SALE OF ALCOHOL TO INTERSTATE TRAVELERS: PERSONAL JURISDICTION AND CHOICE OF LAW ANALYSES

*James B. Lewis**

TABLE OF CONTENTS

I. INTRODUCTION

The sale of alcohol to interstate travelers often results in a "mobile tort" dilemma involving jurisdictional and choice of law questions. Similar constitutional and policy considerations arise in these jurisdictional and choice of law decisions.[1] Both are concerned with providing a remedy for an injured plaintiff and avoiding unfair surprise to a potential defendant on a party level, as well as ensuring a predictable result on a jurisprudential level. An evaluation of the nexus between the forum or the state whose law is to be applied and the parties or activity involved is essential for each of these analyses.[2] Therefore, the same test should be employed for both the personal jurisdiction and choice of law determinations.

Although this Article alludes to party policy considerations of protect-

* B.A., University of North Dakota; J.D., University of Texas School of Law. James Lewis practices with the law firm of Hirsch, Glover, Robinson and Sheiness in Houston, Texas.

Mr. Lewis wishes to express his sincere appreciation to Gloria Salinas for her assistance in the editing of this Article.

1. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 91-93 (3d ed. 1986).
2. *Id.*

ing the defendant, preventing forum shopping, and providing judicial remedy for the plaintiff, an extensive analysis of policy questions is beyond the scope of the discussion. Similarly, jurisprudential considerations of certainty, concern for precedent, ease of application, and flexibility, although ever-present, are not discussed at great length. More emphasis is given to a simple determination of which rules are consistent with traditional notions of justice and equity.

This Article discusses the jurisdictional and choice of law considerations involved in tort cases arising from the sale of alcohol to interstate travelers. An extensive reiteration of the history of in personam jurisdiction is not necessary for the purposes of this Article, but the author offers some background information to clarify his proposals.

Finally, because the jurisdictional analysis employed in *World-Wide Volkswagen v. Woodson*,[3] *West American Insurance Co. v. Westin, Inc.*,[4] and *Janssen v. Johnson*[5] often leads to inconsistent results, this Article suggests an alternative approach.

II. *World-Wide Volkswagen v. Woodson*: In Personam Jurisdiction and the Mobile Torts Dilemma

The minimum contacts doctrine espoused in *International Shoe Co. v. Washington*[6] permitted jurisdiction over an expanding number of defendants. The likelihood of overinclusion was most evident in those cases in which a business presumably created a jurisdictional contact by providing products or services to nonresidents, who subsequently sued the business in another forum. Business establishments needed some assurance that they would not be subjected to roaming torts for which jurisdiction traveled with the product.[7]

To illustrate, consider the popular hypothetical in the case of *Erlanger Mills v. Cohoes Fibre Mills*.[8] The court noted the hesitancy that a California tire dealer might feel if asked to sell a set of tires to a tourist with Pennsylvania license plates, knowing that he might be required to defend a suit for damages in the courts of Pennsylvania if an accident resulted from a defect in the tires.[9] The lesson expounded by the court in *Erlanger Mills* is that

---

3. World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980).
4. West Am. Ins. Co. v. Westin, Inc., 337 N.W.2d 676 (Minn. 1983).
5. Janssen v. Johnson, 358 N.W.2d 117 (Minn. Ct. App. 1984).
6. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
7. This "traveling jurisdiction" problem frequently presented itself in cases involving in rem jurisdiction. If the res was a debt, then jurisdiction existed wherever the debtor was found. The Court rejected this theory in 1977, holding that in rem jurisdiction was subject to the minimum contacts requirement to the same extent as in personam jurisdiction. Shaffer v. Heitner, 433 U.S. 186 (1977).
8. Erlanger Mills v. Cohoes Fibre Mills, 239 F.2d 502 (4th Cir. 1956).
9. *Id.* at 507.

jurisdiction should not arise from the mere foreseeability that the actions of a business may have consequence in some other state through the movements of a customer over whom the business has no control.[10]

Despite the "purposeful availment" language in *Hanson v. Denckla*,[11] which appeared to eliminate the risk of a defendant being haled into a state merely because it was generally foreseeable that a customer might take his or her products into that state, the Supreme Court again faced this issue in *World-Wide Volkswagen v. Woodson*, a case involving a "mobile tort." The plaintiffs were New York residents who bought an automobile from a New York dealer.[12] A year later, while en route to their new residence in Arizona, the plaintiffs were involved in a car accident in Oklahoma.[13] Plaintiffs subsequently sued both the New York dealer and the automobile distributor in Oklahoma state court.[14]

Because the nature of the defendants' contacts was the primary concern, the Court found Oklahoma's interest—the convenience of access to witnesses and evidence, and the plaintiff's litigation preference—insufficient to bestow jurisdiction.[15] The Court affirmed the denial of Oklahoma jurisdiction on the ground that the only contacts between the defendants and Oklahoma were created by the unilateral acts of the plaintiffs.[16] Refusing to find jurisdiction based on the mere general foreseeability that a customer might take the product into any of the fifty states, the Court stated, "Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel."[17]

The Court made an explicit distinction between those situations in which the manufacturer or distributor overtly attempts to establish a market for its products in the forum state, and the situation in which the contact is exclusively consumer-based.[18] The forum state could maintain jurisdiction over a corporation or business that "delivers its products into a stream of commerce with the expectation that they will be purchased by consumers in the forum State."[19]

Although the Court appeared to condition the jurisdictional question on whether the contacts with the forum state were consumer-based or distribu-

---

10. A "general foreseeability" test places almost no limits on the scope of jurisdiction. The Supreme Court attempted to eliminate this problem in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

11. Hanson v. Denckla, 357 U.S. 235 (1958).

12. World-Wide Volkswagen v. Woodson, 444 U.S. at 288.

13. *Id.*

14. *Id.*

15. *Id.* at 294.

16. *Id.* at 298.

17. *Id.* at 296. *But see id.* at 314-16 (Marshall, J., dissenting) (stressing unique mobility of automobile); *id.* at 318-19 (Blackmun, J., dissenting) (same).

18. *Id.* at 297.

19. *Id.* at 297-98.

tor-based, the Court never openly delineated this test for jurisdiction. The Court further added to the confusion by asserting that jurisdiction would lie whenever a business "purposefully avails itself of the privilege of conducting activities within the forum state,"[20] but no jurisdiction would lie if the contact with the forum state is an "isolated occurrence."[21] This test, however, falls far short of resolving the problem because one can envision the situation in which many consumers buy products from an out-of-state dealer and bring the products into the forum state. Whether this scenario satisfies the purposeful availment test is unclear, but the out-of-state purchases certainly are not isolated occurrences.[22]

Although distributor-based contacts are more likely to be sufficient for jurisdiction, the Court did not wholly rule out jurisdiction founded on consumer-based contacts. The lower courts still have some discretion in determining the reach of jurisdiction, depending on the individual facts.

III. Alcohol Sales to Interstate Travelers: Jurisdiction

The consumer-based, unilateral contacts problem arises when a consumer becomes intoxicated in a tavern in one state and subsequently causes an accident in another state. For example, in *Young v. Gilbert*,[23] the New Jersey Superior Court held that the defendant, a New York bowling alley and tavern, had established the requisite minimum contacts with the forum state so that the maintenance of suit in New Jersey did not offend traditional notions of fair play and substantial justice.[24] The New Jersey court found jurisdiction existed despite the fact that the defendant's sole business location was in New York and its "sole substantial contact with New Jersey" was the sale of alcoholic beverages to a New Jersey resident, who became intoxicated at the defendant's New York cocktail lounge and subsequently was involved in an automobile collision in New Jersey while driving home.[25]

Although the precise holding in *Young v. Gilbert* relied on the sale of alcoholic beverages, the court noted that the defendant tavern purchased supplies in New Jersey, maintained life insurance coverage for its employees in New Jersey, and regularly served New Jersey customers in the tavern because of the close proximity and lower drinking age.[26] The court also noted that the New Jersey tavern would not be inconvenienced if suit was

---

20. *Id.* at 297 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
21. *Id.*
22. *Id.*
23. Young v. Gilbert, 121 N.J. Super. 78, 296 A.2d 87 (Law Div. 1972).
24. *Id.* at ____, 296 A.2d at 90-91 (quoting International Shoe Co. v. Washington, 326 U.S. 310 (1945)).
25. *Id.* at ____, 296 A.2d at 89.
26. *Id.* The court appeared to adopt a foreseeability test to confer jurisdiction. In dictum, the court discussed the "reasonable foreseeability" factor at great length. *See id.* at ____, 296 A.2d at 91-92.

maintained in New York, because the tavern was no more than seven miles from the border between the states.[27] Furthermore, the court explicitly acknowledged the "steady trend toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents."[28]

A similar rationale was espoused by the Minnesota Supreme Court in *Blamey v. Brown*,[29] which held that application of the Minnesota long arm statute[30] to assert jurisdiction over a nonresident defendant was consistent with due process.[31] The court listed five criteria applicable in making this determination: (1) the quantity of contacts with the forum state; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with those contacts; (4) the interest of the forum state in providing a forum; and (5) the convenience of the parties.[32]

Although no specific percentage of business with Minnesota residents was shown, the court concluded that sufficient contacts for the exercise of jurisdiction existed due to the proximity of the defendant's Wisconsin tavern to the Minnesota border and to an interstate highway leading to a large Minnesota urban area, as well as Wisconsin's more liberal liquor regulations.[33] The court also imputed constructive knowledge of these contacts to the defendant. The other due process criteria were discussed individually, but throughout the discussion the "reasonable foreseeability" factor was

---

27. *Id.* at ____, 296 A.2d at 91. The court noted the policy considerations of convenience and foreseeability as if attempting to bolster its valid "minimum contacts" decision. *Id.*

28. *Id.* (citing Corporate Dev. Specialists, Inc. v. Warren-Teed Pharmaceuticals, Inc., 102 N.J. Super. 143, 149, 245 A.2d 517, 520 (App. Div. 1968)).

29. Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980).

30. The statute in effect at the time provided, in part: "Subdivision 1. As to a cause of action arising from any acts enumerated in this subdivision, a court of this state with jurisdiction of the subject matter may exercise personal jurisdiction over any . . . non-resident individual [who]: . . . (c) Commits any tort in Minnesota causing injury or property damage . . . ." MINN. STAT. ANN. § 543.19(1)(c) (1976). The defendant claimed that the statute allowed the exercise of personal jurisdiction over a nonresident if the nonresident: "(d) Commits any tort outside of Minnesota causing injury or property damage within Minnesota if, (1) at the time of the injury, solicitation or service activities were carried on within Minnesota by or on behalf of the defendant, or (2) products, materials or things processed, serviced or manufactured by the defendant were used or consumed within Minnesota in the ordinary course of trade." Blamey v. Brown, 270 N.W.2d at 886-87 (citing MINN. STAT. ANN. § 543.19(1)(d) (West 1976)).

Citing Anderson v. Luitjens, 247 N.W.2d 913 (Minn. 1976), the court held that Minnesota Statutes section 53.19, subdivision 1(c) was applicable to the case rather than subdivision 1(d), because the test for whether or not a tort had occurred "in Minnesota" depended on whether damage from the alleged tortious conduct resulted in Minnesota. Blamey v. Brown, 270 N.W.2d at 887. Although this holding seems clearly contrary to the specific language of the statute, a discussion of the wisdom of the court's holding on this issue is beyond the scope of this Article.

31. Blamey v. Brown, 270 N.W.2d at 887-88.

32. *Id.* at 887 (citing Aftanase v. Economy Baler Co., 343 F.2d 187, 197 (8th Cir. 1965); Franklin Mfg. Co. v. Union Pac. R.R. Co., 297 Minn. 181, 210 N.W.2d 227 (1973)). This five factor test for personal jurisdiction was specifically adopted by the Minnesota Supreme Court in Dent-Air, Inc. v. Beech Mountain Air Serv., Inc., 332 N.W.2d 904 (Minn. 1983).

33. Blamey v. Brown, 270 N.W.2d at 888.

prevalent and controlled as to the third criterion, "the source and connection of the cause of action with those contacts."[34] The opinion in *Blamey*, although far from perfect, arrived at a conclusion consistent with traditional notions of fair play and substantial justice, considering all of the circumstances.[35]

The same five-factor test was employed in *Defoe v. Lawson*,[36] but *Defoe* was more easily determined on the facts. In *Defoe* a Minnesota court exercised jurisdiction over a defendant who operated a tavern in Mont du Lac, Wisconsin, a town located on a narrow peninsula of Wisconsin that juts into Minnesota and is accessible only by travel over Minnesota roads.[37] Other jurisdictional facts were that the defendant advertised in a regional directory knowing that it reached primarily Minnesota residents, maintained a bank account in Minnesota, and purchased linen, meat, food, and insurance from Minnesota companies.[38]

As previously noted, courts have taken a more restrictive view of personal jurisdiction since the Supreme Court decision in *World-Wide Volkswagen*. *West American Insurance Co. v. Westin, Inc.* illustrates the potential for unfair results in applying the *World-Wide Volkswagen* test. In *West American* two Minnesota residents drove to a Wisconsin tavern located near the border between the two states because they were too young to drink in Minnesota.[39] On their return trip, they were involved in an accident in Minnesota, resulting in personal injuries and property damage.[40] Their insurance company sued the Wisconsin tavern in a Minnesota court for common law negligence in making an illegal sale of alcohol.[41] The Minnesota Supreme Court noted that Minnesota would be the more convenient forum, and because of differences in the dram shop laws of Minnesota and Wisconsin, the plaintiff could obtain a remedy only in Minnesota.[42] The court nevertheless held there was no jurisdiction.[43]

Pursuant to the court's interpretation of the *World-Wide Volkswagen* "purposeful availment" test, the Minnesota Supreme Court was compelled to overrule its previous decisions in *Blamey v. Brown*[44] and *Anderson v.*

---

34. *Id.*

35. The court noted that the defendant, who resided in Arizona at the time, was no more inconvenienced if haled into a Minnesota forum than he would have been if haled into a Wisconsin forum. *Id.* The defendant should have foreseen the possible consequences of his actions, considering Wisconsin's more liberal liquor laws. *Id.* Furthermore, Minnesota had a strong interest in providing a remedy for its resident. *Id.*

36. Defoe v. Lawson, 389 N.W.2d 757 (Minn. Ct. App. 1986).

37. *Id.* at 759.

38. *Id.*

39. West Am. Ins. Co. v. Westin, Inc., 337 N.W.2d 676, 677 (Minn. 1983).

40. *Id.*

41. *Id.*

42. *Id.* at 681.

43. *Id.*

44. Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978).

Luitjens[45] because those cases premised jurisdiction on: (1) the foreseeability that the sale of liquor by a border city tavern would result in an accident in Minnesota; (2) Minnesota's strong interest in providing a forum; and (3) the insignificance of any inconvenience to the defendant from litigating in Minnesota.[46] The court in *West American* held that these interests, standing alone, did not support the exercise of personal jurisdiction over a foreign defendant because those interests did not relate to the defendant's contacts with Minnesota.[47] The court found that the defendant's only demonstrable contact with the forum state was the plaintiff-insured's "unilateral activity" in driving to Minnesota, which was insufficient to support jurisdiction.[48] The critical relationship was "defined by the defendant's contacts with the forum state, not by the defendant's contacts with the residents of the forum."[49]

Although the court in *West American* admitted that the accident in Minnesota was probably foreseeable, the court rejected this type of foreseeability as a basis of jurisdiction.[50] Relying on *World-Wide Volkswagen*, the court stated:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.[51]

The court then addressed the argument that the decisions in *Anderson* and *Blamey* provided such foreseeability. The court explained that the argument failed because it was essentially circular.[52] The ultimate question in *West American* was whether *Blamey* and *Anderson* were still good law.[53]

Clearly, the decision in *West American* did not hinge on whether the defendant could "reasonably anticipate being haled into the forum" since, even absent the *Anderson* and *Blamey* decisions, a border city tavern in a state with more liberal liquor laws should reasonably anticipate being haled into court in its sister state. Rather, the focal point of the decision was the "purposeful availment" standard precipitated by *Hanson* and *World-Wide Volkswagen*.[54]

---

45. Anderson v. Luitjens, 311 Minn. 203, 247 N.W.2d 913 (1976).
46. West Am. Ins. Co. v. Westin, Inc., 337 N.W.2d at 679.
47. *Id.*
48. *Id.* at 681.
49. *Id.* at 679 (citing Hanson v. Denckla, 357 U.S. 235 (1958)).
50. *Id.*
51. *Id.* (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).
52. *Id.* at 680.
53. *Id.* ("To answer this query by arguing that after *World-Wide*, these cases make jurisdiction by Minnesota courts 'reasonably foreseeable' is to say that *Blamey* and *Anderson* are valid because *Blamey* and *Anderson* are valid.").
54. The court cited Kreisler Mfg. v. Homstad Goldsmith, Inc., 322 N.W.2d 567 (Minn. 1982), which described the "purposeful availment" standard adopted in *Hanson v. Denckla* as

West American and *Blamey* are nearly indistinguishable on the facts pertaining to jurisdiction.[55] The only significant difference is timing. The result in *West American* is unfair. If residents of a bordering sister state account for a significant portion of the defendant's business, there is no reason to apply the unilateral contacts rule to deny jurisdiction. The overly restrictive characterization of the defendant's contacts with the forum should not entirely override the interests of the plaintiff and the forum state.

However, consistent with the new jurisdictional analysis espoused in *West American*, the Minnesota Court of Appeals held in *Janssen v. Johnson* that mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.[56] The court of appeals relied heavily on the *West American/World-Wide Volkswagen* rationale in denying jurisdiction. *Janssen* presented more difficulty than *West American* because the defendants in *Janssen* maintained contact with Minnesota through the purchase of some supplies from a St. Paul company.[57] Nevertheless, the court in *Janssen* held that an isolated purchase of goods from a Minnesota seller by a nonresident was not enough to confer jurisdiction.[58]

The key in *West American* and *Janssen* appears to be that the defendant had no purposeful or deliberate behavior that connected the defendant to the forum state and related in some way to the accident. Advertising in the forum state is one example of purposeful and deliberate behavior that relates to the accident. The court in *Janssen* emphasized the fact that although the previous owners of the tavern advertised in Minnesota newspapers to attract Minnesota patrons, the new owners did not advertise outside Minnesota.[59]

Although the defendants in *West American* and *Janssen* did not "purposefully avail" themselves of the privileges and laws of the forum state in the strictest sense, both were aware of the Minnesota patronage due to the border location and more liberal liquor laws. Fairness requires that Minnesota maintain jurisdiction over these defendants. These cases are perfect examples of the need for relaxation of the recent jurisdictional restrictions.

The emergence of a more relaxed standard may be found in *BLC Insur-*

---

follows: "In addition, the defendant must, by his activities in the forum state, have invoked both the benefits and the protections of the forum state's law . . . ." West Am. Ins. Co. v. Westin, Inc., 337 N.W.2d at 680.

55. The taverns in both cases were located on the same street of the same city.

56. Janssen v. Johnson, 358 N.W.2d 117, 119 (Minn. Ct. App. 1984) (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958)). The facts in *Janssen* were so similar to those in *West American* that a statement of the facts would be redundant.

57. *Id.* at 120.

58. *Id.* (citing Leoni v. Wells, 264 N.W.2d 646, 647 (Minn. 1978)).

59. *Id.* at 118.

ance Co. v. Westin, Inc.[60] In this case, the Minnesota Court of Appeals asserted jurisdiction pursuant to the "purposeful availment" standard. The facts of *BLC* are nearly identical to those in *West American*. The court in *BLC* distinguished *West American* from *Janssen*, however, noting that the decisive fact was the active solicitation of Minnesota customers by advertising on a Minnesota radio station.[61] Although the same tavern was involved in both *BLC* and *West American*, the accident in *West American* occurred a year before the radio advertising.[62] Thus, the purposeful behavior of the defendant in its Minnesota advertising program was such that the defendant should have reasonably anticipated being haled into a Minnesota court.[63]

Similarly, in *Wimmer v. Koenigseder*,[64] Wisconsin tavern owners who regularly advertised in an Illinois newspaper to make Illinois residents aware of their facilities and the advantage of Wisconsin's lower legal drinking age were amenable to suit in Illinois under the "transaction of any business" provision of the Illinois long arm statute. Under the circumstances, the tavern owners could reasonably foresee that serving alcoholic beverages to Illinois residents might lead to automobile accidents in Illinois.[65] The court noted that, for purposes of the Illinois long arm statute, the physical presence of the defendant is not necessary for the commission of a tortious act within Illinois because the place of a wrong is where the last event that renders the actor liable takes place. Thus, the fact that the alleged sale of alcoholic beverages to the driver of an automobile occurred in Wisconsin did not preclude the exercise of Illinois jurisdiction over the Wisconsin tavern owners when the automobile crash and injury occurred in Illinois.[66] The Illinois Supreme Court reversed the appellate decision in *Wimmer*, but not on a jurisdictional basis.[67]

In *Ling v. Jan's Liquors*[68] the Kansas Supreme Court similarly found jurisdiction under the provisions of the Kansas long arm statute, which provides jurisdiction over any person who commits a "tortious act within the state."[69] Under the statute, suit could be brought in Kansas to recover dam-

---

60. BLC Ins. Co. v. Westin, Inc., 359 N.W.2d 752 (Minn. Ct. App.), *cert. denied*, 474 U.S. 844 (1985).

61. *Id.* at 754-55.

62. *Id.* at 755-57.

63. *Id.* at 757 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

64. Wimmer v. Koenigseder, 128 Ill. App. 3d 157, 470 N.E.2d 326 (1984), *rev'd on other grounds*, 108 Ill. 2d 435, 484 N.E.2d 1088 (1985).

65. *Id.* at ____, 470 N.E.2d at 330.

66. *Id.* at ____, 470 N.E.2d at 331.

67. Wimmer v. Koenigseder, 108 Ill. 2d 435, ____, 484 N.E.2d 1088, 1093 (1985) ("We conclude that on the facts presented the plaintiff has not and cannot state a valid cause of action against the defendants and therefore is precluded from recovery against them in this action, even assuming that the Illinois court has jurisdiction over them.").

68. Ling v. Jan's Liquors, 237 Kan. 629, 703 P.2d 731 (1985).

69. *Id.* at ____, 703 P.2d at 733-34. Section 60-308(b)(7) of the Kansas long arm statute

ages for injuries occurring within the state that resulted from negligent conduct outside the state.[70] The court in *Ling* did not delve into the entire gamut of due process considerations. Rather, the court stated only that the holding was consistent with the court's "oft-repeated assertion that the long-arm statute be liberally construed to assert jurisdiction over the nonresident defendants to the full extent permitted by the due process clause of the Fourteenth Amendment to the U.S. Constitution."[71]

The result in *Ling* would probably not be reached under a *West American/World-Wide Volkswagen* due process analysis, because the interpretation of the long arm statute provision of "tortious act within the state" does not appear to satisfy the purposeful availment standard. The result in *Wimmer*, on the other hand, does satisfy the *World-Wide Volkswagen* test because the court specifically found that the Wisconsin tavern owners invoked the benefits and protections of Illinois law by soliciting business from Illinois residents.[72]

The foregoing discussion elicits some interesting questions about the equity of the *West American* approach to jurisdiction in tavern liability cases. For example, a tavern could advertise on Wisconsin radio stations and in Wisconsin newspapers just a few miles from the Minnesota border and avoid the jurisdiction of Minnesota courts. But if the tavern advertised a few miles away in Minnesota, presumably reaching the same consumer market, the tavern would be subject to the jurisdiction of Minnesota courts. This scenario seems inequitable and inconsistent with traditional notions of fair play and substantial justice. After all, radio waves do not stop at state borders. The *West American* and *Janssen* courts completely disregarded any "reasonable foreseeability" aspect of the purposeful availment test for jurisdiction.

The "purposeful availment" analysis in *West American* and *Janssen* suggests that a "contract" of sorts must exist with residents of the forum state. While radio advertising on a Wisconsin station close to the border that reaches Minnesota residents would not be a "purposeful availment," radio advertising on a Minnesota station that reaches virtually the same listening audience would be a "purposeful availment." This contract with a Minnesota radio station seems less closely-related to the tort of illegally serving the Minnesota residents than the actual contact with the residents

---

uses nearly the same language as the Minnesota long arm statute cited in *Blamey*. *See supra* note 30. Nevertheless, the court in *Ling* deemed section 60-308(b)(7) applicable to only products liability cases and concluded that section 60-308(b)(2), which provides jurisdiction over any person who commits a "tortious act within this state," applied because the term "tortious act" implied the whole continuum of actions involved, rather than a single act. Ling v. Jan's Liquors, 237 Kan. at ___, 703 P.2d at 733-34. *See infra* note 75.

70. Ling v. Jan's Liquors, 237 Kan. at ___, 703 P.2d at 734.

71. *Id.* (citing Misco-United Supply, Inc. v. Richards of Rockford, Inc., 215 Kan. 849, 528 P.2d 1248 (1974); Woodring v. Hall, 200 Kan. 597, 438 P.2d 135 (1968)).

72. Wimmer v. Koenigseder, 128 Ill. App. 3d 157, ___, 470 N.E.2d 326, 330 (1984).

through advertising (whether in Minnesota or Wisconsin) and the serving of alcohol to Minnesota patrons.

IV. Proposal: Constructive Commercial Cognizance Test

The results in *West American* and *Janssen* are unjust. In each case, the decision relied heavily upon *World-Wide Volkswagen*. Both cases imply that a defendant will only "reasonably anticipate being haled into the forum state's court" if the defendant "purposefully avails itself of the privilege of conducting activities with the forum state."[73] Furthermore, nonpurposeful and nondeliberate behavior does not invoke jurisdiction even where there was a form of contact with the forum.[74] Neither case appears to regard the operation of a tavern in a state with liberal liquor laws, located in a border city near a large metropolitan area in the forum state to be "purposeful and deliberate behavior" such that a defendant should reasonably anticipate being haled into court in the forum state, even when the defendant knows or should know of substantial patronage from residents of the forum state. Perhaps the key is not whether the activity is "purposeful and deliberate," but rather whether such purposeful and deliberate activity is conducted within the forum state.[75]

The inconsistent results in *BLC* and *West American*, based solely on the existence of radio advertising within Minnesota, uproot any traditional notion of equity. The plaintiff in *West American* was left with no remedy, while just two years later, the plaintiff in *BLC* was allowed to maintain suit merely because the same defendant tavern began advertising on a Minnesota radio station in the interim. This distinction violates the principle of "substantial justice."

The framework of "traditional notions of fair play and substantial jus-

---

73. *See, e.g.*, Janssen v. Johnson, 358 N.W.2d 117, 119 (Minn. Ct. App. 1984); West Am. Ins. Co. v. Westin, Inc., 337 N.W.2d 676, 680 (Minn. 1983).

74. West Am. Ins. Co. v. Westin, Inc., 337 N.W.2d at 680.

75. This seems inconsistent with cases that have given the term "tortious act" a broad interpretation, deeming the term to imply the whole continuum of actions involved rather than a single act. *See, e.g.*, Jack O'Donnel Chevrolet, Inc. v. Shankles, 276 F. Supp. 998 (N.D. Ill. 1967); Vandermee v. District Court, 164 Colo. 117, 433 P.2d 335 (1967); Gray v. American Radiator & Sanitary Corp., 22 Ill. 2d 432, 176 N.E. 761 (1961). Furthermore, in *Ling v. Jan's Liquors*, the Kansas Supreme Court held that the term "tortious act" included both the sale of the liquor in Missouri and the injury to the plaintiff in Kansas because the tortious act was completed in Kansas. Ling v. Jan's Liquors, 237 Kan. 629, ____, 703 P.2d 731, 734 (1985).

The courts in *West American* and *Janssen*, however, interpret "purposeful availment" as restricted to active solicitation of business in the forum state, rather than any purposeful or deliberate activity within the "whole continuum of actions" involved in the tortious act. This interpretation is highly unfair because the actual sale of alcohol to the nonresident is more closely related to the accident than advertising within the forum state. Because the sale occurred in the sister state and the advertising occurred in the forum state, however, the courts in *West American* and *Janssen* may have construed the sale as a relationship only with the nonresident plaintiff and the advertising as a relationship with the forum state.

tice" allows room for a more flexible standard of jurisdiction. This Article proposes a "constructive commercial cognizance" test,[76] which falls within the bounds of a more liberal construction of the "purposeful availment"[77] test than espoused in *West American* and *Janssen*.

A nonresident defendant has constructive commercial cognizance if the defendant is aware or should be aware of a substantial quantity of commercial activity between the defendant's business and residents of the forum state. Jurisdiction is properly exercised over the nonresident defendant if the defendant has constructive commercial cognizance and the commercial activity has a significant relationship to the tortious conduct or injury arising therefrom. The difficulty in applying this test arises from the determination of what constitutes a "substantial quantity of commercial activity" and what constitutes a "significant relationship to the tortious conduct or injury arising therefrom."

To illustrate this test's application, consider the case of *Anderson v. Luitjens*,[78] in which the plaintiff, Anderson, was injured in an automobile accident about three miles north of the Iowa-Minnesota border. Anderson was a passenger in the car owned by Luitjens and driven by Johnson.[79] Prior to the accident, seventeen-year-old Johnson had been served alcoholic beverages at defendant Denker's tavern in Lake Park, Iowa.[80] Lake Park is located about three miles south of the border.[81] According to Denker, eight percent of his business consisted of sales to Minnesota residents.[82] Applying the constructive commercial cognizance test, first, there was actual cognizance of the business activity. Second, most drinking establishments proba-

---

76. Although the author admits the conscious use of alliteration, the phrase does have substantive value beyond aesthetics.

77. A more liberal construction of "purposeful availment" is constructive knowledge of frequent contact with residents of the forum state and an obvious appreciation of that conduct, which manifests itself in active solicitation of the contact inside or outside the forum state. This test, however, rejects the concept that frequent contact with residents of the forum state and contact with the forum state itself are wholly distinct contacts. Furthermore, it is not at all difficult for a business in a border city to actively solicit nonresident patronage without advertising in the forum state. For example, billboard advertising in a Wisconsin city on the Minnesota border, which is not specifically targeted to certain patrons, could be considered active solicitation of the Minnesota patrons. Similarly, advertising on a Wisconsin radio station does not reach only Wisconsin patrons because the airwaves do not stop at the state line.

Furthermore, some business locations are chosen precisely to attract consumers from other states. For purposes of asserting jurisdiction, the significant factor often is not whether the dealer "purposefully" conducts activities in another state, but rather whether the dealer receives a sizable benefit from the connection with another state.

78. Anderson v. Luitjens, 311 Minn. 203, ____, 247 N.W.2d 913, 918 (1976). The court in *Anderson* addressed only the issue of jurisdiction and expressed no views on the choice of law question.

79. *Id.* at ____, 247 N.W.2d at 914.

80. *Id.*

81. *Id.*

82. *Id.* at ____, 247 N.W.2d at 916.

bly consider eight percent of their business to be a "substantial" portion. Last, the relationship between the business activity of selling alcohol to an interstate traveler and a subsequent accident is obvious. Not all cases, however, fit the test this neatly. Thus, a more precise analysis is in order.

Under the constructive commercial cognizance approach, jurisdiction can be asserted over the foreign defendant if: (1) the defendant actively solicits business from customers from the forum state;[83] or (2) the defendant is aware or should be aware of a substantial quantity of commercial activity between the defendant's business and residents of the forum state; and (3) in either (1) or (2), the "contact" activity has a significant relationship to the accident or injury arising therefrom.

If the first test of the constructive commercial cognizance approach is satisfied, then the quantity of commercial activity need not be "substantial," because the foreign defendant has freely chosen to avail himself of the privileges of the forum state. That is, if a business owner solicits business "either through salespersons or through advertising reasonably calculated to reach the [forum] [s]tate,"[84] the quantity of business the defendant ultimately derives from the forum state should be immaterial. This "purposeful availment" standard does not allow jurisdiction where the foreign defendant merely purchases supplies or insurance in the forum state, because the "contact" activity must have a significant relationship to the accident or injury arising therefrom.

Further, the foreign defendant's knowledge of the "business solicitation" and the type of that solicitation may be considered in determining whether the nonresident "actively solicits business from customers from the forum state."[85] In *Erickson v. Spore*,[86] for example, the only evidence of solicitation of business from Minnesota residents by the Wisconsin bar owner prior to the day of the accident was advertising in the Tri-County Advertiser, which circulated largely in Wisconsin, but also in a small part of Minnesota.[87] The defendant stated that after he advertised in this Wisconsin publication, he was informed that "there was some little corner around Lakeland where 30 or 40 copies were circulating in Minnesota. That was the first [he] had known [of] that."[88]

The United States District Court for the District of Minnesota ruled that the record before them did not show a "purposeful availment" of "the

---

83. This is the method of establishing jurisdictional contacts recognized by World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) and West Am. Ins. Co. v. Westin, Inc., 337 N.W.2d 676, 681 (Minn. 1983). This Article further proposes, however, that the "active solicitation of business from customers from the forum state" need not be carried out within the forum state. *See supra* note 77.

84. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 295.

85. *Id.*

86. Erickson v. Spore, 618 F. Supp. 1356 (D. Minn. 1985).

87. *Id.* at 1358.

88. *Id.* at 1358 n.1.

privilege of conducting activities within the forum state."[89] The court noted that the relationship between the forum and the litigation rested entirely on the plaintiff's residence in Minnesota because the accident occurred in Wisconsin.[90]

Given a factual situation similar to that in *Erickson*, the court should proceed past the first "active solicitation" part of the constructive commercial cognizance approach and consider whether the defendant was aware or should have been aware of a substantial quantity of commercial activity between the defendant's business and residents of the forum state. This is more equitable, because the defendant in *Erickson* was not even aware of the slight circulation of his advertisements in Minnesota until after he had placed the ads. Although the defendant's constructive cognizance of this interstate business activity seems likely due to the tavern's close proximity to Minnesota, these facts were not developed by the plaintiff's counsel.[91]

As a factor in denying personal jurisdiction, the court in *Erickson* stated that the connection between the accident and defendant's advertising in Minnesota was indirect at best, because the plaintiff did not assert that defendant's advertising had anything to do with Erickson's decision to visit defendant's tavern.[92] This restriction, which is based on the connection between the advertising and the plaintiff, places an unduly heavy burden of proof on the plaintiff. Whether the intoxicated person visited the tavern in response to defendant's advertising is irrelevant in determining whether the defendant purposefully availed himself of the benefits of the laws of the forum state. Furthermore, if the intoxicated person died in the accident, the plaintiff could never prove whether the intoxicated person heard or saw the advertisement.

The business solicitation should not be required to be "regular" or "continuous" in order to assert personal jurisdiction over a nonresident defendant who actively solicits business in the forum state to induce the forum's residents to patronize the defendant's business. This was the ill-reasoned holding of the unpublished case, *Koziol v. Dialtone Lounge*.[93] The United States District Court for the District of Massachusetts held that even though the Connecticut tavern, which was located only five miles from the Massachusetts border, advertised a drink special on both a Massachusetts radio station and in a Massachusetts newspaper with the knowledge and desire that Massachusetts residents would cross the border to patronize the defendant's lounge, the court could not exercise personal jurisdiction over the defendant because the plaintiff failed to demonstrate that the busi-

89. *Id.* at 1359-60.

90. *Id.*

91. *See generally* Erickson v. Spore, 618 F. Supp. 1356 (D. Minn. 1985).

92. *Id.* at 1360.

93. Koziol v. Dialtone Lounge, No. 84-0054-F (D. Mass. Apr. 9, 1986) (WESTLAW, DCT file).

ness solicitation was done "regularly."[94] The court believed that occasional active solicitation of business in the forum state was not a purposeful availment of the benefits and protections of the laws of the forum state.

Both the nature and frequency of the foreign defendant's contacts with the forum state must be evaluated in the second test for jurisdiction under the constructive commercial cognizance approach, in order to determine whether the quantity of commercial activity is "substantial."[95] In the past, courts have spoken of only two types of jurisdictional contacts: "isolated" and "continuous and systematic."[96] An example of an "isolated contact" is a situation in which a tavern in the middle of a state serves one nonresident who then drives across the border and causes an accident. The "continuous and systematic" standard, on the other hand, has been likened to a requirement of "pervasive presence" in the forum.[97] The standard would be met, if a large percentage of a border city's patrons come from the neighboring state on a daily basis. The requirement of "substantial commercial activity" lies somewhere between these two tests.

If a nonresident defendant merely has knowledge of a possible jurisdictional contact but does not actively solicit that contact and derives only marginal business profits from the contact, jurisdiction should be denied. Upholding jurisdiction on grounds of mere knowledge of an insignificant contact with the forum state is unfair to a foreign defendant because the defendant is forced to choose between refusing to serve out-of-state customers, serving them and obtaining additional insurance, or making other preparations for a possible lawsuit in the forum state.

When a nonresident defendant knows or should know of a possible jurisdictional contact and receives substantial business profits from that contact, however, jurisdiction should be maintained. In this situation, the foreign defendant can reasonably obtain additional insurance because the

---

94. *Id.* The Massachusetts statute requires "regular" business, as follows:

> A court may exercise personal jurisdiction over a person, who acts directly or by agent, as to a cause of action in law or equity arising from the person's . . . (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth . . . .

MASS. GEN. LAWS ANN. ch. 223A, § 3(d) (West 1985).

The court in *Koziol* further held that "the 'substantial revenue' must be derived not from Massachusetts residents but from goods sold or services rendered within Massachusetts." Koziol v. Dialtone Lounge, No. 84-0054-F (D. Mass. Apr. 9, 1986) (WESTLAW, DCT file). Therefore, personal jurisdiction could not rest on the statute because no dispute existed as to the fact that the defendant's sole activity of serving drinks in its bar took place entirely within Connecticut. *Id.*

95. *See* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

96. *See id.* at 317; Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952).

97. *See* Seidelson, *Recasting World-Wide Volkswagen as a Source of Longer Jurisdictional Reach*, 19 TULSA L.J. 1, 18 (1983).

defendant can cover the extra expense with the profits received from the out-of-state patrons.

If this test had been employed in *Defoe*, there would have been no need for speculation regarding the defendant's knowledge of substantial commercial activity between the defendant's business and residents of the forum state, because virtually every customer had to travel over Minnesota roads to get to the bar.[98] The court's reasoning was consistent with the rationale behind the proposed test. The court employed a minimum contacts "fair warning" requirement, which was satisfied if the foreign defendant "purposefully directed" his activities at the forum state's residents[99] (as opposed to the state itself) and if the injuries "[arose] out of or relate[d] to" those activities.[100] Most cases, however, do not afford such easy application of the test.

The *World-Wide Volkswagen* opinion recognized a need for predictability in a jurisdictional approach so that potential defendants could structure their behavior accordingly.[101] No significant problem exists with predictability when the businessperson actively solicits contacts with the forum state. Nevertheless, a specific court's interpretation of "substantial commercial activity" may be difficult to predict. The businessperson is in the best possible position, however, to determine the probable result because he or she has access to all of the factors the court is likely to consider, including: (1) the percentage of revenue attributable to out-of-state patronage; (2) the frequency of out-of-state patronage; (3) the actual number of out-of-state customers; and (4) the actual dollar revenues gained from out-of-state patronage.

Under the constructive commercial cognizance test, jurisdiction would have existed in *West American* and *Janssen*. Although there was no evidence introduced in either case regarding the exact quantity of out-of-state business, discovery on this issue probably would have revealed substantial out-of-state patronage.[102] Police officers could have testified in *West American* that seventy-five percent of all the drinking-and-driving accidents oc-

---

98. *See* Defoe v. Lawson, 389 N.W.2d 757, 759 (Minn. Ct. App. 1986). *See also supra* notes 36-38 and accompanying text.

99. Defoe v. Lawson, 389 N.W.2d at 759 (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)).

100. *Id.* (citing Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).

101. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 266, 297 (1980).

102. As previously noted, Wisconsin had more liberal liquor laws, and the tavern in both cases was located within a short distance of a large urban area in Minnesota. In *Janssen* the defendant knew that many of his patrons were Minnesota residents due to the location of the tavern near the state border. Janssen v. Johnson, 358 N.W.2d 117, 118 (Minn. Ct. App. 1984). Similarly, in *West American* the court specifically noted that the tavern was located only 15 miles from Minneapolis-St. Paul, a huge market. West Am. Ins. Co. v. Westin, Inc., 337 N.W.2d 676, 677 (Minn. 1983).

curring in the vicinity of the accident were caused by persons drinking at a Wisconsin tavern.[103]

The third element of the constructive commercial cognizance approach must be met in every instance. The contact activity must have a significant relationship to the accident or injury. The language of the proposed test obviously would not extend personal jurisdiction over a social host who merely invited nonresident guests for the weekend and served them alcohol. In *Perry v. Hamilton*[104] an automobile accident occurred in Washington after DeeAnn Perry, a Washington resident, returned from a weekend visit to the Hamilton residence in Idaho where she had become intoxicated.[105] The primary contact the Hamiltons had with the forum state, or the residents of the forum state, was a telephone call inviting the Perrys to their home for the weekend.[106]

The court ruled that "[p]hone calls alone may be sufficient to satisfy due process requirements where the nonresident defendant initiates the contact and as a result enjoys the privileges and protections of Washington courts."[107] In this case, however, the Hamilton's phone call, or even expanding the contact to include their ongoing friendship, was not purposeful activity directed toward Washington of a nature sufficient to confer personal jurisdiction.[108]

The court apparently based its decision that jurisdiction did not exist, at least in part, on the fact that the "activity" took place in Idaho. This basis is consistent with the first of the three criteria required by the Washington courts: the nonresident defendant must purposefully do some act or consummate some transaction in the forum state.[109]

The better reasoning, however, is that the contacts initiated by the Hamiltons were not with the forum state nor did they relate to the accident. Because the contacts that the Hamiltons made with the Perrys were purely social rathen than business-related or solicitation-type contacts, the

---

103. West Am. Ins. Co. v. Westin, Inc., 337 N.W.2d at 678.
104. Perry v. Hamilton, 51 Wash. App. 936, 756 P.2d 150 (1988).
105. *Id.* at ____, 756 P.2d at 151.
106. *Id.* at ____, 756 P.2d at 152-53.
107. *Id.* at ____, 756 P.2d at 153.
108. *Id.*
109. The three criteria include:

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Id. at ____, 756 P.2d at 152 (footnotes omitted) (citing Tyee Constr. Co. v. Dulien Steel Prods., Inc., 62 Wash. 2d 106, 115-16, 381 P.2d 245, 251 (1963)).

Hamiltons did not invoke the benefits and protections of Washington law.[110]

In *Lawson v. Darrington*[111] two types of contacts were present: contacts that were substantially related to the accident or injury, and contacts that were unrelated to the accident or injury. The Iowa defendant in *Lawson* operated a bar approximately twelve miles south of the Minnesota border.[112] Two or three times a year, defendant hired dancers from Minnesota.[113] The bar also used a Minnesota booking agency to hire Minnesota rock band talent.[114] The relationship between these contacts and the car accident that resulted from the intoxication of Gregg Darrington was tenuous at best.

The defendant bar owner, however, regularly advertised in two Minnesota newspapers and on one Minnesota radio station, thereby encouraging patronage from Minnesota customers.[115] This purposeful and active solicitation of Minnesota customers set "in motion the chain of events" that injured a Minnesota resident.[116] The court noted that the Minnesota advertising did not have to "directly cause" the Minnesota resident's trip to the Iowa bar, because that would be an unduly narrow interpretation of the due process "reasonable anticipation" test.[117] Rather, because the contacts initiated by defendant with Minnesota "relate[d] to the operation and solicitation of Minnesota customers," personal jurisdiction was upheld.[118]

In summary, the current jurisdictional analysis precipitates inequitable results, and more particularly, the decisions in *West American*, *Janssen*, and *Koziol* actually encourage negligent or illegal behavior on the part of owners of taverns located on state borders at the expense of out-of-state plaintiffs. A less restrictive jurisdictional approach is needed to preserve "traditional notions of fair play and substantial justice."

V. Choice of Law Analyses

A. *Introduction*

The interplay between jurisdictional and choice of law analysis often leads to an evaluation of the same issues and policy choices. Thus, with a view toward a goal of basic "fairness" to the state interests involved, as well as fairness to the parties to the suit, the same "constructive commercial cog-

110. *Id.* at ___, 756 P.2d at 153.
111. Lawson v. Darrington, 416 N.W.2d 841 (Minn. Ct. App. 1987).
112. *Id.* at 843.
113. *Id.*
114. *Id.* at 844.
115. *Id.* at 845.
116. *Id.* at 844 (citing Anderson v. Luitjens, 311 Minn. 203, 208, 247 N.W.2d 913, 916 (1976)).
117. *Id.* at 844-45. Compare this interpretation with the implied requirement of an actual response to defendant's advertising in Erickson v. Spore, 618 F. Supp. 1356, 1360 (D. Minn. 1985). *See supra* notes 86-90 and accompanying text.
118. Lawson v. Darrington, 416 N.W.2d at 845.

nizance" approach proposed for jurisdictional analysis should be employed in choice of law analysis. The approach should be applied, however, with some variation and additional considerations. One additional consideration is an interest analysis that prefers the forum state as to the remedy afforded the plaintiff and the "penalty" imposed upon the defendant, unless application of the forum state's law would result in anachronism.

B. *Background: Choice of Law in Tavern Liability Cases*

In *Schmidt v. Driscoll Hotel*[119] the Minnesota Supreme Court held that even though the accident in which the passenger sustained injuries had occurred in Wisconsin, an action could be brought under the Minnesota Civil Damage Act, since all the parties involved were residents of Minnesota and the intoxicants had been sold in Minnesota.[120] The court flatly rejected the universal rule previously applied to torts conflicts, *lex loci delicti*,[121] because the rule would not afford Minnesota citizens the protection that the Civil Damage Act intended.[122] *Schmidt* is considered to be the case that opened the door to the replacement of the place-of-wrong rule with a method of analysis that focuses on the policies underlying putatively conflicting domestic tort rules.[123]

The opposite result was reached in *Butler v. Wittland*,[124] in which an action was brought against Illinois tavern operators for damages sustained by Missouri plaintiffs when their automobile collided in Missouri with the automobile of an intoxicated man to whom Illinois defendants allegedly sold

---

119. Schmidt v. Driscoll Hotel, 249 Minn. 387, 82 N.W.2d 365 (1957).

120. *Id.* at ____, 82 N.W.2d at 368.

121. The principle that the law of the place of the wrong governs was articulated in the RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 377-83 (1934). For a discussion of the inadequacy of this rule as universally applied, see Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215 (1963). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 146 (1971). For a more modern analysis, see *infra* notes 161-189 and accompanying text.

122. Schmidt v. Driscoll Hotel, 249 Minn. at ____, 82 N.W.2d at 368-369. The court noted that if sections 377 and 378 of the *Restatement (First)* were applied to multi-state fact situations like the one facing the court, an injured plaintiff would have no remedy in either "the state where the last event necessary to create tort liability took place" or in "the state where the liquor dealer's violations of the liquor statutes occurred." *Id.* at ____, 82 N.W.2d at 368. The court distinguished Eldridge v. Don Beachcomber, Inc., 342 Ill. App. 151, 95 N.E.2d 512 (1950) and similar cases on the basis that the plaintiff who was denied recovery under the Illinois Dram Shop Act in *Eldridge* was not an Illinois resident, whereas in *Schmidt*, the Minnesota Civil Damage Act provided a remedy for a Minnesota resident. Schmidt v. Driscoll Hotel, 249 Minn. at ____, 82 N.W.2d at 369. Furthermore, the Illinois Act in *Eldridge*, unlike the Minnesota statute, required no illegal act for the bar owner to be liable; all that was necessary was sale of liquor that caused "in whole or in part" the intoxication of the person causing the damage. *See* E. SCOLES & R. WEINTRAUB, CONFLICT OF LAWS 457 (2d ed. 1972) (citing ILL. REV. STAT. ch. 43, para. 135 (1965); Osborn v. Leuffgen, 381 Ill. 295, 45 N.E.2d 622 (1942)).

123. E. SCOLES & R. WEINTRAUB, *supra* note 122, at 301.

124. Butler v. Wittland, 18 Ill. App. 2d 578, 153 N.E.2d 106 (1958).

or gave intoxicating liquors.[125] The Illinois Dram Shop Act was held inapplicable because the Act was without extraterritorial effect.[126] The court rejected *Schmidt* on the sole basis that *Schmidt* was not Illinois precedent, and alternatively applied *Eldridge v. Don Beachcomber, Inc.*,[127] which stated Illinois law. Although purporting to apply the law of the place of the wrong, the court in *Butler* determined that the tort or wrong was the collision, rather than the sale of alcohol.[128] Thus, Missouri law applied.[129] If the Illinois act would have had extraterritorial effect, the remedy provided by the Illinois Dram Shop Act would have been available without regard to fault or negligence of the dramshop keeper. The reasoning behind the Illinois Dram Shop Act is highly questionable because it is unclear exactly what behavior is dissuaded by such an Act. No coherent underlying policy was articulated by the court in *Butler*, and apparently no policy analysis was employed.

A similar lack of reasoning was displayed by Illinois courts when the Illinois Dram Shop Act was again presumed to have no extraterritorial effect because the Act was "particularly severe" and did not require any illegal sale.[130] Variations on this theme and methods to avoid the harsh result are discussed in several federal and state court cases.[131] Regardless of the prior

---

125. *Id.* at ____, 153 N.E.2d at 107.

126. *Id.* at ____, 153 N.E.2d at 109.

127. Eldridge v. Don Beachcomber, Inc., 342 Ill. App. 151, 95 N.E.2d 512 (1950). *See also supra* note 121.

128. Butler v. Wittland, 18 Ill. App. 2d at ____, 153 N.E.2d at 110.

129. *Id.*

130. *See, e.g.*, Graham v. General U.S. Grant Post No. 2665, 43 Ill. 2d 1, 248 N.E.2d 657 (1969); Liff v. Haezbroeck, 51 Ill. App. 2d 70, 200 N.E.2d 525 (1964). The deck was apparently stacked against the plaintiff from the start in *Liff*, in which liquor was served in Illinois, a drunk caused damage in Iowa, recovery was denied under the Illinois Dram Shop Act because the harm was not caused in Illinois, and recovery was denied under the Iowa Dram Shop Act because the liquor was not served in Iowa. *See* E. SCOLES & R. WEINTRAUB, *supra* note 122, at 457.

131. *See, e.g.*, Rubitsky v. Russo's Derby, Inc., 70 Ill. App. 2d 482, 216 N.E.2d 680 (1966). In *Rubitsky* an action was brought against an Illinois corporation engaged in retail sale of alcoholic liquors, for personal injuries sustained by plaintiff cab driver when he picked up two intoxicated people at defendant's establishment, drove them to Wisconsin, and was assaulted there by them. Citing *Butler* and *Eldridge*, the court applied the doctrine of *lex loci delicti* and held that "where an action is brought in Illinois for a tort committed in another state, the substantial law of the latter will be applied by the Illinois court." *Id.* at ____, 216 N.E.2d at 681-82. *See also* Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960) (Illinois Dram Shop Act did not apply extraterritorially where the sale of intoxicating liquor took place in Illinois and the injury resulting therefrom occurred in Michigan. The court based civil liability under Michigan common law in violation of an Illinois criminal statute, because the public policies of both states would be thwarted where no liability was found.); Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963) (action was maintained under Indiana common law where the action brought against Illinois tavern operators, for injuries sustained when plaintiff was struck in Indiana by an automobile driven by a patron of the Illinois tavern, because the Illinois Dram Shop Act was given no extraterritorial effect).

treatment, the Illinois Dram Shop Act and its lack of extraterritorial effect was recently upheld as constitutional in *Linnabery v. DePauw.*[132] Because the Illinois Dram Shop Act bears a reasonable relation to the purpose of protecting individuals within the boundaries of the state, Illinois has every right to defer to the sovereignty of other states to enact measures to protect members of the public within their respective borders.[133]

Zucker v. Vogt[134] represented a revival of state policy analysis when the Connecticut Dram Shop Act was applied extraterritorially to permit recovery against an owner of a Connecticut bar that illegally served liquor to a New York resident, resulting in a collision of the New Yorker's automobile in New York. The Connecticut Act was applied extraterritorially because the basic concepts underlying the Connecticut and New York dram shop acts were the same.[135] Similarly, in *Trapp v. 4-10 Investment Corp.*[136] the court employed a "significant contacts" analysis to allow Minnesota residents to recover against a North Dakota liquor store under the North Dakota Dram Shop Act, because application of the North Dakota Act would not contravene the interests or policies of Minnesota, which also has a dram shop act.[137]

In the last two decades and especially after 1976, courts throughout the nation have become increasingly willing to employ a policy or governmental interest analysis to give dram shop acts extraterritorial effect, depending on the circumstances. A discussion of the modern analyses and a proposal for a revised approach follows.

C. *Choice of Law: Governmental Interest Test in "True Conflict" Situations*

In order to understand what is meant by a "true conflict," consider the case of *Waynick v. Chicago's Last Department Store,*[138] in which no true conflict existed. In *Waynick* the court found that the plaintiff had stated a valid cause of action where injuries were sustained as a result of an automobile accident in Michigan caused by the driver's intoxication in Illinois.[139] Both Illinois and Michigan had dram shop acts at the time,[140] but the court refused to apply either statute because the court seriously doubted that the

---

132. Linnabery v. DePauw, 695 F. Supp. 411 (C.D. Ill. 1988).

133. *Id.* at 413.

134. Zucker v. Vogt, 329 F.2d 426 (2d Cir. 1964).

135. *Id.* at 442. Both acts were intended to protect the public health and welfare from the inherent dangers of liquor traffic.

136. Trapp v. 4-10 Inv. Corp., 424 F.2d 1261 (8th Cir. 1970).

137. *Id.* at 1265.

138. Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied,* 362 U.S. 903 (1960). *See also supra* note 124.

139. Waynick v. Chicago's Last Dep't Store, 269 F.2d at 326.

140. *See* ILL. ANN. STAT. ch. 43, para. 135 (1935); MICH. STAT. ANN. ch. 175, § 18.993 (Callaghan 1937).

Michigan statute was intended to apply to cases in which the alcohol was sold in another state, and the Illinois statute had previously been found to have no extraterritorial effect.[141] The court nevertheless found that Michigan's common law applied, since the public policies of both states would have been thwarted if no liability were found.[142] The court noted that the defendants' contention that the Illinois Dram Shop Act "preempted the field" was unsound because the Illinois Act had *avoided* the field.[143] Thus, common law applied. Interestingly, Illinois had no public policy of sheltering defendants from such liability.

On the other hand, a true conflict existed in *Bernhard v. Harrah's Club*,[144] in which the California Supreme Court held a Nevada tavern operator who actively solicited California business subject to civil liability for serving obviously intoxicated patrons who subsequently caused harm to California residents, despite the adamant rejection of this extended liability for the sale of alcohol in the tavern operator's home state, Nevada.

In response to defendant Harrah's Club advertising, Fern and Philip Myers, drove from their California residence to Harrah's Club in Nevada.[145] At the club, the Myers' were served numerous alcoholic beverages by defendant's employees, even after the Myers had reached the point of obvious intoxication,[146] rendering them incapable of safely driving a car.[147] While traveling on Highway 49 near Nevada City, California, the Myers' vehicle crossed the center line into the lane of oncoming traffic and collided head-on with a motorcycle operated by the plaintiff, Richard Bernhard, a California resident.[148]

In a unanimous decision authored by Justice Sullivan, the California Supreme Court applied the governmental interest approach adopted in *Reich v. Purcell*.[149] The governmental interest approach entails an analysis of the competing interests of the states in having their law applied "to determine the law that most appropriately applies to the issue involved."[150] Using this analysis, the court conceded that both states had an interest in having their own law applied. Nevada had an interest in protecting the de-

---

141. Waynick v. Chicago's Last Dep't Store, 269 F.2d at 324 (citing Eldridge v. Don Beachcomber, Inc., 342 Ill. App. 151, 154, 95 N.E.2d 512, 514 (1950)). *See also supra* note 100.

142. Waynick v. Chicago's Last Dep't Store, 269 F.2d at 324-25. The Illinois act that made the sale of liquor to an intoxicated person unlawful was deemed to provide protection to all members of the public, and plaintiffs were entitled to the protection of the Illinois dram shop act. *Id.* at 325-26.

143. *Id.* at 324-25.

144. Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976).

145. *Id.* at 315, 546 P.2d at 720, 128 Cal. Rptr. at 216.

146. The court did not attempt to define "obvious intoxication."

147. *Id.* at 315, 546 P.2d at 720, 128 Cal. Rptr. at 216.

148. *Id.*

149. Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

150. *Id.* at ____, 432 P.2d at 730, 63 Cal. Rptr. at 34.

fendant from liability, subscribing to the traditional view that absent a Nevada statute specifically providing for civil liability, there can be no civil action against a tavernkeeper for tortious acts committed by intoxicated patrons.[151] Conversely, California had an interest in extending the tavernkeeper's liability to provide a remedy for the plaintiff and dissuade the taverns from illegally or negligently selling and serving alcoholic beverages, in order to ultimately protect California citizens from intoxicated drivers.[152]

The court next analyzed the case in terms of comparative impairment and concluded that California's interest in protecting its residents from injury by intoxicated drivers would be more significantly impaired by failing to apply forum law than Nevada's corresponding interest in limiting the liability of its tavern operators.[153] The court reasoned that Nevada tavern operators who regularly encouraged the business of California residents had placed themselves "at the heart of California's regulatory interest."[154] Realizing the obvious affront to Nevada's state sovereignty, the court limited the holding to only those tavernkeepers who actively solicited California business,[155] thus relatively few Nevada tavernkeepers would be affected. As for the individual tavern keepers, the court claimed no imposition of a new duty to distinguish California residents from other patrons, since selling alcohol to intoxicated persons was already proscribed by Nevada criminal law.[156]

At least two commentators have rejected the *Bernhard* rationale, noting that the Nevada statute that imposed criminal sanctions for serving liquor to intoxicated persons had been repealed three years before the opinion.[157] Furthermore, the reasoning that few Nevada tavernkeepers would be affected can be employed to arrive at the opposite conclusion, since there is no reason to believe that many California citizens injured in California would be affected if the decision had gone the other way.[158] The same commentators suggested that the comparative impairment approach could be fairly and effectively employed only if based upon some objective criteria.[159] The holding in *Bernhard* has been abolished by statute in favor of "prior judicial

---

151. *See* Halvorson v. Birchfield Boiler Inc., 76 Wash. 2d 759, 458 P.2d 897 (1969).

152. Bernhard v. Harrah's Club, 16 Cal. 3d at 318, 546 P.2d at 722, 128 Cal. Rptr. at 218.

153. *Id.* at ____, 546 P.2d at 723, 128 Cal. Rptr. at 219. The comparative impairment approach provides for application of the law of the state whose interest would be more significantly impaired if it were subordinated to the law and interest of the other state. Horowitz, *The Choice of Law in California—A Restatement*, 21 U.C.L.A. L. Rev. 719, 748 (1974).

154. Bernhard v. Harrah's Club, 16 Cal. 3d at 323-24, 546 P.2d at 725-26, 128 Cal. Rptr. at 221-22.

155. *Id.* at 323, 546 P.2d at 725, 128 Cal. Rptr. at 221.

156. Nev. Rev. Stat. § 202.100 (1973).

157. E. Scoles & R. Weintraub, *supra* note 122, at 323-24.

158. *Id.* at 324 (noting that there was no empirical data to bolster the assertion).

159. *Id.* at 324-25. An extensive discussion of objective criteria and various methods of employing the analysis is beyond the scope of this Article.

interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as proximate cause of injuries inflicted upon another by an intoxicated person."[160] Regardless of its imperfections, *Bernhard* reached a just result.

D. *Modern Choice of Law Decisions Involving Tavern Liability*

Blamey v. Brown[161] listed five factors to be considered in resolving choice of law issues: "(1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial test; (4) advancement of the forum's governmental interest; and (5) application of the better rule of law."[162]

Under this analysis, the court in *Blamey* noted a definite need for predictability of result because the potential defendant tavernkeepers should know the possible legal consequences of their actions.[163] The tavernkeepers could then take adequate safeguards to protect themselves, such as procuring insurance. Although this rationale seems logical, little or no empirical evidence exists in the sphere of unintentional torts suggesting that people shape their behavior according to the legal responsibilities imposed upon them. The more realistic need for predictability stems from our society's desire that the defendant perceive that he or she is being treated fairly.[164] This "perceived fairness" factor seems intimately related to the "reasonable foreseeability" concept of jurisdiction to the extent that both are aimed at removing unfair surprise.

The "maintenance-of-interstate-order" factor considered in *Blamey* "includes the requirement that the state whose laws are applied have sufficient contacts with the facts in issue."[165] Presumably, this requirement is in the interest of preserving state sovereignty.[166] The court in *Blamey* found

---

160. CAL. BUS. & PROF. CODE § 25602 (West 1978).

161. Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980).

162. *Id.* at 890. This choice-of-law approach was adopted from a proposal by Robert Leflar. *See* Leflar, *Choice-Influencing Considerations in Conflicts of Law*, 41 N.Y.U. L. REV. 267 (1966).

163. *Id.*

164. For a more extensive discussion on policy issues, see E. SCOLES & R. WEINTRAUB, *supra* note 122, at 325-31; R. LEFLAR, AMERICAN CONFLICTS OF LAW § 107 (3d ed. 1977).

165. Blamey v. Brown, 270 N.W.2d at 891.

166. *See* Thoring v. Bottonsek, 350 N.W.2d 586 (N.D. 1984). The court stated that respect for territoriality and integrity of state sovereignty, which are primary considerations in determining the existence of personal jurisdiction, are also factors in choice of law determinations. *Id.* at 590. Thus, *Thoring* held that the North Dakota Dram Shop Act had no extraterritorial effect on the sale of alcohol in Montana to a driver who was later involved in a collision in North Dakota. *Id.* at 591. Note that the *Thoring* court first ruled on the choice-of-law issue, making it unnecessary to decide the issue of jurisdiction. *Id.* at 588-91.

See also Hennes v. Loch Ness Bar, 117 Wis. 2d 397, 344 N.W.2d 205 (Wis. Ct. App. 1983), in which the Wisconsin court, citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 293 (1980), would not allow Minnesota to "export its public policy to Wisconsin, a coequal sover-

that Minnesota did, in fact, have sufficient contacts because the residences of the plaintiff and her creditors were in Minnesota and her journey on the night of the accident began and ended in Minnesota.[167]

The third factor, simplification of the judicial task, was not extensively considered in *Blamey* since any court would be fully capable of administering Wisconsin's rule of nonliability.[168] Judicial efficiency is an ever-present policy consideration in many areas and is most often enhanced by adoption of an objective rule.

The fourth and fifth considerations, advancement of government interest and application of the better rule of law, are often confused and combined due to the forum state's natural preference for application of its own law and the element of subjectivity in choosing the applicable law.[169] For example, in *Blamey* the court held that Minnesota's strong interest in compensating resident accident victims and substantial interest in assuring that Minnesota creditors are paid dictated the application of Minnesota law.[170] Likewise, the "better rule of law" consideration also supported application of Minnesota's common law, because Minnesota's common law provided a remedy for the Minnesota victim, whereas Wisconsin law did not.[171] The court seemed to say that Minnesota had the better rule of law because Minnesota had the better policy and governmental interest. Similarly, the court in *Koziol* simply determined that Connecticut's interest in regulating the sale of intoxicating beverages within its borders predominated over Massachusetts' interest in providing a remedy for its injured citizens.[172] However, the court subjectively selected the law of the foreign state.

The *Blamey* case provides an example of the misapplication (or less preferable application) of the "better law" consideration. Proper application of this rule requires: (1) that a "true conflict" is involved, in which the underlying policy of either state would be significantly and legitimately advanced if that state's law was applied; and (2) that the "better law" is selected by objective standards, such as the "anachronism" and "aberrational"

---

eign." *Hennes* was similar to *Bernhard* on the facts, but the opposite conclusion may be explained by the fact that in *Hennes* it was the defendant's state of residence ruling upon the applicability of the foreign law of the plaintiff's state, so state sovereignty was the controlling policy. The Comparative Impairment Approach is not used in Wisconsin.

167. Blamey v. Brown, 270 N.W.2d at 891.

168. *Id.* at 890.

169. *See, e.g.*, Patton v. Carnrike, 510 F. Supp. 625 (N.D.N.Y. 1981) (New York's overriding interest in preserving the integrity of its Dram Shop Act required that the law of New York, rather than the law of Pennsylvania, be applied). *See also* Bankord v. DeRock, 423 F. Supp. 602, 606 (N.D. Iowa 1976) (Iowa Dram Shop Act was construed liberally and given extraterritorial effect in order to "aid in suppressing the mischief and advance the remedial objective which prompted its enactment").

170. Blamey v. Brown, 270 N.W.2d at 891.

171. *Id.*

172. Koziol v. Dialtone Lounge, No. 84-0054-F (D. Mass. Apr. 9, 1986) (WESTLAW, DCT file). *See supra* notes 93-94 and accompanying text.

standards.[173] Obviously, in *Blamey* the "better law" was not selected upon examination of objective criteria. Rather, the forum state merely favored its own policies.

The court in *Blamey* could have used a more objective standard of applying Minnesota law, which best reflected the clear trend among the states. The court could have rejected the Wisconsin law, which did not provide an adequate remedy for the plaintiff, on the basis that the Wisconsin law was aberrational.[174]

A temptation for subjective application of the factors listed, and illustrated, in *Blamey* is just one reason for the need of a new choice of law analysis, or at least a variation of the old analyses. This temptation has not been eliminated by the choice of law principles proposed by the *Restatement (Second) of Conflict of Laws*[175] largely because the *Restatement* employs factors nearly identical to those listed by the court in *Blamey*.[176] Although both the *Restatement* and the *Blamey* analysis are concerned with the needs of interstate systems, the *Restatement* emphasizes the goals of facilitating commercial intercourse and adoption of the same choice of law rules by many states,[177] rather than the preservation of state sovereignty.[178]

The "predictability of result" factor noted in *Blamey* was divided into elements similar to the *Restatement's* "protection of justified expectations" and "certainty, predictability and uniformity of result" elements.[179] The *Restatement* authors note, however, that in certain areas such as negligence, parties act without giving thought to the legal consequences of their conduct or to the law that may be applied.[180] Consequently, there are no expectations to protect.[181] The *Restatement* authors also note that predictability and uniformity of result may discourage forum shopping to the extent that

---

173. E. SCOLES & R. WEINTRAUB, *supra* note 122, at 273-79, 328-29.

174. For an example of a tort choice of law analysis that employs these objective criteria, see E. SCOLES & R. WEINTRAUB, *supra* note 122, at 346.

175. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

176. Section 6 provides:

> (1) A court, subject to the constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of applicable rule of law include: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Id.

177. *Id.* comment d.

178. *See supra* note 166 and accompanying text.

179. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d)-(e) (1971).

180. *Id.* comment g.

181. *Id.*

these objectives are attained in choice of law.[182] This Article asserts that forum shopping may be discouraged if the laws are uniform. The converse may be true, however, if the choice of law result is predictable, because the plaintiff's counsel chooses the forum in which the choice of law rule dictates the application of the state's law that is more favorable.

In the area of dram shop liability, predictability of result is very important because modern tavern owners are likely to consider the legal consequences of their transactions based on society's increasing awareness of the problem of drunken drivers on our highways.

Consideration of the relevant policies of the forum,[183] the relevant policies of other interested states, and the relative interests of those states in the determination of the particular issue,[184] involves the highly subjective analysis employed in *Blamey* in determining which is the "better rule of law."[185] These factors also encompass governmental interests analysis to determine the state whose interests are most deeply affected.[186]

Ironically, the choice of law principles listed in *Blamey* and the *Restatement* include ease in the determination and application of the law to be applied.[187] Yet, employment of either test in determining which law will be applied involves exhaustive analysis of multiple factors and each factor's relevance to the particular situation. Under the *Restatement*, analysis is not complete upon mere examination of the above mentioned principles, however, because additional factors are involved with respect to issues in tort[188] and personal injuries.[189]

---

182. *Id.* comment i.

183. *Id.* § 6(2)(b).

184. *Id.* § 6(2)(c).

185. *See supra* notes 170-71 and accompanying text.

186. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 comment f (1971).

187. *Id.* § 6(2)(g). This is essentially the same as the "simplification of the judicial test" principle listed in Blamey v. Brown, 270 N.W.2d 884, 890 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980).

188. With respect to issues in tort, the *Restatement* provides:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6. (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

189. With respect to actions for personal injuries, the *Restatement* provides:

> In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles

Estates of Braun v. Cactus Pete's, Inc.[190] illustrates the subjective application (or misapplication) of the principles espoused in the *Restatement*. An action was brought in Idaho for damages resulting from fatal injuries to Mistie and Becky Braun, which were sustained when their vehicle was struck by a pickup driven by a man who was returning from a Nevada casino, Cactus Pete's.[191] Although the accident occurred in Idaho and the decedents and the driver of the pickup were Idaho residents, the Idaho Supreme Court ruled that Nevada law applied, citing the "most significant relationship" test of the *Restatement*[192] as authority.[193] Of the four factors listed in the *Restatement*,[194] the court employed only one—the place where the conduct causing the injury occurred—noting that the sale of alcohol occurred in Nevada. As a result, the plaintiffs were denied recovery because the public policy of Nevada prohibited the imposition of civil liability on a tavernkeeper.[195]

The majority in *Estates of Braun* did not allow the extraterritorial application of Idaho law to Nevada conduct in direct contravention of Nevada law. Apparently in support of its position, the majority noted that the Brauns were traveling to their employment at Jackpot, Nevada, when they were killed.[196] This fact, however, supports the application of Idaho law under the constructive commercial cognizance test, because business people in this Nevada border city were probably well aware of the commercial activity with Idaho residents.

Justice Huntley, in his dissent, recognized the majority's misapplication of the *Restatement* principles listed in section 6. He stated that the interests of the forum state were better served by application of Idaho law, and while Nevada had an interest in protecting the economic interests of its business owners, the casino business advertised and catered in large part to residents of Idaho.[197] Furthermore, the owner was surely aware that patrons leaving the casino would be operating motor vehicles in Idaho.[198]

---

stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971).

190. Estates of Braun v. Cactus Pete's, Inc., 108 Idaho 798, 702 P.2d 836 (1985).

191. *Id.* at ____, 702 P.2d at 837.

192. *See supra* note 188.

193. Estates of Braun v. Cactus Pete's, Inc., 108 Idaho at ____, 702 P.2d at 838.

194. Section 145 of the *Restatement* includes the following factors: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. *See supra* note 188.

195. Estates of Braun v. Cactus Pete's, Inc., 108 Idaho at ____, 702 P.2d at 838. Presumably Nevada does not prohibit the imposition of civil liability on a tavern keeper regardless of the nature of the act. The court probably meant that Nevada prohibits dram shop liability.

196. *Id.*

197. *Id.*

198. *Id.* at ____, 702 P.2d at 839.

The insightful dissent further asserted that even under the provisions of section 145 of the *Restatement*, Idaho law should have been applied because Idaho's contacts were more significant to this cause of action than Nevada's contacts.[199] The accident and resulting deaths occurred in Idaho between Idaho residents. Although the conduct allegedly causing the accident occurred in Nevada, the results of that conduct could predictably occur in Idaho. Moreover, Idaho patrons constituted a substantial portion of Cactus Pete's customers and the owner was aware that many of the customers immediately returned to Idaho after consuming libations served at the casino.[200]

Justice Huntley's dissent combined the issues normally associated with a jurisdictional analysis with those involved in choice of law determinations. This is precisely the type of analysis that should be employed because both analyses should involve a foreseeability factor as a safeguard to defendants and party interest analysis for the benefit of all concerned.

Applying the constructive commercial cognizance test to *Estates of Braun*, personal jurisdiction over Cactus Pete's would exist because the owner was aware of the substantial commercial activity between his Nevada business and the residents of Idaho.[201] Thus, the "contact" activity of serving alcohol to the obviously intoxicated patron who later caused the accident had a significant relationship to the accident and resulting injuries. Because the test is met for personal jurisdiction and a "true conflict" clearly exists,[202] the only step left to determine whether the Idaho forum's law should apply is the "anachronistic or aberrational" test. The Idaho law, which would provide a remedy for the injured plaintiff and hold the tavern operator liable for his negligent acts, is consistent with the modern trend. Thus, the law of the forum state should apply.

Fortunately, not all of the courts applying the most significant relationship test or similar tests in the context of dram shop liability have employed the simplistic "law of the state of sale controls" rationale espoused in *Estates of Braun*. In fact, a fairly even split appears among the cases: some have applied the law of the place of sale, and others have applied the law of the place of accident.[203]

---

199. *Id.*

200. *Id.*

201. *Id.* The first "active solicitation" step of the proposed test was not addressed because these facts were not presented in the statement of the case.

202. *Id.* at ____, 702 P.2d at 838. Nevada's policy prohibiting imposition of civil liability upon tavern keepers conflicts with the Idaho negligence law, which imposes dram shop liability upon negligent bar owners.

203. Cases applying the law of the place of sale include Trapp v. 4-10 Investment Corp., 424 F.2d 1261, 1265 (8th Cir. 1970); Sommers v. 13300 Brandon Corp., 712 F. Supp. 702, 705 (N.D. Ill. 1989) (citing Pardey v. Boulevard Billiard Club, 518 A.2d 1349, 1352 (R.I. 1986)); Patton v. Carnrike, 510 F. Supp. 625, 628 (N.D.N.Y. 1981); and Rong Yao Zhou v. Jennifer Mall Restaurant, Inc., 534 A.2d 1268 (D.C. 1987). Cases applying the law of the place of the

The court in *Sommers v. 13300 Brandon Corp.*,[204] however, noted that in all cases applying the law of the place of the accident, the law of the place of sale provided no liability while the law of the place of the accident provided a cause of action. Furthermore, those cases also involved application of the common law of the place of the accident, not the application of statute.[205]

Citing the same five factors as the court in *Blamey* considered in deciding which law to apply,[206] *Pardey v. Boulevard Billiard Club*[207] held that "[i]n dram shop actions arising out of automobile accidents, the place where the liquor was unlawfully sold is of greater significance than the location of the accident because when an intoxicated person is driving, the actual site of the crash is largely fortuitous."[208] Although this appears to be a return to the rationale of *Estates of Braun*, the court was really employing the "better rule of law" approach. The court noted that Massachusetts law would not be offended by application of the Rhode Island statute because Massachusetts' dram shop law could not apply extraterritorially to the Rhode Island vendor.[209] Thus the Massachusetts law could not provide a remedy to the plaintiff.[210]

The court then correctly stated that the better-reasoned authorities gave extraterritorial effect to the statutes that were remedial in nature if this application was consistent with legislative intent. Accordingly, the court held that since the Massachusetts statute did not follow these authorities, Rhode Island law would apply because it was remedial in nature and consistent with the intent of both legislatures.[211]

---

accident include Bernhard v. Harrah's Club, 16 Cal. 3d 313, ____, 546 P.2d 719, 725, 128 Cal. Rptr. 215, 221, *cert. denied*, 429 U.S. 859 (1976); Blamey v. Brown, 270 N.W.2d 884, 890-91 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980); and Carver v. Schafer, 647 S.W.2d 570, 578 (Mo. Ct. App. 1983).

204. Sommers v. 13300 Brandon Corp., 712 F. Supp. 702, 705 (N.D. Ill. 1989).

205. *Id.*

206. *See supra* text accompanying note 162. In *Pardey v. Boulevard Billiard Club*, however, the court cited Brown v. Church of the Holy Name of Jesus, 105 R.I. 322, 252 A.2d 176 (1969), as the proponent of these factors.

207. Pardey v. Boulevard Billiard Club, 518 A.2d 1349 (R.I. 1986).

208. *Id.* at 1352.

209. *Id.*

210. *Id.*

211. *Id.* (citing Trapp v. 4-10 Investment Corp., 424 F.2d 1261 (8th Cir. 1970); Patton v. Carnrike, 510 F. Supp. 625 (N.D.N.Y. 1981); Bankord v. DeRock, 423 F. Supp. 602 (N.D. Iowa 1976); Zucker v. Vogt, 200 F. Supp. 340 (D. Conn. 1961)). *But see* Graham v. General U.S. Grant Post No. 2665, 43 Ill. 2d 1, 248 N.E.2d 657 (1969) (holding dram shop act has no extraterritorial effect). Note, however, that there was no need for extraterritorial application of the Rhode Island Statute in *Pardey* because the tavern was located in Rhode Island. Pardey v. Boulevard Billiard Club, 518 A.2d at 1351. The plaintiffs were Massachusetts' residents who were involved in an accident in Massachusetts with minors who were illegally served alcohol in the Rhode Island club. *Id.* The discussion regarding extraterritorial application of statute was necessary only to demonstrate why Massachusetts law should not apply.

The District of Columbia Court of Appeals reached the same conclusion, applying a governmental interests analysis to a personal injury action arising from an accident occurring in Maryland, where the alleged negligent sale of alcohol occurred in the District of Columbia. The court noted in *Rong Yao Zhou v. Jennifer Mall Restaurant*[212] that a conflict existed because Maryland adhered to a policy of protecting negligent bar owners from civil liability, while the District of Columbia law made tavernkeepers answerable in tort.[213] In this case, however, the restaurant was located in the District of Columbia, so Maryland's interest in protecting its tavern owners from civil liability would not be prejudiced by application of District of Columbia law.[214] Therefore, a "false conflict" situation was created in which the policy of the District of Columbia would be advanced by application of District of Columbia law, but the policy of Maryland (protecting *its* tavern owners) would not be advanced by application of Maryland law.[215] The court ruled that the District of Columbia law applied.[216]

Perhaps the best application of the *Restatement's* "most significant contacts" test[217] occurred in *Sommers v. 13300 Brandon Corp.*,[218] but that court did not employ a pure application of the test since it still considered the foreseeability factors normally associated with jurisdictional analysis.[219] In *Sommers* an Illinois resident who had been drinking at a tavern located in Illinois was involved in an automobile accident in Indiana with the plaintiff, an Indiana resident.[220]

The Illinois Dram Shop Act did not allow a claim for injuries sustained in another state as a result of an Illinois tavernkeeper selling alcoholic beverages.[221] Consequently, the plaintiff could obtain no recovery under the law of the forum state.[222] The United States District Court ruled that under the "most significant relationship" factors listed in the *Restatement*, the Illinois place of sale was equally balanced with the Indiana place of injury, and the plaintiff's Indiana residence was equally balanced with the defendant's residence in Illinois.[223] Furthermore, Indiana's strong interest in protecting the well-being of its residents and insuring that injured residents can pay their creditors was balanced by Illinois' interest in protecting its tavern owners

212. Rong Yao Zhou v. Jennifer Mall Restaurant, 534 A.2d 1268 (D.C. 1987).
213. *Id.* at 1270.
214. *Id.* at 1271.
215. *Id.* at 1270-71.
216. *Id.* at 1271.
217. *See supra* note 188 and accompanying text.
218. Sommers v. 13300 Brandon Corp., 712 F. Supp. 702 (N.D. Ill. 1989).
219. *Id.* at 706.
220. *Id.* at 703.
221. *Id.*
222. *Id.* (citing ILL. REV. STAT. ch. 43, para. 135(a) (1986)).
223. *Id.* at 705.

from excessive judgments.[224]

Because the policies of Indiana and Illinois were consistent to the extent that each would hold tavern owners liable for injuries caused by patrons whom the tavern keeper caused to be intoxicated, the court ruled that Indiana law applied.[225] Furthermore, the court noted that Illinois applied its Dram Shop Act to sales outside of Illinois that caused injury in Illinois, so it was assumed that Illinois would approve of other states imposing liability for injuries occurring in other states caused by sales of alcohol in Illinois.[226] Moreover, the tavern owners should not be surprised that some of their patrons travel to Indiana after drinking at the tavern, considering the tavern's close proximity to the border.[227] Under these circumstances and considering these policies, the place of the sale seemed insignificant.

Although the court in *Sommers* reached the correct decision employing the "most significant contacts" test, the same result could have been obtained without such an exhaustive analysis if the constructive commercial cognizance test were applied after the "solicitations" and "substantial commercial activity" facts had been developed.

This proposed test is easy to apply and results in a predictable and fair decision in almost every instance. Although this Article has limited its discussion of the proposed test to dram shop liability cases, the test could have other applications, such as in a products liability context.[228]

VI. Conclusion

Jurisdictional and choice of law analysis in tavern liability cases should be revised with an emphasis on fairness to the defendant, while providing a remedy for the injured plaintiff. The constructive commercial cognizance approach provides such analysis, as follows:

A. A party is subject to personal jurisdiction in the forum if the party: (1) actively solicits business from residents of the forum state; OR (2) is aware or should be aware of a substantial quantity of commercial activity between his or her business and residents of the forum state; AND (3) the

---

224. *Id. See also* Carver v. Schafer, 647 S.W.2d 570, 577-78 (Mo. Ct. App. 1983). The Illinois statute limits the liability for Illinois tavern owners, but does not immunize them from liability. Ill. Rev. Stat. ch. 43, para. 135(a) (1986).

225. Sommers v. 13300 Brandon Corp., 712 F. Supp. at 705 (citing Pardey v. Boulevard Billiard Club, 518 A.2d 1349, 1352 (R.I. 1986); Bernhard v. Harrah's Club, 16 Cal. 3d 313, ———, 546 P.2d 719, 725, 128 Cal. Rptr. 215, 221, *cert. denied*, 429 U.S. 859 (1976)).

226. *Id.* at 705-06.

227. *Id.* at 706.

228. *See, e.g.*, Fournier v. Marigold Foods, Inc., 678 F. Supp. 1420 (D. Minn. 1988). The case involved a sale of allegedly contaminated ice cream in Minnesota that was manufactured in Minnesota and caused a death in California. California law is unlikely to be applied because the defendant probably did not actively solicit California business, nor is it likely that there was a substantial quantity of commercial activity between the defendant's business and California residents. These facts, however, were not discussed in the text of the case.

"contact" activity has a significant relationship to the accident or injury arising therefrom.

B. If the preceding test for in personam jurisdiction is employed and there is a "true conflict" in the policies of two or more states having contacts with the parties or the transaction, apply the law of the forum state, unless that law is anachronistic or aberrational, considering: (1) the remedy afforded the plaintiff; and (2) the penalty imposed upon the defendant.

The evaluation of jurisdictional contacts in the above test ensures that in keeping with the concept of basic fairness, the defendant could reasonably foresee being haled into the forum state. Conversely, the choice of law analysis favors the advancement of plaintiffs' interests pursuant to the modern trend of holding taverns liable for their negligent actions because the plaintiffs' counsel is in a position to choose the forum. If the remedy afforded the plaintiff in the forum state is unusually harsh on the defendant, however, the "anachronism or aberration" element provides a safeguard.

This constructive commercial cognizance approach is preferable to the confusing and largely subjective analyses employed today because the test is easily applied, fair to all parties concerned, and promotes predictability and uniformity of result.