Wisconsin's Borrowing Statute: Did We Shortchange Ourselves?

Donna Mae Endreson
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I. INTRODUCTION

Two Wisconsin residents embark on a vacation by car. On January 7, 1985, they are involved in an automobile accident. On January 2, 1986, the plaintiff passenger calls you for advice and wants to bring suit against the defendant driver for injuries. In full awareness of Wisconsin's three-year statute of limitation for personal injury suits, you conclude that there is plenty of time to file a complaint and you set up an appointment for the following week to get the particular facts.

At next week's meeting the passenger informs you that the accident occurred while driving through Alabama. A quick check of Alabama law tells you that you have missed the statute of limitation by several days, as Alabama law at the time only allowed one year for some types of personal injuries.

In a second scenario, the Wisconsin client is a victim of asbestosis caused by exposure to asbestos fibers. A product liability suit is contemplated. The judicially implied discovery rule in product liability suits will allow commencement within three years from the date at which the injury was or could have been reasonably diagnosed. As the disease was diagnosed on October 1, 1984, the statute of limitation should not present a problem until October of 1987.

The defendant's expert produces unrefuted testimony that the disease was reasonably diagnosable on September 1, 1984, at which time the plaintiff was in the middle of a two-month vacation in New York. The last element of the cause of action to occur is this discovery; therefore, the cause of action arose while the plaintiff was in New York. Although the plaintiff is

3. Asbestos litigation has become extremely common. Even as early as 1981, there were approximately 25,000 suits pending. Note, Asbestos Litigation, 10 Okla. City U.L. Rev. 393, 397 (1985).
5. Id.
entitled to bring suit against the fiber manufacturer in a Wisconsin court (assuming personal jurisdiction over the defendant), will the court have to apply the New York statute of limitation and its provision that the clock begins ticking from the time of initial exposure to the fibers, thus barring recovery to the Wisconsin plaintiff? Should this be affected by the residency of the plaintiff? Of the defendant?

These are only a few of the problems which arise under Wisconsin's borrowing statute. Section 893.07(1) of the Wisconsin Statutes states, "[i]f an action is brought in this state on a foreign cause of action and the foreign period of limitation which applies has expired, no action may be maintained in this state." Although Section 893.07(1) applies to any type of foreign action, this Comment will focus on actions based on tort law as they generally have a shorter statute of limitation and are thus of more practical concern.

Part II will provide a brief overview of the history and purpose of borrowing statutes, as well as delineate the different types of statutes in use in various jurisdictions. Part III focuses on Wisconsin's borrowing statute and the effect it has on certain actions in this state, an effect which this author criticizes. Parts IV and V present alternative wordings of the statute and attempt to dispel any constitutional problems

7. See Segala & Galbo, Asbestos: New York's Approach to the Statute of Limitations, 57 N.Y. St. B.J., Nov. 1985, at 28, 29 (discusses the "archaic" approach of New York with regard to measuring time from the last date of exposure to asbestos fibers).
9. Id. Subsection (2) provides: "If an action is brought in this state on a foreign cause of action and the foreign period of limitation which applies to that action has not expired, but the applicable Wisconsin period of limitation has expired, no action may be maintained in this state.” Wis. Stat. § 893.07(2) (1983-84). This subsection insures that the shorter period of limitation will be used in determining whether the action may be brought in Wisconsin. Several other jurisdictions have neglected to make similar legislative clarifications. In those cases, the judiciary has generally interpreted the borrowing statute in a manner consistent with Wisconsin's approach. See, e.g., Conner v. Spencer, 304 F.2d 485 (9th Cir. 1962) (applying Oregon's borrowing statute); Keaton v. Crayton, 326 F. Supp. 1155 (D.C. Mo. 1971); Murray v. Farrell, 2 Alaska 360 (1905); Smith v. Elliard, 110 Mich. App. 25, 312 N.W.2d 161 (1981).
11. See infra notes 15-46 and accompanying text.
12. See infra notes 47-66 and accompanying text.
which might arise. Finally, Part VI proposes two methods of attaining these changes and the benefits of each proposed change.

II. GENERAL OVERVIEW OF BORROWING STATUTES

A. Effect of Borrowing Statutes

Borrowing statutes, also called "anti-forum shopping" statutes, generally operate to bar any cause of action if the jurisdiction in which the cause of action arose would bar the action due to that jurisdiction's statute of limitation. It is essentially a legislative choice-of-law determination which requires that the law of the place of injury (lex loci) be used to ascertain the applicable statute of limitation rather than the law of the forum (lex fori).

The traditional distinctions of lex loci and lex fori were based on the concept of procedural versus substantive law. If classified as substantive, the law of the place of injury generally applied; if procedural, the law of the forum was used. For the purpose of choice-of-law determinations, statutes of limitation have historically been classified as procedural matters and thus are governed by the law of the forum.

Borrowing statutes reverse the common law lex fori/lex loci distinctions by applying the statute of limitation of the place of injury. The statutes are legislatively mandated choice-of-law rules which can involve a variety of factors, among which is the residence of the parties involved in the litigation. Although most states have fashioned their bor-

13. See infra notes 67-101 and accompanying text.
14. See infra notes 102-109 and accompanying text.
19. Id.
21. See supra notes 16-17 and accompanying text.
rowing statutes to take this factor into consideration, Wis-consin's statute is silent on this point.

B. Purpose of Borrowing Statutes

As the name "anti-forum shopping" suggests, the primary purpose of borrowing statutes is to prevent plaintiffs from shopping for a forum which has a more lenient statute of limitation. Because of the traditional lex fori and lex loci distinction, the forum's statute of limitation was often automatically applied, and many plaintiffs seized upon the opportunity to bring claims in jurisdictions where a favorable disposition could be achieved despite their apparent tardiness in bringing the claim.

This "forum shopping" has been looked upon with disfavor by courts and legislatures alike. The United States Supreme Court has also expressed some concern at the routine

23. The following states have either a requirement or exception based on residency: ALA. CODE § 6-2-17 (1975); ALASKA STAT. § 09.10.220 (1983); ARIZ. REV. STAT. ANN. § 12-506 (1982); CAL. CIV. PROC. CODE § 361 (West 1982); DEL. CODE ANN. tit. 10, § 8121 (1974); HAWAII REV. STAT. § 657-9 (1976); IDAHO CODE § 5-239 (1979); ILL. ANN. STAT. ch. 83, para. 21 (Smith-Hurd 1966) (residency requirement stems from judicial interpretation of statute); IND. CODE ANN. § 34-1-2-6(b) (Burns 1986); IOWA CODE ANN. § 614.7 (West 1950); KAN. STAT. ANN. § 60-516 (1983); ME. REV. STAT. ANN. tit. 14, § 866 (1980); MASS. GEN. LAWS ANN. ch. 260, § 9 (West 1959); MICH. COMP. LAWS ANN. § 600.5861 (West 1986); MISS. CODE ANN. § 15-1-65 (1972); MONT. CODE ANN. § 27-2-104 (1985); NEB. REV. STAT. § 25-215 (1985); NEV. REV. STAT. ANN. § 11.020 (Michie 1986); N.Y. CIV. PRAC. L. & R. 202 (McKinney 1972); N.C. GEN. STAT. § 1-21 (1983); OR. REV. STAT. § 12.260 (1983); R.I. GEN. LAWS § 9-1-18 (1985); TENN. CODE ANN. § 28-1-112 (1980); UTAH CODE ANN. § 78-12-45 (1977); WASH. REV. CODE ANN. § 4.16.290 (1962).

24. Wisconsin's borrowing statute only considers whether the action is a "foreign cause of action" and when the period of limitation expires. WIS. STAT. § 893.07(1) (1983-84). See also infra notes 47-57 and accompanying text.


26. See supra notes 18-20 and accompanying text.


28. Id.


application of a forum’s statute of limitation to a cause of action regardless of contacts between the forum and the litigation.\textsuperscript{31} The Court has not yet found it appropriate to determine if such an application may be a violation of due process.\textsuperscript{32}

Problems associated with the application of a forum’s statute of limitation have been rendered moot in many of the cases which have arisen in the thirty-five jurisdictions currently utilizing borrowing statutes.\textsuperscript{33} “Forum shopping” for the purpose of attaining lengthier statutes of limitation has been effectively curtailed as a result of the passage of this legislation. Naturally, other provisions in a forum’s law can be the focus of such “shopping,” but traditional choice-of-law concerns often prevent a plaintiff from taking advantage of the forum’s laws if the provisions sought are substantive in nature.

There are other purposes behind statutes of limitation that are applicable here. Statutes of limitation seek to achieve a balance between the plaintiff’s right to a reasonable time for seeking recovery and the defendant’s right to repose within a reasonable time after the event giving rise to the cause of action.\textsuperscript{34} If the time is unjustifiably short, the plaintiff is

\textsuperscript{32} Id.
\textsuperscript{33} ALA. CODE § 6-2-17 (1975); ALASKA STAT. § 09.10.220 (1983); ARIZ. REV. STAT. ANN. § 12-506 (1982); CAL. CIV. PROC. CODE § 361 (West 1982); DEL. CODE ANN. tit. 10, § 8121 (1974); FLA. STAT. ANN. § 95.10 (West 1982); HAWAII REV. STAT. § 657-9 (1976); IDAHO CODE § 5-239 (1979); ILL. ANN. STAT. ch. 83, para. 21 (Smith-Hurd 1966) (residency requirement stems from judicial interpretation of statute); IND. CODE ANN. § 34-1-2-6(b) (Burns 1986); IOWA CODE ANN. § 614.7 (West 1950); KAN. STAT. ANN. § 60-516 (1983); KY. REV. STAT. ANN. § 413.320 (Baldwin 1985); LA. CIV. CODE ANN. art. 10 (West 1986); ME. REV. STAT. ANN. tit. 14, § 866 (1980); MASS. GEN. LAWS ANN. ch. 260, § 9 (West 1959); MICH. COMP. LAWS ANN. § 600.5861 (West 1986); MISS. CODE ANN. § 15-1-65 (1972); MO. ANN. STAT. § 516.190 (Vernon 1986); MONT. CODE ANN. § 27-2-104 (1985); NEB. REV. STAT. § 25-215 (1985); NEV. REV. STAT. ANN. § 11.020 (Michie 1986); N.Y. CIV. PRAC. L. & R. 202 (McKinney 1972); N.C. GEN. STAT. § 1-21 (1983); OKLA. STAT. ANN. tit. 12, §§ 104-108 (West 1985-86); OR. REV. STAT. § 12.260 (1983); PA. STAT. ANN. tit. 42, § 5521 (Purdon 1981); R.I. GEN. LAWS § 9-1-18 (1985); TENN. CODE ANN. § 28-1-112 (1980); UTAH CODE ANN. § 78-12-45 (1977); VA. CODE ANN. § 8.01-247 (1984); WASH. REV. CODE ANN. § 4.16.290 (1962); W. VA. CODE § 55-2-17 (1981); WIS. STAT. ANN. § 893.07 (West 1983); WYO. STAT. § 1-3-117 (1977).
\textsuperscript{34} See Vernon, supra note 20. See generally Milhollin, Interest Analysis and Conflicts Between Statutes of Limitation, 27 HASTINGS L.J. 1 (1975).
prejudiced in seeking a remedy. If it is unjustifiably long, the defendant is prejudiced in remaining accountable.

Naturally, the courts have an interest in statutes of limitation as well. By imposing statutory time limits, the court will not be required to adjudicate stale claims or claims in which evidence and witnesses are no longer available. This allows the court to handle more recent claims and keep the ever-growing caseload at a workable level.

Although borrowing statutes have an effect on the defendant's interest in repose and the court's interest in adjudicating claims quickly, this effect is certainly not an intended purpose of the statutes. The legislature has determined that certain claims should be left for another state's statutory determination as to what laws are necessary to achieve the various purposes behind statutes of limitation. Any "loss" resulting from the decision to follow another state's statute is thought to be offset by the "gain" in preventing forum shopping.

C. Types of Borrowing Statutes

There are perhaps as many types of borrowing statutes as there are jurisdictions which have adopted them. It has been said that the borrowing statutes are "so diverse that they have produced a great deal of confusion." Classifications by various commentators have been almost as diverse. Rather than a broad-based analysis of all the various groupings, the following classification will deal only with the focus of this Comment, the residency requirements.

Three of the thirty-five borrowing statutes are eliminated from further consideration since they deal only with contract actions or actions to enforce judgments. Of the thirty-two which remain, seven have no residency requirements: Florida,

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35. See Vernon, supra note 20, at 297.
36. But see Case Note, supra note 25, at 721 (author suggests that borrowing statutes serve to mitigate negative effect of tolling provisions on defendant).
37. R. LEFLAR, supra note 27, at § 128.
38. See, e.g., Ester, supra note 25, app. at 79-84 (categorized by a wide variety of factors); Vernon, supra note 20, at 294-96 (categorized by statutory language used); Note, Statutes of Limitation: Lex Loci or Lex Fori, 47 VA. L. REV. 299, 308-09 (1961) (categorized by requirements).
Kentucky, Missouri, Oklahoma, Pennsylvania, Wisconsin and Wyoming.  

Residency requirements are of two types: (A) either a particular residency requirement must be met for the borrowing statute to apply, or (B) the residency requirement must be met for the exception to the borrowing statute to apply. Given a situation involving a foreign statute of limitation which has run and a forum statute which has not run, applying the first type of residency requirement will result in the action being barred. If the same situation were to be resolved under the second type of residency requirement, it would result in the exception applying and the action being governed by the forum statute of limitation.

Those states which have residency requirements for the borrowing statute to apply are of three subtypes: (A1) the plaintiff must have been a resident of the foreign state when the cause of action accrued, (A2) the defendant must have been a resident of the foreign state, or (A3) both plaintiff and defendant were non-residents when the cause of action arose. Included in Subtype A1 are Arizona, Massachusetts and Rhode Island. Subtype A2 includes Alabama, Indiana, Iowa, Mississippi and Tennessee. Subtype A3 includes Alaska, Illinois, Maine, Oregon and Washington.

The residency requirements for the exception to apply are of two subtypes: (B1) the plaintiff must be a citizen or resident of the forum state, or (B2) the defendant must be a resident of the forum state. Subtype B1 is the largest with eleven states: California, Delaware, Hawaii, Idaho, Kansas, Michigan,

Analysis of these requirements shows that if the plaintiff is a resident of the forum state, the forum's statute of limitation will apply if that state is in Subtypes A3 or B1. The foreign state's statute of limitation will apply if the forum state is in Subtypes A1 or B2. Finally, a Subtype A2 state will require further inquiry into the residency of the defendant. Furthermore, the seven states which do not have any residency requirements would apply the foreign state's statute. In summation, if the plaintiff is a resident of the forum, sixteen states will apply the forum statute, eleven states will apply the foreign statute, and five states will depend on other factors.

III. WISCONSIN'S BORROWING STATUTE

A. Classification of Wisconsin's Borrowing Statute

The borrowing statute adopted by the Wisconsin legislature in 1979 applies the foreign state's statute of limitation to any action "brought in this state on a foreign cause of action." Nothing appears in the statute to define "foreign cause of action." The only case to deal directly with the interpretation of section 893.07 was Office Supply Co. v. Basic/Four Corp. decided by the United States District Court for the Eastern District of Wisconsin. The court characterized the legislature's choice of the phrase "foreign cause of action" as meaning a cause of action which arises outside of Wisconsin.

The court's subsequent application of that rule to the facts of Office Supply is somewhat misleading. Wisconsin's center-

46. See supra note 39.
47. WIS. STAT. § 893.07 (1983-84).
49. Id at 782.
of-gravity approach\textsuperscript{50} was used by the district court to determine where the cause of action arose. The Wisconsin Supreme Court had adopted the center-of-gravity approach in 1964 as a method for resolving conflict of law issues.\textsuperscript{51} This approach replaced the earlier \textit{lex loci} rules which governed substantive law, but certainly did not affect the application of \textit{lex fori} to procedural matters such as pleadings and evidence.

Typically, the question of where a cause of action arose is answered by determining where the last element of the cause of action took place.\textsuperscript{52} Perhaps justification for the court's reasoning in \textit{Office Supply} can be found in the fact that it involved a contract negotiated and signed by the plaintiff in Wisconsin, called for services to be performed in Wisconsin, and further provided for performance of express warranty obligations in Wisconsin, the latter being the major point of contention between the parties.\textsuperscript{53} Presumably, the last element constituting a cause of action for breach of warranty did occur in Wisconsin.

If the Wisconsin courts adopt the reasoning of the eastern district, we will be faced with the incongruous result of the Wisconsin legislature making a choice-of-law determination through enactment of section 893.07, only to be followed by the court's independent analysis based on the center-of-gravity approach to determine if the action falls within the "foreign cause of action" parameters of the statute. Thus, the court would be using an approach originally reserved for resolution of substantive law issues to resolve an issue which, although admittedly questionable, has always been considered procedural in nature when dealing with a choice of law.\textsuperscript{54}

The more proper interpretation of "foreign cause of action" is to consider where the last element of the cause of action occurred. This position has support in the predecessor to

\textsuperscript{50} The Wisconsin Supreme Court adopted the center-of-gravity approach in Wilcox v. Wilcox, 26 Wis. 2d 617, 635, 133 N.W.2d 408, 417 (1965).

\textsuperscript{51} Id.

\textsuperscript{52} See, e.g., Renfroe v. Eli Lilly & Co., 541 F. Supp. 805, 807 (E.D. Mo.), aff'd, 686 F.2d 642 (8th Cir. 1982).

\textsuperscript{53} Office Supply, 538 F. Supp. at 782.

\textsuperscript{54} Earlier Wisconsin cases had consistently applied the law of the forum to statutes of limitation. Estate of Schultz, 252 Wis. 126, 30 N.W.2d 714 (1948); Will of Bate, 225 Wis. 564, 275 N.W. 450 (1937).
the current borrowing statute which was found in section 893.205(1).\textsuperscript{55} Section 893.205(1) provided for borrowing a state's statute of limitations if a person brought an action for personal injuries which were received in the foreign state.\textsuperscript{56} As injuries are generally the last element of a tort action to occur, it would appear that the use of the phrase "foreign cause of action" in the subsequent enactment was meant to apply to similar situations. Wisconsin has the only borrowing statute which employs such a phrase; the remaining thirty-five jurisdictions use phrases such as "cause of action accruing outside of the state" or "action which has arisen in another state."\textsuperscript{57}

Except for the ambiguity of the phrase "foreign cause of action," the Wisconsin borrowing statute is straightforward. Once a foreign cause of action is found, it will be barred by the first statute of limitation to run, be it the forum's statute or the foreign period of limitation.\textsuperscript{58} There are no residency requirements for application of the statute, nor are there any exceptions. As a result, Wisconsin's statute falls within the category of those which bar a resident plaintiff's claim brought within the forum's statutory period but failing to meet an applicable foreign statute.\textsuperscript{59}

\textbf{B. Effect of Wisconsin's Borrowing Statute}

The application of Wisconsin's borrowing statute is clear; once a foreign cause of action is found to exist, the Wisconsin courts are required to apply the foreign statute of limitation, regardless of the existence of any mitigating factors. This is an appropriate result when faced with a situation which is obviously forum shopping, i.e., an out-of-state plaintiff suing an out-of-state defendant for an injury which occurred outside of Wisconsin. The application of a foreign statute is not so compelling when a Wisconsin plaintiff sues a Wisconsin defendant

\textsuperscript{55} Wis. Stat. § 893.205(1) (repealed 1980).
\textsuperscript{56} Id. It should be noted that this section also contained an exception to be applied if the injured party was a resident of Wisconsin at the time of injury. \textit{Id}.
\textsuperscript{57} See \textit{supra} note 33. Some courts have attempted to make a distinction between a cause of action "accruing" and a cause of action "arising." \textit{See} Doughty v. Funk, 15 Okla. 643, 649, 84 P. 484, 486 (1906).
\textsuperscript{58} Wis. Stat. § 893.07 (1983-84). \textit{See also supra} note 9.
\textsuperscript{59} For other statutes having the same effect, \textit{see supra} notes 40 & 44.
on a cause of action which accrued across the border in another state.

The effect of the statute is thus not only to prevent non-resident plaintiffs from shopping for a favorable forum but also to prevent resident plaintiffs from bringing suit in the state of their residence when a cause of action has accrued outside the state. This latter effect does not comport with the purpose of borrowing statutes, the prevention of forum shopping. The unnecessarily broad language of Wisconsin's borrowing statute results in a wide variety of claims which may be barred despite the fact that no forum shopping was involved.

C. Criticism of Wisconsin's Borrowing Statute

The Wisconsin legislature could have worded the borrowing statute differently so that only the narrow purpose of such a statute would have been met without substantial interference with other rules of law. For example, the Arizona legislature only borrows the foreign period of limitation if the person migrated to Arizona to recover upon an action which was barred by the state from which he or she came.\(^\text{60}\) The most common wording, however, and one which is equally effective provides for applying the foreign statute of limitation to any action which arises outside of the state, "except where the cause of action originally accrued in favor of a resident of [that] State."\(^\text{61}\)

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\(^{60}\) ARIZ. REV. STAT. ANN. § 12-506 (1982).

\(^{61}\) N.C. GEN. STAT. § 1-21 (1983). See also CAL. CIV. PROC. CODE § 361 (West 1982) ("except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued"); DEL. CODE ANN. tit. 10, § 8121 (1974) (except "[w]here the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State"); HAWAI'I REV. STAT. § 657-9 (1976) ("except in favor of a domiciled resident thereof, who has held the cause of action from the time it accrued"); IDAHO CODE § 5-239 (1979) ("except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued"); KAN. STAT. ANN. § 60-516 (1983) ("except in favor of one who is a resident of this state and who has held the cause of action from the time it accrued"); MICH. COMP. LAWS ANN. § 600.5861 (West 1986) ("except . . . where the cause of action accrued in favor of a resident of this state"); MONT. CODE ANN. § 27-2-104 (1985) ("except by a resident of the state and . . . where the cause of action originally accrued in favor of a resident of the state"); NEV. REV. STAT. ANN. § 11.020 (Michie 1986) ("except in favor of a citizen thereof who has held the cause of action from the time it accrued"); N.Y. CIV. PRAC. L. & R. 202 (McKinney 1972) ("except . . . where the cause of action
Both of these wordings have the effect of limiting forum shopping while retaining the rights of resident plaintiffs to pursue claims in their home state within the statutory time period chosen by their own legislators. Currently, the resident plaintiff’s ability to do so depends on the relatively fortuitous happenstance of where the cause of action arose. Victims of tortious conduct do not have the opportunity to choose the location of the tort to any greater degree than they choose the identity of the tortfeasor.

Although the treatment of resident plaintiffs varies with the location of the tort, some courts have held that this is not a violation of the equal protection doctrine.\(^6\) It is, however, a violation of Wisconsin’s oft-stated principle that the policy of Wisconsin tort law is to provide recovery to injured persons.\(^6\)

Any concern which Wisconsin might have about subjecting out-of-state defendants to unexpectedly longer statutes of limitation fades into the distance when one considers that defendants do not generally “shop” for plaintiffs; unless a particular plaintiff is targeted, the tortfeasor is unlikely to know the residency of the victim and is quite certain not to know the existence or operation of any borrowing statute which might be applicable.

In addition to the problems presented by the lack of a residency exception, the Wisconsin legislature should clarify the meaning of “foreign cause of action.”\(^6\)

It is possible that the legislature meant to continue the concept of the earlier section 893.205(1) which based the action on the location of the injury.\(^6\)

The interpretation of the eastern district of Wisconsin could also be correct in that the center-of-gravity test should be applied to determine if another state has more substantial

\(^{62}\) See Szlinis v. Moulded Fiber Glass Cos., 80 Mich. App. 55, 263 N.W. 2d 282 (1977). Szlinis held that Michigan’s borrowing statute did not violate equal protection despite the fact that it discriminated between resident plaintiffs injured within the state and those injured outside the state. \textit{Id.} This case was decided prior to the amendment of Michigan’s borrowing statute in 1978 which created an exception in favor of resident plaintiffs.

\(^{63}\) Conklin v. Horner, 38 Wis. 2d 468, 481, 157 N.W.2d 579, 585 (1968).

\(^{64}\) See supra notes 46-57 and accompanying text.

\(^{65}\) Wis. Stat. § 893.205(1) (repealed 1980).
contacts with the action; if so, it is a "foreign cause of action."

The first interpretation appears to be the theoretically correct position. However, the eastern district's interpretation would perhaps allow the courts more leeway in "choosing" a statute of limitation than the Wisconsin legislature intended.

IV. SUGGESTED ALTERNATIVES TO THE CURRENT STATUTE

A. Exception for Resident Plaintiffs

A provision in favor of resident plaintiffs which would once again exempt them from operation of the borrowing statute (as section 893.20567 did) would achieve several of the goals of Wisconsin tort law. First, Wisconsin plaintiffs would be assured of access to a Wisconsin court if compliance with Wisconsin's statute of limitation was met. This would be especially helpful in those situations in which the cause of action could have arisen in any of several states.

Second, the current borrowing statute might actually encourage Wisconsin plaintiffs to shop for a forum which does not have borrowing legislation but can obtain jurisdiction over the defendant. An appropriate amendment would effectively stop this forum shopping as Wisconsin plaintiffs would always be guaranteed Wisconsin's statutory period within which to bring claims. It will, of course, be impossible to stop any forum shopping which occurs as a result of Wisconsin's statute.

66. Office Supply, 538 F. Supp. 776. See also supra notes 48-54 and accompanying text.


68. See, e.g., Duke v. Housen, 589 P.2d 334 (Wyo.), cert. denied, 444 U.S. 863 (1979). In the three weeks following the introduction of Margaret Housen to "Pony" Duke, the couple engaged in sexual intercourse in the states of Virginia, New York, Pennsylvania, Iowa, Nebraska and again in New York. Following this, Duke terminated the relationship and informed Housen that he had gonorrhea and that she probably had contracted it from him. This was confirmed by laboratory tests which Housen had done in Washington, D.C. As Housen did not bring suit until nearly four years after this test, one of Duke's primary defenses was that the statute of limitation had run. The problem before the court was to determine in which state the cause of action arose. The majority applied New York law to bar the action. Id. at 337. The concurring opinion applied both the "last element" test and the "significant relationship" test to determine that the cause of action arose in Washington, D.C. and was likewise barred. Id. at 353-54. The dissent decided that the borrowing statute should be interpreted to require "the law of all the states where the action might possibly have arisen" to bar the action. Id. at 354 (emphasis in original).
of limitation having already run. This can only be handled by other jurisdictions adopting borrowing statutes, with or without residency exceptions.

Third, Wisconsin could be assured that it is providing equal treatment to all its citizens who are victims of tortious conduct. If one Wisconsin resident is injured in a car accident in Wisconsin, another in Michigan, and yet another in Minnesota, an inherent notion of fairness would require that each victim be given the same amount of time within which to pursue a claim in the Wisconsin courts.

B. Exception for Resident Defendants

Exempting resident defendants from application of the borrowing statute may not be as favorable as an exemption in favor of plaintiffs, but a defendant exemption still achieves certain purposes. The law presumes knowledge of the law by all persons. Based on this maxim, potential defendants are presumed to have a reasonable expectation of the length of time they must wait before repose for past transgressions will be granted. A resident of Wisconsin is, therefore, accustomed to Wisconsin's statute of limitation and would not be unduly prejudiced by application of that statute, even when the cause of action is "foreign" in nature.

C. Exception if Either Plaintiff or Defendant is a Resident

The purpose of "anti-forum shopping" statutes are best met when the statute contains an exception which applies the forum's statute of limitation to actions wherein either plaintiff or defendant is a resident. The most common way of expressing such an exception is by making non-residency of both parties a requirement for the borrowing statute to apply, i.e., "[w]hen the cause of action has arisen in another state . . . between non-residents of this state."

70. This argument is necessarily somewhat circular. If all persons are presumed to know the law, then that same Wisconsin defendant is presumed to be aware of the borrowing statutes and the fact that Wisconsin's borrowing statute will allow a shorter statute to bar an action against the defendant if the action arose in another state.
71. OR. REV. STAT. § 12.260 (1983); see also ALASKA STAT. § 09.10.220 (1983); WASH. REV. CODE ANN. § 4.16.290 (1962); accord ME. REV. STAT. ANN. tit. 14, § 866
When two Wisconsin residents are involved in an action which arose outside of the state and the action is brought in Wisconsin, there are two possible reasons for the plaintiff to do so: (1) a desire to have Wisconsin law control the action, or (2) for the convenience of the parties. Regarding the first reason, naturally Wisconsin's procedural law would apply. The choice of substantive law will depend on "center-of-gravity" factors with a weak presumption that Wisconsin law will control. Although choosing a Wisconsin forum for this reason appears to be a type of forum shopping, it is virtually impossible to distinguish the effect of this choice from a decision by the plaintiff to bring an action here for the sake of convenience. Furthermore, in a relatively small, unsophisticated claim, it is much more plausible that the choice to bring suit in the home state of both plaintiff and defendant was based on factors unrelated to forum shopping such as convenience and financial considerations.

There is nothing to gain by requiring resident plaintiffs and defendants to abide by a foreign statute of limitation when the forum is chosen for reasons unrelated to forum shopping. The plaintiff should be entitled to the protection which his or her legislators have deemed appropriate, and the defendant should likewise not be able to reap the benefits of another state's legislature. The defendant, if a resident, has chosen to live and work according to Wisconsin law with respect to all other claims. No prejudice will result by holding that same defendant accountable with respect to foreign claims as well. To automatically apply the borrowing statute, without exception, on the basis of where the cause of action arose, is to completely ignore the particular circumstances and rights of the parties involved.

(1980) (all parties must have resided in the foreign state at the time that the foreign statute of limitation barred the action).


73. Conklin v. Horner, 38 Wis. 2d 468, 475, 157 N.W.2d 579, 582 (1968); Wilcox v. Wilcox, 26 Wis. 2d 617, 634, 133 N.W.2d 408, 416 (1965).
V. CONSTITUTIONAL RAMIFICATIONS OF PROPOSED CHANGES

A. Equal Protection

An equal protection question arises with respect to both the current borrowing statute and the proposed changes. As the statute presently stands, resident plaintiffs are divided into two classes: those whose actions arise within the state and those whose actions are foreign. Resident defendants are likewise divided. If the statute were amended to allow exceptions for resident plaintiffs and/or defendants, the classes of litigants would be divided into residents and nonresidents.

The Supreme Court of Illinois determined in *Miller v. Lockett* that a judicial construction of a borrowing statute which created an exception in favor of residents is not unconstitutional on equal protection grounds. Illinois' borrowing statute does not contain any exceptions on its face; however, the appellate court has recognized an exception in favor of residents since as early as 1912, a construction which the Illinois Supreme Court affirmed as late as 1973.

The *Lockett* court used a rational basis test to determine that the state had a legitimate interest in creating an exception in favor of residents. The purpose of the borrowing statute

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74. 98 Ill. 2d 478, 457 N.E.2d 14 (1983).
75. *Id.*
76. ILL. ANN. STAT. ch. 83, para. 21 (Smith-Hurd 1966).
78. Coan v. Cessna Aircraft, 53 Ill. 2d 526, 293 N.E.2d 588 (1973). The reasoning in *Coan* was based in part on construction of a related statute which contained tolling provisions with exceptions in favor of residents. ILL. ANN. STAT. ch. 83, para. 19 (Smith-Hurd 1966). This statute was later ruled unconstitutional in part by Haughton v. Haughton, 76 Ill. 2d 439, 394 N.E.2d 385 (1979), cert. denied, 444 U.S. 1102 (1980). The *Coan* court reasoned that the two sections, the borrowing statute and the tolling provisions, were in conflict with respect to certain situations. For example, a defendant who remained absent from the state, thus tolling the statute of limitation, could be subjected to perpetual liability unless repose was granted under the law of the place where the cause of action arose. It was for this reason that the court determined that a resident exception needed to be judicially interpreted into the borrowing statute. *Coan*, 53 Ill. 2d at 529, 293 N.E.2d at 590. Subsequent to the *Coan* decision, the Illinois Supreme Court also decided that the ruling of partial unconstitutionality of the tolling provisions did not affect their decision to allow for a residency exception. *Lockett*, 98 Ill. 2d at 5457 N.E.2d at 16-17; see also Norman v. Kal, 550 F. Supp. 736, 739 (N.D. Ill. 1982).
79. 98 Ill. 2d at 54, 457 N.E.2d at 17-18.
is to deter forum shopping by nonresidents; therefore, borrowing is unnecessary in actions between residents. The Illinois court found Idaho's decision in *Miller v. Stauffer Chemical Co.* to be persuasive authority.

In *Stauffer*, the Idaho court rationalized that borrowing statutes are choice of law rules developed by the legislature. As with any choice of law decision, various factors concerning the forum and its relationship to the plaintiff may be considered; one such factor is the residence of the plaintiff. Provided the decision to except resident plaintiffs from the operation of the statute serves the purposes of promoting uniformity of limitation periods and discouraging forum shopping, the distinction will be allowed to stand.

In addition to relying on the *Stauffer* decision, the *Lockett* court noted that the party seeking to have the borrowing statute invalidated was unable to cite any decision which held a residency exception to be a violation of equal protection. On the other hand, a borrowing statute without residency exceptions was also held to not violate equal protection despite the fact that residents injured inside the state were treated differently than residents injured outside the state.

### B. Privileges and Immunities

In *Canadian Northern Railway Co. v. Eggen*, the United States Supreme Court upheld a borrowing statute with a plaintiff residency exception as passing constitutional muster under the privileges and immunities clause. Article IV, § 2 of the United States Constitution states that "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several States."
The plaintiff, Eggen, was a resident of South Dakota and sought damages in Minnesota for personal injuries received while employed by the defendant in Canada.91 There is no indication in the opinion that the plaintiff had any connection with the state of Minnesota. The borrowing statute of Minnesota barred any action which was barred by the laws of the place where it arose unless the plaintiff was a resident of Minnesota.92 Minnesota's statute of limitation for personal injuries was six years, Canada's was one year, and the plaintiff brought suit almost two years after the accident.93

The plaintiff argued that if he were a resident of Minnesota, he would have been allowed to pursue his claim. Therefore, he maintained that the borrowing statute denied him the privileges accorded to Minnesota residents.94 The Supreme Court recognized that one of the fundamental privileges of a citizen is the right to institute and maintain an action in another state's court system.95 The Court stated:

The laws of Minnesota gave to the nonresident respondent free access to its courts, for the purpose of enforcing any right which he may have had, for a year—as long a time as was given him for that purpose by the laws under which he chose to live and work—and having neglected to avail himself of that law, he may not successfully complain because his expired right to maintain suit elsewhere is not revived for his benefit by the laws of the state to which he went for the sole purpose of prosecuting his suit.96

The test is not whether the nonresident has the same precise extent of rights as the resident, but whether the terms for bringing suit are reasonable and adequate in themselves.97 If the length of time to bring suit is reasonably sufficient to allow ordinarily diligent persons to enforce their rights, it will not be violative of the privileges and immunities clause.98

92. *Id.* at 558 (citing *MINN. STAT.* § 7709 (1913)).
93. *Id.* at 559.
94. *Id.* at 560.
95. *Id.*
96. *Id.* at 563.
97. *Id.* at 562.
98. *Id.*
C. Right to Travel

*Miller v. Stauffer Chemical Co.*\(^9\) also confronted an allegation by the plaintiff that the borrowing statute penalized the exercise of the right to travel.\(^10\) The court rather summarily dismissed this claim, noting that a state action which affects interstate movement does not necessarily affect the recognized right to travel.\(^10\) Adoption of choice of law rules by the Idaho legislature was found not to be an inhibition of this right.\(^10\)

VI. Method of Adapting Borrowing Statute

A. Judicial Interpretation

Wisconsin appellate courts have not had an opportunity to interpret the borrowing statute enacted by the legislature in 1979. Wisconsin could take the same approach as Illinois and find that the borrowing statute and tolling provisions are in conflict unless a residency requirement is implied into the borrowing statute.\(^10\) Wisconsin's and Illinois' tolling provisions are essentially the same\(^10\) and would support such an interpretation.

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100. *Id.* at __, 581 P.2d at 348.
101. *Id.* at __, 581 P.2d at 348.
102. *Id.* at __, 581 P.2d at 348.
103. See supra note 78 and accompanying text.
104. Wisconsin's tolling provisions provide:
If a person is out of this state when the cause of action accrues against the person an action may be commenced within the terms of this chapter respectively limited after the person returns or removes to this state. But the foregoing provision shall not apply to any case where, at the time the cause of action accrues, neither the party against nor the party in favor of whom the same accrues is a resident of this state; and if, after a cause of action accrues, he or she departs from and resides out of this state the time of absence is not any part of the time limited for the commencement of an action.

Wis. Stat. § 893.19 (1983-84). Illinois' tolling provisions at the time of the court's interpretation stated:
If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the times herein limited, after his coming into or return into the state; and if, after the cause of action accrues, he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action. But the foregoing provisions of this section shall not apply to any case, when, at the time the cause of action accrued or shall accrue, neither the party against nor in favor of whom the same accrued or shall accrue, were or are residents of this state.
The significant problem with this approach is that subsequent to Illinois’ determination that the statutes were in material conflict, part of the tolling provisions were struck down as unconstitutional.\textsuperscript{105} Illinois then based its interpretation of the borrowing statute on the premise that once a statute is construed and the legislature does nothing to change the court’s interpretation, the interpretation will stand.\textsuperscript{106}

### B. Legislative Amendment

The legislature alone has the power to change the actual wording of the statute. In addition to the concern that the lack of a residency exception is requiring plaintiffs to forego bringing claims in their home state, there remains the problem of interpretation of the “foreign cause of action” language. By using a phrase which is completely different from each of the other borrowing statutes in use in the United States, it is difficult to determine if the legislature was referring to something else or was finding a new way to express an old concept.\textsuperscript{107}

By returning the statute to the concept embodied in section 893.205(1),\textsuperscript{108} the court can ensure the greatest amount of protection available to Wisconsin victims of tortious conduct. Any constitutional concerns which the legislature may have had previously have been rendered moot by the majority of decisions finding residency exceptions to be constitutionally sound as long as they are rationally based to discourage forum shopping.\textsuperscript{109}

The recommended language is that which applies the statute only where both parties were nonresidents at the time the

\textsuperscript{105} Haughton v. Haughton, 76 Ill. 2d 439, 394 N.E.2d 385 (1979), cert. denied, 444 U.S. 1102 (1980).


\textsuperscript{107} See supra notes 46-57 and accompanying text.

\textsuperscript{108} WIS. STAT. § 893.205(1) (repealed 1980).

cause of action arose. In this manner, only those actions which truly resemble forum shopping would be affected by foreign statutes of limitation.

VII. CONCLUSION

What effect would a residency exception have in situations such as those set forth in the introduction? In the first situation involving an action between Wisconsin residents arising outside the state, the Wisconsin statute of limitations would apply, much to the expectations of ordinary citizens.

In the second action involving a Wisconsin plaintiff who was outside the jurisdiction when the cause of action accrued, the plaintiff would likewise be able to bring suit timely as application of the borrowing statute would not be triggered due to her residency. If she were actually a resident of New York at the time the cause of action arose, her ability to bring the cause of action would rely on the residency of the corporate defendant. If the defendant had headquarters here and thus were a resident of Wisconsin, the plaintiff’s claim need only meet Wisconsin’s statute of limitation. This is an appropriate result since her decision to bring suit here could be as easily based on convenience and availability of corporate witnesses as on a desire to shop for forums.

If, on the other hand, the defendant were not a resident of Wisconsin, the law of the place where the cause of action arose would apply, the presumption being that forum shopping was the only motivation for filing a suit here between nonresidents. In this situation, there is authority for the proposition that all of the judicial interpretations of the foreign state concerning the statute of limitation, i.e., discovery rules, must be borrowed as well.

A change in the law is suggested for two fundamental reasons. First, the current borrowing statute does not provide the amount of protection for Wisconsin residents which con-

111. WIS. STAT. § 801.05(1) (1983-84).
112. See supra notes 71-72 and accompanying text.
stitutionally may be granted to them.\textsuperscript{114} Second, the use of the phrase "foreign cause of action" is bound to cause interpretational problems in the future.\textsuperscript{115} A recommended model which would correct both problems is Oregon's borrowing statute which requires the cause of action to arise between nonresidents.\textsuperscript{116}

The law constantly finds itself in need of change to conform to a dynamic society, while at the same time, it is in need of continuity. The borrowing statute as it currently stands will only become a liability to the citizens of Wisconsin. Therefore, amending the statute will benefit Wisconsin citizens and far outweigh any loss in continuity of law.

\textbf{DONNA MAE ENDRESON}

\textsuperscript{114} See supra notes 74-87 and accompanying text.
\textsuperscript{115} See supra notes 47-57 and accompanying text.
\textsuperscript{116} OR. REV. STAT. § 12.260 (1983).