467–68.

54. Leflar, *supra* note 36, at 476.

55. Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. Ill. L. Rev. 683, 702 (1991).

56. *See* Grossman, *supra* note 3, at 38–39; *see also* Wani, *supra* note 17, at 706–07.

57. *Restatement (Second) Conflict of Laws* § 142(1) (1971).

58. Wani, *supra* note 17, at 707.

59. *Id.*

term accurately reflects the fact that under the *Uniform Act*, a determination of a substantive law governing the claim also resolves the question of which statute of limitation applies.[60]

Thus, under the *Uniform Act*, the forum's choice of law methodology is not applied independently of the statute of limitation issue. The *Uniform Act* only provides for application of the forum's conflict methodology to the limitation issue when no single substantive law can be identified as the basis for the particular claim.[61]

Any discussion of how the *Uniform Act* should be applied must consider the historical development which led to its promulgation. The *Uniform Act* was developed to provide a comprehensive and uniform substitute for judicial escape devices and borrowing statutes.[62] Thus, the *Uniform Act* was intended to remedy the same problems that escape devices and borrowing statutes were intended to cure: forum shopping and law selection.[63]

III. THE *UNIFORM ACT* IN WASHINGTON: THE *RICE* AND *WILLIAMS* CASES

The *Uniform Act* has been adopted by the legislatures of six states,[64] including Washington's, where it was passed in 1983 with little or no discussion.[65] Since then, Washington courts have had the opportunity to apply the law only occasionally. The two cases which provide the most thorough analysis of a conflict between statutes of limitation are *Rice v. Dow Chemical Co.*[66] and *Williams v. State*.[67] The *Rice* case illustrates the

60. *Uniform Conflict of Laws-Limitations Act* § 2(a)(1), 12 U.L.A. 61, 63.

61. *Uniform Conflict of Laws-Limitations Act* § 2(b)(1), 12 U.L.A. 61, 63.

62. Prefatory note to the *Uniform Act*, 12 U.L.A. 61, 62 (giving brief history of development of law relating to statutes of limitation and stating that *Uniform Act* is current version of effort "designed to replace these variant borrowing acts").

63. The purpose of escape devices and borrowing statutes is to ameliorate the problems of forum shopping and law selection associated with characterization of statutes of limitation as procedural. *See supra* notes 20–30 and accompanying text. In order to replace escape devices and borrowing statutes the *Uniform Act* should perform their functions.

64. Ark. Code Ann. §§ 16-56-201 to 16-56-210 (Michie 1985); Colo. Rev. Stat. Ann. §§ 13-82-101 to 13-82-107 (West 1984); Mont. Code Ann. §§ 27-2-501 to 27-2-507 (1991); N.D. Cent. Code §§ 28-01.2-01 to 28-01.2-05 (1985); Or. Rev. Stat. §§ 12.410–12.480 (1988); Wash. Rev. Code §§ 4.18.010–904 (1983); *see Uniform Conflict of Laws-Limitations Act*, 12 U.L.A. 61.

65. There was no testimony or argument against the bill, and the arguments for the bill were uniformity and prevention of forum shopping. H.R. Rep., H.B. 925, 48th Leg. (1983).

66. 124 Wash. 2d 205, 875 P.2d 1213 (1994).

67. 76 Wash. App. 237, 885 P.2d 845 (1994).

importance of identifying a governing substantive law for an analysis under the *Uniform Act*. The *Rice* court, however, did not clearly enunciate an analytical framework for accomplishing this task. The *Williams* case demonstrates the difficulty courts will experience in attempting to apply the *Uniform Act* absent clear guidelines on this point.

In *Rice v. Dow Chemical Co.*, the Washington Supreme Court faced the question of whether to apply Oregon's two-year limitation period or Washington's three-year limitation period.[68] The case involved a claim by a worker against a herbicide manufacturer, alleging that exposure to the herbicide caused the worker to develop leukemia.[69] For the purposes of its decision, the court assumed that plaintiff had been extensively and routinely exposed to herbicides over a course of four years while working in Oregon.[70] The Plaintiff moved to Washington in 1967 and was accidentally splashed with herbicides once while in Washington.[71] The Defendant sought to dismiss plaintiff's claims based on Oregon's eight-year statute of repose and two-year statute of limitation.[72]

The supreme court stated that, although Washington and Oregon's limitation periods differed, "variations in limitation periods are not subject to conflict of laws methodology."[73] The court interpreted the *Uniform Act* as mandating first a determination of which state's substantive law applied and then application of that state's limitation period.[74] The court went on to state, however, that the difference in the statutes of repose could raise a conflict of substantive law.[75] Although the time frame within which the plaintiff could have brought the claim under Washington's statute of repose was unclear, under any circumstances it was longer than Oregon's.[76] The court applied Washington's conflicts

68. *Rice*, 124 Wash. 2d at 210, 875 P.2d at 1216.

69. *Id.* at 207, 875 P.2d at 1214.

70. *Id.*

71. *Id.*

72. *Id.* at 207–08, 875 P.2d at 1214–15.

73. *Id.* at 210, 875 P.2d at 1216.

74. *Id.*

75. According to the court, a statute of repose is distinguishable from a statute of limitation in that the former prevents the cause of action from accruing, while the latter bars plaintiff from bringing a cause of action that has accrued. *Id.* at 211–12, 875 P.2d at 1216–17. This Comment does not consider the narrower question of whether, under the court's interpretive framework, statutes of repose should give rise to conflicts in substantive law. Instead, the Comment advocates a mode of analysis which makes such a determination irrelevant for purposes of determining the applicable statute of limitation.

76. *Id.* at 212–13, 875 P.2d at 1217.

methodology[77] to the conflict between the statutes of repose and concluded that Oregon had the most significant relationship with the case.[78] The court then held that the Plaintiff's claim was barred by Oregon's statute of repose.[79] In a brief sentence the court finished by noting that the application of Oregon law to the substantive claim required application of the Oregon limitation period as well.[80]

Courts looking to the supreme court's analysis in *Rice* will discover a gap in the analysis which limits its usefulness. For any analysis under the *Uniform Act*, the court must be able to identify the law which forms the substantive basis for the claim.[81] In view of the fact that the supreme court ultimately felt compelled to apply Oregon's statute of limitation, Oregon's substantive law must have been held to govern the claim. Nevertheless, it is not clear how the court arrived at that conclusion. The only substantive issue analyzed by the court was the issue of which state's statute of repose governed the claim. Perhaps Oregon's substantive law formed the basis for the claim because Oregon's statute of repose applied to the claim. As will be discussed, *infra*, this is not a method of analysis which best promotes the purpose of the *Uniform Act*. Furthermore, the supreme court did not make it clear that this was the method of analysis it was adopting. Because the *Rice* court merely identified one substantive conflict, resolved it, and applied Oregon's statute of limitation, it never clearly articulated a method for identifying the law which formed the substantive basis for the claim. It is that gap which will cause confusion among the lower courts.

The Washington Court of Appeals faced a similar conflicts situation in *Williams v. State*.[82] In *Williams*, an Oregon resident was killed when his truck struck the bridge between Vancouver, Washington and Portland, Oregon.[83] The Plaintiff filed wrongful death actions against both Oregon and Washington, but it is the suit against Oregon that is relevant here. As in *Rice*, the Plaintiff's ability to recover in Washington depended to some degree on whether Washington's three-year or Oregon's two-year

77. Washington has adopted the *Restatement*'s approach to conflicts issues. Johnson v. Spider Staging Corp., 87 Wash. 2d 577, 555 P.2d 997 (1976). For a comprehensive discussion of Washington's choice of law methodology, see Philip A. Trautman, *Choice of Law in Washington—The Evolution Continues*, 63 Wash. L. Rev. 69 (1988)

78. *Rice*, 124 Wash. 2d at 216, 875 P.2d at 1219.

79. *Id.*

80. *Id.* at 217, 875 P.2d at 1219.

81. *Uniform Conflict of Laws-Limitations Act*, § 2(a), 12 U.L.A. 61, 63.

82. 76 Wash. App. 237, 885 P.2d 845 (1994).

83. *Id.* at 238, 885 P.2d at 846–47.

statute of limitation applied.[84] In *Williams*, however, there was a conflict between the non-claim statutes of the two jurisdictions.[85] Oregon's non-claim statute required that notice of claims against the state be given within one year of the injury, whereas Washington required notice within three years.[86] Oregon's one-year non-claim statute and Washington's analogous three-year period provided the substantive conflict for the case.[87]

The Washington Court of Appeals, citing *Rice*, recognized that limitation periods are not subject to the conflict of laws methodology.[88] Apparently ignoring this admonition, however, the court proceeded to consider each state's relationship to the case along with its respective interest in applying its own statute of limitation.[89] The court concluded that Washington's interests were greater in relation to the statute of limitation issue.[90] The court then followed the same inquiry with regard to the non-claim statutes and determined that Oregon's non-claim statute barred the claim.[91] Although the determination that Washington law provided the applicable statute of limitation may be dicta, it is dicta that demonstrates a misunderstanding among the courts.

There is little question that the appeals court in *Williams* did not follow the supreme court's lead in *Rice*. The *Uniform Act* calls for the application of the statute of limitation of the jurisdiction upon whose law the claim is "substantively based." Both the *Rice* and *Williams* cases involved a conflict between Oregon and Washington statutes of limitation in addition to another substantive conflict. In the *Rice* case, the additional substantive issue was the difference between statutes of repose, and in the *Williams* case it was a conflict between notice periods. In *Rice*, the supreme court declined to apply Washington's conflicts methodology to the limitation issue itself. Despite the fact that it

84. *Id.* at 241, 885 P.2d at 847–48.

85. The so-called non-claim statute in the case was a law requiring that, in tort actions against the state, notice be given to the state within a certain period after the alleged loss or injury. The court, citing Lane v. Department of Labor & Industry, 21 Wash. 2d 420, 425–26, 151 P.2d 440 (1944), distinguished statutes of limitation from non-claim statutes and held that the latter could provide a substantive conflict. *See also Uniform Conflict of Laws-Limitations Act* § 2 cmt., 12 U.L.A. 61, 63 (limitation period refers only to commencement of action and does not refer to requirements for giving notice of claims).

86. *Williams*, 76 Wash. App. at 241, 885 P.2d at 847.

87. *Id.*

88. *Id.* at 245, 885 P.2d at 850.

89. *Id.* at 245–48, 885 P.2d at 850–51.

90. *Id.* at 247, 885 P.2d at 850–51.

91. *Id.* at 248–49, 885 P.2d at 851–52.

expressly recognized that rule, the *Williams* court did apply the conflicts methodology to the limitation issue.

The lower court's difficulties can be traced to the supreme court's failure to articulate a clear standard for determining the governing substantive law. As mentioned above, the supreme court in *Rice* concluded that Oregon law governed but failed to articulate a method for reaching that conclusion.[92] The court considered only the conflict between the statutes of repose in its decision. Thus, arguably the court adopted an approach under which the determination of any substantive conflict is dispositive of the substantive law on which the claim is based. If the supreme court indeed adopted this approach, then it is not surprising that the *Williams* court did not apprehend it. This is not the necessary interpretation of the *Uniform Act*, nor does it best promote the goals and intent of the Act.[93]

IV. SELECTING A SUBSTANTIVE BASIS

The *Uniform Act* states that "if a claim is substantively based on the law of one other state, the limitation period of that state applies."[94] Under the *Uniform Act*, therefore, the limitation issue is not generally subject to an independent conflicts analysis.[95] Instead, it is tied to the law that forms the substantive basis for the claim.[96] Recognizing that this will not always be feasible, the *Uniform Act* does permit application of the conflicts methodology to the limitation issue in the event that no single substantive base for the case can be identified.[97]

The definition of the phrase "substantively based" will determine the frequency with which statutes of limitation will, in practice, be tied to the body of law that invokes the statute of limitation at issue in the case. If "substantively based" refers to the law which invokes the statute of

92. *See supra* notes 68–81 and accompanying text.

93. *But see Uniform Conflict of Laws-Limitations Act* § 2 cmt., 12 U.L.A. 61, 63 ("This section treats limitation periods as substantive, to be governed by the limitation law of a state whose law governs other substantive issues inherent in the claim."). This quote might support a position contrary to that advocated here. But, much as the law on which a claim is "substantively based" is subject to different interpretations, "issues inherent in the claim" is a term which might be interpreted in various ways as well. This term should probably be interpreted to include only those issues which relate to the underlying claim rather than peripheral substantive issues. *See infra* notes 98–110 and accompanying text.

94. *Uniform Conflict of Laws-Limitations Act* § 2(a)(1), 12 U.L.A. 61, 63.

95. *Uniform Conflict of Laws-Limitations Act* § 2(a)(1), 12 U.L.A. 61, 63.

96. *Uniform Conflict of Laws-Limitations Act* § 2(a)(1), 12 U.L.A. at 63.

97. *Uniform Conflict of Laws-Limitations Act* § 2(a)(2), 12 U.L.A. at 63.

limitation then it is less likely that the limitation issue will be subject to an independent conflicts analysis. Such an approach would focus on the law underlying the claim. If, however, the term is interpreted to include any substantive issue related to the claim, then an independent conflicts analysis will be applied to the limitation issue more frequently. Such an interpretation would tend to focus more on peripheral[98] substantive issues.

In order to fully understand both the difficulty and importance of identifying a substantive basis purposes choosing an applicable statute of limitation under the *Uniform Act*, four possible factual scenarios are considered below. An outcome for each of the fact patterns is predicted based on an approach that focuses on the law creating the cause of action and an approach that does not.

It will become clear while discussing the four scenarios below that the concerns expressed herein arise whenever the choice of law methodology involves any type of interest analysis.[99] Interest analysis, or a modified form of interest analysis such as that embodied in the *Restatement*, is currently enjoying popularity among states,[100] and is welcomed by courts because of the flexibility it offers to judges.[101] Washington is one of several states which has adopted the modified interest analysis set forth in the *Restatement*, which requires considering the relevant state interests.[102] Therefore, the concerns expressed herein are relevant to both Washington and a growing number of other states.

The distinguishing feature between interest analysis and other conflict methodologies is that different issues in a single case give rise to different state interests. A state's interest in application of its product liability law will be very different from its interest in applying its host-

98. The term "peripheral" is used in this Comment to refer to a law other than the law which acts as the referent for the application of a particular statute of limitation.

99. The concerns do not arise with respect to certain other conflicts methodologies such as the doctrine of vested rights. Under that doctrine, the law of the place where the cause of action accrued governs the case. The determination of governing law, therefore, would not vary depending on the issue subject to the conflicts methodology. This is equally true for modern conflicts theories that do not involve an evaluation of a state's interest, such as a center of gravity or strict contact counting analysis. For a complete discussion of the different types of conflicts analysis see Smith, *supra* note 44, at 1043–48.

100. *See* Smith, *supra* note 44, at 1046 (identifying *Restatement* as most popular choice of law methodology).

101. *Id.* at 1048.

102. *See* Johnson v. Spider Staging Corp., 87 Wash. 2d 577, 580, 555 P.2d 997, 1000 (1976).

guest statute.[103] Because the law of the state with the greatest interest on a given issue is applied, the laws of several states may govern different issues in a single case.

1. Scenario One—Conflicts of Underlying Law

This scenario imagines a conflict between each state's law on the underlying claim. Using the hypothetical in the introduction,[104] State *B* has a strict liability law for manufacturers, whereas State *C* does not. This is a conflict between the laws which underlie the claim. In the hypothetical, the court in State *C* determined that State *B*'s strict liability law should govern. Because section 2(a)(1) of the *Uniform Act* directs that the limitation period of the state upon whose law the claim is substantively based applies, State *B*'s limitation period applies. This scenario presents no difficulties.

2. Scenario Two—Conflicts Between Both Underlying and Peripheral Law

A second scenario begins from the same premise: The court in State *C* determines that State *B*'s strict liability law is applicable. This time the situation is complicated by the fact that State *C* also has a statute of repose that, like the statute of limitation, is longer than that of State *B*. As noted, conflicts between statutes of repose give rise to substantive conflicts.[105] State *C* will apply its conflicts methodology and may determine that its own longer statute of repose is applicable to the case. This creates a situation where laws from two different states govern substantive issues in the case. State *B*'s strict liability law governs rights and liabilities and invokes the statute of limitation, but State *C*'s statute of repose applies to the case.

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103. A host-guest statute bars a passenger in an automobile from bringing an action against the driver for injuries sustained due to the driver's negligent driving. In the case of a product liability law, the state interest at stake may be deterring unsafe products in the market. With respect to host-guest statutes, the interest may be protection of insurance companies from collusive suits.

104. The hypothetical supposed that a corporation operates solely within State *A* but distributes products to customers throughout the United States. A customer in State *B* wants to sue the corporation under a statute unique to State *B* which imposes strict liability on manufacturers. It has been three years since the injury, however, and both State *A* and State *B*'s two-year statutes of limitation have expired. The customer does some research and discovers that State *C* has a six-year limitation period for actions sounding in tort.

105. *See supra* note 75 and accompanying text.

The question under the *Uniform Act* is whether a single state's law can be identified as the "substantive base" for the claim. If so, then the statute of limitation of that state applies. If, however, more than one state's laws form the substantive basis for the claim, then an independent conflicts analysis will be performed with respect to the statutes of limitation issue. Depending on the interpretation of the phrase "substantively based" the statute of limitation may or may not be subject to an independent analysis in this scenario.

If an approach that focuses on the law underlying the claim is applied, then the law of a single state will be identifiable as the law upon which the claim is substantively based. For example, in the hypothetical, an emphasis on the underlying law would focus attention on the strict liability law of State *B*. The strict liability law of State *B* is the law which invokes the statute of limitation and gives rise to the liability to which the statute of limitation is directed. Therefore, under the approach advocated here, the law of State *B* forms the substantive basis for the claim.

If, however, the strict liability law and the statute of repose are both viewed as parts of the substantive basis for the claim, then section 2(a)(2) of the *Uniform Act* requires that the conflicts methodology be applied directly to the limitation issue. This will be the result if the underlying law is given no more weight than any peripheral substantive issue. Under this interpretation, there would be no consideration of the fact that the strict liability law is the law which created the cause of action. The laws of two different states govern substantive issues in the case, therefore the limitation issue would be subject to an independent analysis.

3. *Scenario Three—Conflicts in Peripheral Law*

In this scenario, the strict liability laws of State *B* and State *C* are the same. There still exists, however, a conflict between the statutes of repose of State *B* and *C*. Due to the nature of the state interests that are implicated by statutes of repose, the court determines that State *C*'s statute of repose applies despite the limited contacts that State *C* has with the case.

Having resolved the conflict on statutes of repose, a court in State *C*, under an interpretation which emphasizes peripheral substantive issues, concludes State *C*'s statute of limitation applies. If the court's analysis stops at this point, it will have identified a state whose law governs a substantive issue. Under the *Uniform Act*, the court then applies that state's statute of limitation. This occurs despite the fact that a conflicts

analysis applied to the law underlying the claim in the case reveals that State *B* has a much greater interest in applying its strict liability law to this case.[106]

Under an interpretation which emphasized underlying law, the court would not stop its analysis at the determination of the law governing the statute of repose question. It would identify which state's law formed the substantive basis for the claim and would apply that state's limitation period. In order to determine the law upon which the claim is substantively based, the court would perform a conflicts analysis on the underlying law. This would lead to the application of the limitation period of the state with the greatest interest in the case with respect to the creation and regulation of the liability.

4. *Scenario Four—Conflicts in Neither Underlying Nor Peripheral Law*

In the final scenario the substantive law of the two states is the same and the only conflict is between two states' statutes of limitation. This is a situation where State *C* and State *B* have the same strict liability law and same statutes of repose but different statutes of limitation. State *C* has only the minimum contacts necessary to assert jurisdiction over the defendant.

The general rule in conflicts cases is that where there is no conflict between the law of the forum and the law of a foreign state, the forum does not engage in a conflicts analysis but instead simply applies forum law.[107] Because this situation is not covered by section 2(a) of the *Uniform Act*, it will probably fall under the "all other claims" language of section 2(b).[108] Therefore, the forum applies its statute of limitation regardless of its connection to the cause of action in any case that involves only a conflict between statutes of limitation.[109] In the hypothetical, then, if the suit is filed in State *C*, under an interpretation of the *Uniform Act* that does not emphasize the underlying law, State *C*

106. This could be the result, for example, if the plaintiff is from State *B*, the product was produced and purchased in State *B*, the injury occurred in State *B*, and the judicially recognized purpose of the strict liability law is to compensate injured persons and deter manufacturers from introducing dangerous products into the marketplace.

107. *See, e.g.*, Rice v. Dow Chemical Co., 124 Wash. 2d 205, 210, 875 P.2d 1213, 1216 (1994) (stating that to engage in choice of determination, there must first be actual conflict between laws).

108. *Uniform Conflict of Laws-Limitations Act*, § 2, 12 U.L.A. 61, 63).

109. Wani, *supra* note 17, at 700.

applies its own statute of limitation under section 2(b) of the *Uniform Act.*

It is suggested that when a court is faced with a conflict only between statutes of limitation, it treat that conflict as a conflict between the underlying statutes and apply the conflicts methodology to those laws instead. Due to the different nature of the interests invoked, this could very well lead to a different outcome than application of the forum law. Although unorthodox,[110] this approach has been applied[111] and leads to a result more consistent with the purpose of the *Uniform Act.*

V. EFFECTUATING THE LEGISLATURE'S ACTION

When the Washington legislature adopted the *Uniform Act,* it had several conflict methodologies from which to choose. It could have, for example, adopted a completely substantive model such as that embodied in the *Restatement.* The legislature, however, did not adopt the *Restatement*'s model, under which each issue including the statute of limitation is treated as a separate substantive conflict. Instead, the legislature adopted the unitary approach of the *Uniform Act.* The Washington courts should adopt an analytical framework that effectuates this selection, rather than one which marginalizes it.

As was discussed earlier, forum shopping and law selection occur in situations where the court applies a statute of limitation that is unrelated to the underlying law. The *Uniform Act* is an attempt to limit the occurrence of forum shopping and law selection by mandating application of a related limitation period. In three of the four scenarios described above, an approach which does not focus on the underlying law eliminates any assurance that the relationship between the statute of limitation and the underlying law will be preserved. There are different reasons for this depending on whether scenario two or scenarios three and four are being considered. Under scenario two, an approach which does not focus on the underlying law can result in application of the

110. Generally courts will only apply a conflicts analysis if there is an actual conflict. *See supra* note 107 and accompanying text. However, this general rule is not inconsistent with the approach advocated here because there is a conflict between the laws of the different states. This is merely a method for resolving the conflict between the statutes of limitation that focuses on a different set of laws.

111. *See infra* notes 145-67 and accompanying text.

conflicts methodology directly to the limitation issue.[112] In scenarios three and four, the approach selected will determine whether the limitation period is actually tied to the underlying law or whether the applicable limitation period is determined by some other means.

1. Scenario Two Situations

The situation in scenario two, is one where an interpretation of "substantively based" which does not focus on the underlying claim can result in application of the forum state's conflict methodology to the limitation issue. Such an interpretation is inconsistent with the purpose of the *Uniform Act* to prevent forum shopping and law selection.

There are several reasons why application of a state's conflicts methodology to the limitation issue is contrary to the purpose of the *Uniform Act.* In the most obvious case, a state's conflicts methodology could categorize statutes of limitation as procedural and apply its own. Thus, application of the state's conflicts methodology to the limitation issue would create an analysis and result identical to the traditional, disfavored approach.

Similarly, there is also a tendency to apply a forum's statute of limitation if the state's conflicts methodology calls for any type of interest analysis.[113] There are two interrelated reasons for this: the traditional parochial nature of statutes of limitation; and the nature of the interests invoked with respect to the limitation issue.

Because statutes of limitation were traditionally considered procedural, courts have historically viewed limitation periods as essential and applied sovereign laws of the forum in all circumstances.[114] Substantial efforts have been made to move courts away from this categorization to prevent perceived evils associated with it.[115] Nevertheless, the state interests that led to the categorization of statutes of limitation as procedural still exist. Perhaps the most significant of these are the concepts of sovereignty and of local control over

112. Although application of the conflicts methodology to the limitation issue can be avoided if the laws of a single state happen to govern both underlying and peripheral law, due to the nature of interest analysis it is just as likely that these issues will be governed by the laws of different states.

113. *See* Grossman, *supra* note 3, at 39 (observing that courts applying interest analysis to limitation issue tend to apply forum law); Smith, *supra* note 44, at 1048 (noting that true interest analysis is forum favoring).

114. Grossman, *supra* note 3, at 10–11.

115. *See supra* part I.

administration of the legislative plan.[116] The strong tradition for application of the forum's statute of limitation may explain the fact that despite scholarly works considering more varied interests, many courts are content to consider only the most parochial interests.[117]

The legislative purposes for enacting statutes of limitation are rarely well defined.[118] Moreover, cases and comments dealing with statutes of limitation rarely discuss or analyze their purpose or function.[119] Thus, a court applying an interest analysis to the limitation issue is permitted considerable leeway to identify and weigh state interests. One leading commentator lists three interests underlying limitation laws: (1) promoting achievement of justice, (2) providing stability to potential defendants, and (3) promoting efficient use of judicial resources.[120] These interests can be summarized as fairness, protection of defendants, and conservation of judicial resources.[121]

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116. One court put it this way:

> It is, of course, the forum that is best able to decide when claims are so stale that they will burden its dockets, and only the forum has a significant interest in insuring that its dockets are not burdened by such claims. In addition, the forum has an interest in the defendant's protection from stale claims and the plaintiff's pursuit of recovery. We believe that, in any case in which either party is a New Hampshire resident or the cause of action arose in this State, the sum of our above stated forum interests in applying our own statute, in combination with the benefit of simplification afforded by regular application of our own rule, will tip the choice of law balance in favor of the application of our own limitation period to cases tried here. Thus, in such cases, our courts may typically apply the relevant New Hampshire statute without appeal to our choice-influencing considerations.

Keeton v. Hustler Magazine, Inc., 549 A.2d 1187, 1192 (N.H. 1988).

117. *See* Grossman, *supra* note 3, at 39 (noting that "not all" courts demonstrate parochial attitude, implicitly recognizing that problem exists).

118. Wani, *supra* note 17, at 708–09.

119. Leflar, *supra* note 36, at 468.

120. *Id.* at 471. The Washington Court of Appeals in *Williams* cited the Leflar article when it identified the interests to be considered in its statute of limitation analysis. The court, however, described the interests mentioned by Leflar as (1) the protection of defendants from claims where defenses may no longer be available, and (2) prevention of possibly unjust judgments due to delays that result in the danger of unreliable determinations. Williams v. State, 76 Wash. App. 237, 246, 885 P.2d 845, 850 (1994). It is unclear why the court omitted the commonly invoked interest of conservation of judicial resources.

121. Courts and commentators identify additional interests. Leflar mentions an additional possibility: that selection of a limitation period may represent a policy of relative favoring of one cause of action over another. Leflar, *supra* note 36, at 471. A federal court in Washington, in Tomlin v. Boeing Co., 650 F.2d 1065, 1071 (9th Cir. 1981), felt that a statute of limitations was intended to discourage certain types of behavior:

> The notion that behavior will be affected by a statutory bar to an action is tenuous at best. The only way a longer or shorter statute of limitation could impact on behavior is if the actor anticipates the victim's failure to bring the claim within the allotted period of time. Absent some

Because the fairness consideration is of such a general nature and is naturally of universal concern, it is unlikely to have any impact on the question of whose statute of limitation to apply. The *Williams* court mentioned and dismissed the consideration, noting that either of Washington's or Oregon's statutes of limitation would serve for this purpose.[122] In fact, another commentator identifies only protection of defendants and conservation of judicial resources as state interests where statutes of limitation are concerned.[123]

An evaluation of each state's relative interest in conserving judicial resources will almost inevitably weigh in favor of applying the forum's statute of limitation. If the forum has a shorter limitation period, it will be interested in applying its shorter period to conserve judicial resources.[124] The foreign state will have no interest in having its longer limitation period applied because its judicial resources are not being employed. In situations where the forum's statute of limitation is longer than the foreign state's, absent other considerations or interests, the forum's law is still more likely to apply. This is because such a situation is viewed as one in which neither state has an interest in having its law applied.[125] A forum does not further its interest in conserving judicial resources by applying a longer statute of limitation, but the foreign state also has no interest in applying its shorter period. Under pure interest analysis, this type of situation is resolved in favor of applying the forum's law.[126]

A given state's interest in providing repose[127] for the defendant will often depend on whether the defendant resides in that state.[128] Frequently, courts only identify a forum interest in providing repose to a defendant if

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actuarial study indicating increased liability for longer limitation periods, no rational actor is going to alter his/her behavior on a contingency so speculative and beyond his/her control.

Id.

122. *Williams*, 76 Wash. App. at 246, 885 P.2d at 850.

123. Gary L. Milhollin, *Interest Analysis and Conflicts between Statutes of Limitation*, 27 Hastings L.J. 1, 10 (1975).

124. *Id.* at 11.

125. *Id.*

126. Bruce Posnak, *Choice of Law: A Very Well-Curried Leflar Approach*, 34 Mercer L. Rev. 731, 778 (1983) (noting that author would not necessarily follow this rule).

127. Although this word was used earlier in the context of a statute of repose, it is also a term of art which describes the situation in which a potential defendant no longer has to worry about liability because the defendant is entitled to assert the limitation bar as a defense.

128. Milhollin, *supra* note 123, at 10–11.

the defendant resides in the forum.[129] Furthermore, a foreign state's interest in providing repose to defendants who are residents of the foreign state will not be impaired if the forum state applies its own, shorter statute of limitation. Thus, the only situation in which a foreign state will be deemed to have a greater interest in providing repose to the defendant is when the defendant resides in that state and that state has a shorter limitation period than the forum.[130]

Because of the parochial nature of statutes of limitation, the flexibility which interest analysis affords courts, and the nature of the interests invoked by a conflict between statutes of limitation, it appears likely that the forum will apply its own limitation period. The expectation that a court will apply a cursory interest analysis to arrive at application of the forum's law has empirical support.

Consider the case of *New England Telephone & Telegraph Co.*,[131] where the Supreme Court of Massachusetts identified several interests to justify its conclusion to apply the forum's longer limitation period. Included among the interests cited by the court was the preference expressed by the State of Massachusetts that contracts be enforceable within six years of the accrual of the cause of action.[132] Another consideration was that Massachusetts could have, but had not, enacted broad legislation importing the statutes of limitation of other States.[133] Finally, the court noted that the predictability of the judicial process in providing answers with respect to completed transactions would be lessened by an abrupt change of law in this case.[134] The court was referring to the fact that Massachusetts was taking its first steps to discard the traditional notion that statutes of limitation were procedural.[135]

A court considering these types of interests does not depart very far, if at all, from the traditional characterization of statutes of limitation as procedural. The court's consideration of the forum legislature's preference for its statute of limitation is just the type of interest that will inevitably lead to application of the forum's law if the conflicts analysis is applied to the limitation issue. Others have supported this conclusion.

129. *Id.*

130. *Id.*

131. New England Tel. & Tel. v. Gourdeau Constr. Co., 647 N.E.2d 42 (Mass. 1995).

132. *Id.* at 45.

133. *Id.*

134. *Id.*

135. *Id.* at 46.

For example, one court refused to apply its conflict analysis to the limitation issue, pointing out that to do so would increase the opportunity for forum shopping.[136] A scholar noted that treating the limitation issue as an independent issue often resulted in application of the forum's statute of limitation.[137]

The Washington appellate court's analysis in *Williams* demonstrates that a Washington court might not handle the issue much differently. There the court erroneously applied the Washington conflicts methodology to the limitation issue.[138] After identifying fairness and protection of defendants as the relevant interests, the court concluded that Oregon's interest in seeing its liability barred by its shorter statute of limitation did not outweigh Washington's interest as co-defendant and the forum.[139] The fact that Washington was the forum appears to have tipped the scales in Washington's favor.

The cases above reflect an attitude and mode of analysis that will almost inevitably lead to application of the forum's limitation period. It is not necessary, however, that a court apply the forum's limitation period in all situations to imperil the goals of the *Uniform Act*. Damage enough is done if a court has wide latitude to apply the forum's law regardless of the state's connection to the underlying claim. The *Uniform Act* is an attempt to tie the limitation period and the law which is the basis for the claim together.[140] An interpretation of the Act which permits a court to apply the forum's law regardless of its connection to the basis for the claim is contrary to that purpose.

2. *Scenario Three and Four Situations*

The problem with automatically applying the forum's statute of limitation in a situation such as scenario four is that it does nothing to discourage forum shopping. The typical forum shopping situation does not necessarily involve any difference in substantive law. In *Keeton v. Hustler Magazine*,[141] for example, there was not necessarily any difference between the libel laws of the different states. Instead, the plaintiff sought out the New Hampshire court solely for its limitation

136. Henry v. Richardson-Merrell, Inc., 508 F.2d 28, 32 n.10 (3d Cir. 1977).

137. Grossman, *supra* note 3, at 39.

138. *See supra* notes 82–93 and accompanying text.

139. Williams v. State, 76 Wash. App. 237, 246, 885 P.2d 845, 850 (1994).

140. Wani, *supra* note 17, at 706–07, 714.

141. Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

period which exceeded the limitation period of any other state in the country.[142] If a state automatically applies its own statute of limitation when a claim is filed, the opportunity for forum shopping will persist, and the purpose of the Act will be thwarted.

In a scenario three, under an approach that does not emphasize underlying law, the resolution of conflicting peripheral issues determines the applicable statute of limitation. The problem with such an approach is not immediately obvious because the outcome of the conflict analysis depends on the nature of the interests invoked, which, in turn, depends on the peripheral issue. Nevertheless, it is clear that the nature of the interests invoked with respect to the peripheral issue will not necessarily be the same as the interests which would be invoked in an analysis of underlying law. Because the interests are not necessarily similar, the effect of focusing on the peripheral issue will be to tie the limitation period to the peripheral issue instead of the underlying law.

The most obvious example of the problematic result of an approach that focuses on peripheral law occurs when the peripheral law is a statute of repose. Because of the similarity between statutes of limitation and statutes of repose, courts often treat them identically.[143] This Comment discussed earlier the problems associated with a modern conflicts analysis applied to the limitation issue.[144] If the applicable statute of limitation is tied to a repose issue which is identical to a limitation issue, this is effectively the same as treating the limitation issue as a separate substantive issue. The result is an analysis more consistent with that espoused in the *Restatement* than the one selected by the Washington legislature. Furthermore, all of the problems associated with applying the conflicts methodology to the limitation issue discussed earlier would arise.

In the *Rice* case, the disposition of the repose issue may have been determinative of the issue of which state's limitation period to apply. If the interests identified are identical, then the two analyses are identical. However, even if different peripheral issues with different interests are involved, there may be problems with this approach. For example, it is difficult to argue that the determination of which state's statute of repose, or notice statute, applies really establishes a substantive basis for the

142. *Id.* at 773.

143. *See, e.g.*, Gantes v. Kason Corp., No. A-31, 1996 WL 408532 (N.J. July 23, 1996) (identifying New Jersey's two-year statute of limitation and Georgia's ten-year statute of repose, as well as interest in eliminating stale claims behind Georgia's statute of repose).

144. *See supra* notes 112–40 and accompanying text.

claim. Oregon's interest in receiving notice might overwhelm any Washington interest, even in a case occurring completely in Washington state. It would be difficult to justify applying Oregon's statute of limitation to bar all claims against all co-defendants based on the fact that Oregon law governs that single issue. Nevertheless, that could be the result under an approach which focuses on that peripheral issue, instead of establishing which state's law governs the underlying law.

The approach advocated here for handling the situations in scenarios three and four requires application of the conflicts methodology to laws between which no actual conflict exists. Although this might appear to entail difficulties, in fact the nature of the state interests invoked often do not require that an actual conflict exist to determine which state's interest is greater. Furthermore, existing cases demonstrate that this type of analysis has been successfully employed before.

An example is the seminal case of *Heavner v. Uniroyal, Inc.*, which was the first case to discard the procedural characterization and undertake an interest-type analysis to determine which state's law governed the underlying claim.[145] In *Heavner*, a North Carolina resident who bought a truck trailer with a Uniroyal tire mounted on one of its wheels brought a product liability suit against the tire manufacturer, Uniroyal, and the seller of the truck.[146] At issue was whether to apply New Jersey's recently adopted statute of limitation or North Carolina's shorter statute of limitation.[147] The court noted that the plaintiffs were residents of North Carolina, defendant was a New Jersey corporation, co-defendant was a Delaware corporation, the purchase took place in North Carolina, and the accident took place in North Carolina.[148] The court also stated in a footnote that the plaintiff obviously had been shopping for a forum in which its claim would not be barred and where it could avail itself of more favorable substantive law.[149] The court held that under New Jersey interest analysis, upon which it did not elaborate, New Jersey did not have sufficient interest to apply its own law.[150] It concluded that where there was not sufficient interest to apply New Jersey substantive law, it would not apply New Jersey's statute of limitation either.[151]

145. 305 A.2d 412 (N.J. 1973).

146. *Id.* at 414.

147. *Id.*

148. *Id.*

149. *Id.* at 414 n.3.

150. *Id.* at 418.

151. *Id.*

Although in *Heavner* the court implied that some conflict might exist between New Jersey and North Carolina's law to the extent that North Carolina may not have recognized strict liability,[152] it did not engage in an interest analysis to find North Carolina's law governed on any specific issue. It's conclusion that North Carolina's statute of limitation would govern, contrary to the traditional rule that a forum would apply its own limitation period, was based on a general finding of governing substantive law.[153] Much of what motivated the court was scholarly criticism of the rule that the forum apply its own limitation period.[154]

A general determination of the substantive basis for a claim also was carried out in *Cropp v. Interstate Distributor Co.*[155] In *Cropp*, the Oregon court considered a conflicts situation under the *Uniform Act*. The case involved an accident that took place on a highway in California.[156] Without identifying any particular difference between the driving laws of California and Oregon, the court noted that the plaintiff's allegations concerned the parties' rights and responsibilities on California highways, which were rights defined and regulated by California law.[157] The majority concluded that the claim was therefore based on California's substantive law.[158] The dissent encouraged an interest analysis which considered, among other things, the states' relative interests with respect to the statutes of limitation issue.[159] As might be expected, the majority held that the foreign statute of limitation governed while the dissent would have applied forum law.[160]

This type of analysis has been employed even in the ninth circuit. In an unpublished decision of the Ninth Circuit Court of Appeals, *Mansfield*

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152. *Id.* at 414 n.3.

153. *Id.* at 418.

154. *Id.* at 415–18.

155. 880 P.2d 464 (Or. Ct. App. 1994).

156. *Id.* at 465.

157. *Id.* at 465–66.

158. *Id.* at 466.

159. *Id.* at 466–68 (Rossman, J., dissenting).

160. The majority chastises the dissent in a footnote, stating:

> The dissent erroneously concludes that Oregon's substantive law is applicable because of Oregon's 'substantial interest' and California's 'negligible interest' in the outcome of the case. As stated above, the proper inquiry, under ORS 12.430 (the *Uniform Act*-eds.), is what law forms the substantive basis of the claims, not which state has a more substantial interest in the application of its law. The dissent criticizes us for concluding that plaintiffs' claims are substantively based on California law. It concludes that Oregon's limitation period applies, but never explains how plaintiff's claims could be substantively based on Oregon law.

Id. at 466 n.3.

v. Watson,[161] a patient sued her Oregon-based therapist for a rape which had occurred while the patient was working in Oregon.[162] The court, citing the Act, noted that "if the claim is substantively based upon the law of one state, the limitation period of that state applied."[163] Applying the *Restatement*'s significant relationship test, the court held that in order to determine which state's substantive law governs it must weigh (1) the contacts of each state with the cause of action, (2) each state's interest in having its law applied, and (3) the justifiable expectations of the parties.[164] The court proceeded to examine each state's contacts with the event, noting that the relationship developed in Oregon, the rape occurred there, and that both parties were Oregon residents.[165] The court found that Washington's only contact was with the plaintiff who moved there several years after the rape.[166] On this basis the court concluded that the district court had correctly held that Oregon had the most significant relationship and Oregon's statute of limitation governed.[167]

The court in *Mansfield* engaged in only a limited inquiry but the decision is intuitively appealing. The court engages in a more general comparison of contacts and interests to conclude that the claim was basically an Oregon claim brought to Washington. It focused on the underlying claim rather than applying the conflicts analysis to the limitation issue which might well have led to the application of Washington's statute of limitation. Such a result would have encouraged forum shopping to take advantage of Washington's longer limitation period in cases otherwise mostly related to Oregon.

VI. CONCLUSION

This Comment advocates an interpretation of the *Uniform Act* that focuses the analysis thereunder on the law which invokes the statute of limitation. The *Rice* court's failure to propose an analytical framework for identifying the law that forms the substantive basis for a given claim contributed to the difficulties of the *Williams* court. Under the choice of law method advocated in this Comment, a court would conduct the

161. Mansfield v. Watson, No. 90-35649, 1993 WL 74374 (Wash. Mar. 17, 1993) (unpublished disposition).

162. *Id.* at *1.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at *2.

analysis for a fact pattern identical to that in the *Rice* case differently. The court first would identify the law that forms the substantive basis for the claim. The *Rice* case was a tort-based product liability action.[168] There was a conflict between statutes of limitation so the court would apply Washington's conflict methodology to the product liability law of both states. The court would identify and weigh the relative contacts and interests of both states in the application of their product liability laws. Once a determination had been made as to which state's tort law applied, the court would apply that state's statute of limitation as well. Finally, the court would make a separate determination of the applicable statute of repose, which determination would not affect the applicable statute of limitation.

There are two basic models for selecting statutes of limitation now that the traditional procedural characterization has been discarded. The *Restatement*'s method treats each issue, including the limitation issue as an independent substantive issue. The *Uniform Act*, on the other hand, ties the limitation period to the law that forms the substantive basis for the claim. This Comment demonstrates how an approach that fails to focus on the law that invokes the statute of limitation tends to dissolve the link between the statute of limitation and the underlying law. The courts should adopt a rule that focuses on the underlying law, thereby effectuating the goal of the *Uniform Act* and the intent of the legislature in adopting it.

168. Rice v. Dow Chemical Co., 124 Wash.2d 205, 207, 875 P.2d 1213, 1214 (1994).