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Recent Developments in Conflicts of Laws

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“Restatement 2d, Conflicts” refers to the **RESTATEMENT (SECOND)
CONFLICT OF LAWS** (ALI, Philadelphia, 1971).

READER'S
ANNOTATIONS

A. Introduction

1. Ordinarily, practicing lawyers and judges will do almost anything to avoid conflicts issues, but there have been some developments in this area in recent years that are important to the practicing bar and the bench.
 - a. The first of these has been a change in choice-of-law methodology in many states.
 - i. This change in methodology has increased the opportunities for the forum to apply its own law, and that has, of course, increased the incentives for forum shopping.
 - b. The second development is really a nondevelopment — the Supreme Court has been unwilling to control this forum shopping by controlling the way states make choice-of-law decisions.
 - i. Finally, however, the Court has imposed some indirect controls on forum shopping through restrictions on jurisdiction and venue.

B. Changes in Choice of Law

1. Changes in the choice-of-law process have been significant, if not revolutionary, over the past 30 years. Traditionally, courts

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used a set of rules that prescribed which states' laws were applicable generally according to the type of case. *See* RESTATEMENT OF CONFLICT OF LAWS *passim* (ALI, Philadelphia, 1934).

- a. Thus in a tort case the law of the place of the wrong applied. In a contract case the law of the place where the contract was made was used. When the problem was the ownership or use of real property, the law of the place where the land was located applied; and so on.
- b. In the past three decades, these rules have been replaced or supplemented in many states by new methodologies or approaches. Two characteristics principally distinguish the modern approaches from the traditional rules they replace.
 - i. First, the modern approaches resolve conflicts issue-by-issue, instead of by choosing one state's law to govern all the substantive issues in the case. *See, e.g.,* Reese, *Depeccage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 59-60 (1973). For example, in the Chicago DC-10 litigation, one state's law was applied to the issue of punitive damages and another's to the measurement of compensatory damages. *See In re Air Crash Disaster near Chicago, Ill. on May 25, 1979*, 644 F.2d 594 (7th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981). *See also Browne v. McDonnell Douglas Corp.*, 504 F. Supp. 514 (N.D. Cal. 1980).
 - ii. One practical consequence of this issue-by-issue approach is that, when faced with a multistate case, the lawyer should not just send an associate off to do a memo on "whose law applies to this case." Rather, the efficient course is to determine, first, whether there are any differences among the states regarding essential issues and then, only if there are, which state's law will apply on each issue.
 - iii. Besides deciding on an issue-by-issue rather than a case-by-case basis, the other major change under the modern approaches is that they explicitly or implicitly consider

the results for the parties of selecting one state's law or another's. *But see* Restatement 2d, Conflicts §§145, 188. (which, by stating presumptive rules, appear to be jurisdiction-selecting, although reference in each to policies stated in section 6 is consistent with the modern trend).

iv. The traditional rules just pointed to one jurisdiction or the other and applied its law regardless of that law's content. The law of the place of the wrong would be applied without considering whether it would favor the plaintiff or defendant. Under the modern approaches, by contrast, it is appropriate to consider which party will benefit, either because that bears on how each state's interests in the case will be affected or because it points to the "better law." *See generally* R. LEFLAR, *AMERICAN CONFLICTS LAW* 198-200, 210-22, (Bobbs-Merrill, Indianapolis, 3d ed., 1977).

2. The modern approaches developed out of a recognition that the traditional rules frequently led to results that were unfair — or if not unfair, they were at least irrational in the sense of not advancing the purposes of the laws being applied. *See, e.g.,* Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).
 - a. But with the "better" results available today has also come greater uncertainty — if not uncertainty that one state will reach the same result on the facts as another, at least the psychological uncertainty for the lawyer when first approaching the case as to what methodology will be used and what result is likely to derive therefrom.
 - i. One should note two things here: first, the certainty of the traditional approach was somewhat illusory, since that system too could be manipulated. *See, e.g.,* R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 75-126 (3d ed., West Pub. Co., St. Paul, Minn. 1981), illustrating and discussing the traditional use of characterization to manipulate the results.

ii. Second, under modern approaches the uncertainty varies. It may be pronounced in tort and contract cases, but land cases still tend to be governed by the law of the situs. Compare R. LEFLAR, *AMERICAN CONFLICTS LAW* chs. 13-14 (Bobbs-Merrill, Indianapolis, 3d ed. 1977) with *id.* ch. 16.

C. An Illustration of the Modern Methodologies

1. The full horror of modern choice of law can be seen in the litigation following the American Airlines DC-10 crash at Chicago in May 1979. *In re Air Crash Disaster near Chicago, Ill. on May 25, 1979*, 644 F.2d 594 (7th Cir. 1981), cert. denied, 454 U.S. 878 (1981), is the principal conflicts opinion, dealing with punitive damages.
 - a. The lower court decision on the issue is reported at 500 F. Supp. 1044 (N.D. Ill. 1980); the issue of prejudgment interest is considered at 480 F. Supp. 1280 (N.D. Ill. 1979), *aff'd*, 644 F.2d 633 (7th Cir. 1981).
 - i. In this mass disaster litigation 118 wrongful death actions, commenced in five states and Puerto Rico, were consolidated for pretrial purposes in the federal district court in Chicago.
 - b. Under the rule of *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the court was required to apply the different choice-of-law approaches of the districts from which the cases were transferred. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).
 - c. The case thus provides a good illustration of modern choice-of-law methodology in theory and practice. A summary describing the parties and some essential features of the litigation follows.
 - i. The plaintiffs (personal representatives) in the *Air Crash Disaster* case are, and their decedents were, residents of California, Connecticut, Hawaii, Illinois, Indiana, Massachusetts, Michigan, New Jersey, New York,

Vermont, Puerto Rico, Japan, the Netherlands, and Saudi Arabia. The residences of the beneficiaries are not stated. Some of those jurisdictions allow punitive damages in wrongful death actions; some do not.

ii. The defendants are American Airlines and McDonnell Douglas Corporation. American Airlines is incorporated in Delaware, has its principal place of business — its headquarters — in New York, moved within three months of the crash to Texas, and has its maintenance base in Oklahoma, where its planes are serviced. It is unknown whether Delaware has a punitive damages rule; New York does not allow recovery for punitive damages, whereas Texas and Oklahoma allow recovery.

iii. McDonnell Douglas is incorporated in Maryland, has its principal place of business in Missouri, and has its DC-10 plant in California, where its planes are designed and manufactured. It is unknown whether Maryland has a punitive damages rule; Missouri allows recovery for punitive damages, whereas California denies recovery.

iv. The fatal flight was scheduled to fly from Chicago to Los Angeles; many of the tickets were bought in Chicago. The crash occurred in Illinois, which denies punitive damages.

d. With regard to transferor districts:

i. Illinois' state courts follow the "most significant relationship" approach of Restatement 2d, Conflicts;

ii. California follows the "comparative impairment" approach; no choice-of-law approach is discerned in Hawaii;

iii. Michigan's trial court said the "interest analysis" should be used, whereas its court of appeal said that the "place of the wrong" was weakening in favor of the "most significant relationship" test;

- iv. The New York trial court said the “interest analysis” should be used, whereas its court of appeal said the “most significant relationship” is preferable; and
- v. Puerto Rico follows the traditional “place of wrong” approach.
- e. A critical conflicts issue in the case was the availability of punitive damages.
- i. The district court concluded that all the approaches led to the disallowance of punitive damages against American, but some permitted punitive damage claims against McDonnell Douglas. The court of appeals found that all approaches precluded punitive damages claims against both defendants.
- ii. For cases commenced in Puerto Rico, the choice of law was relatively easy. Puerto Rico applies the traditional place-of-wrong rule. *Jimenez Puig v. Avis Rent-A-Car Sys.*, 574 F.2d 37, 40 (1st Cir. 1978). No public policy exception was applicable, since both Puerto Rico and Illinois, the place of wrong, would deny punitive damages. Therefore, the court barred punitive damages claims in the Puerto Rico cases. *In re Air Crash Disaster*, 644 F.2d at 630 (7th Cir. 1981).
- iii. For cases commenced in Hawaii, there was some difficulty, since neither the parties nor either of the courts were able to identify that state’s choice-of-law rules. The court of appeals resolved this difficulty by presuming that the forum would apply its own local law. *Id.* at 630-31. It thus followed the Restatement 2d, Conflicts §136, comment h and Ninth Circuit practice with Hawaii cases. *See, e.g., Commercial Ins. Co. v. Pacific-Peru Constr. Corp.*, 558 F.2d 948, 952 (9th Cir. 1977).
- f. Both courts agreed that Illinois would follow the “most significant relationship” approach of the Restatement 2d, Conflicts. 500 F. Supp. at 1048; 644 F.2d at 611. This approach presumes the application of the law of the state

of injury unless another state has a more significant relationship to the occurrence or the parties. *Ingersoll v. Klein*, 46 Ill. 2d 42, 48, 262 N.E.2d 593, 596 (1970); Restatement 2d, Conflicts §§146 (personal injuries), 175 (wrongful death). Determining the state of the most significant relationship involves, first, determining the location of certain contacts, which for torts include the following:

- i. The place of the injury;
 - ii. The place of the misconduct;
 - iii. The domicile, residence, nationality, place of incorporation, and place of business of the parties; and
 - iv. The place where the relationship, if any, between the parties is centered. Restatement 2d, Conflicts §145(2).
- g. Those contacts are then evaluated for their relative importance to the particular issue, and in light of such general criteria as protecting justified expectations, advancing relevant policies of the forum and other states, and promoting certainty, predictability, and uniformity of result. Restatement 2d, Conflicts §6(2).
2. In deciding which state had the most significant contacts with the punitive damages issue, the Seventh Circuit determined that the plaintiff's or decedent's domicile was not very important because punitive damages rules are concerned with the defendants.
- a. A state that denies punitive damages does so to protect the defendants against excessive liability; a state that permits them does so to deter certain conduct by the defendants — the extent of its concern for its plaintiffs is defined by its compensatory damages rules. 644 F.2d at 612.
 - b. In any event, both the state of departure and the destination had the same rule disallowing punitive damages. *Id.* at 612, 616.

- i. The most significant contacts, in the court's view, were where the defendant had acted and where it had its principal place of business. For both American and McDonnell Douglas, however, one of those states allowed punitive damages and the other denied them.
 - ii. Thus, Missouri, where McDonnell Douglas is headquartered, seeks to deter wrongful conduct by corporations acting or controlled from there by allowing punitive damages. California, where McDonnell Douglas designed and built the plane, seeks to encourage that activity within the state by protecting manufacturers from the imposition of punitive damages. *See id.* at 613-14. *See also id.* at 617-21 (the same approach applied to American, complicated by the transfer of the corporate headquarters from New York to Texas about the time of the crash).
 - iii. Since neither contact was deemed more significant, the court resolved the impasse by looking to the place of the accident. *See id.* at 614-15 (rejecting the district court's choice of the headquarters state, even though that would make responsibility for corporation's conduct uniform). 500 F. Supp. at 1049-50.
 - iv. The place of the accident is concerned with airline safety, which it could promote by imposing punitive damages, and with airline activity, which it could encourage by denying them. 644 F.2d at 615-16, 620-21.
 - v. Since Illinois had chosen the latter course, the balance was thrown against the punitive damages claims in the cases from Illinois.
 - vi. The court noted that this resolution was not intended to signal a return to the law of the place of wrong. Rather, when all other factors are equal, using the place of the injury provides an easily applied and principled means of decision; it also promotes certainty and uniformity of result. *Id.* at 616, 621.
- c. For the cases coming from California, the court applied a "comparative impairment" approach. *Offshore Rental*

Co. v. Continental Oil Co., 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978); *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976).

i. The first step in this approach is to determine whether a "true conflict" exists. A "true conflict" is more than a difference in possibly applicable laws. In "interest analysis" it is a term of art meaning that the interests or policies of one state cannot be promoted without impairing the interests or policies of another. *See, e.g., Currie, Married Women's Contracts, supra*, 25 U. CHI. L. REV. at 259 (1958).

ii. For example, Oklahoma has a policy of encouraging care in aircraft maintenance by imposing punitive damages against those whose conduct is faulty. If that policy were to be implemented by imposing punitive damages against American Airlines, New York's policy of protecting companies with headquarters there against excessive liability would necessarily be impaired.

iii. Likewise, an application of New York's law to this case would promote its policy but necessarily impair Oklahoma's.

iv. With such a true conflict, the second step of the California approach is to try to determine which state's policy would be more impaired if its law were not applied. This inquiry focuses on two factors: first, the current status of the rule and the intensity with which it is applied; and second, the "fit" between the rule and the particular situation.

v. As far as the Seventh Circuit was concerned, this "comparative impairment" inquiry did not help to resolve the problem. The rule of neither the state in which the conduct occurred nor the state in which the defendant was headquartered was archaic, each rule had been strongly reaffirmed in recent years, and each squarely fit the situation. *Id.* at 622-25, 626-28.

- vi. Again, the court resolved the equipoise between interested states by tossing Illinois into the balance. As the state of the accident, it was interested in discouraging faulty conduct and encouraging airline activity. Its rule subordinated the former policy to the latter, so punitive damages were denied against both defendants in the California cases, too. *Id.* at 625-26, 628.
- d. With the cases coming from Michigan and New York, the question was more which method applied than how to apply it.
- i. The trial court had said that Michigan followed “interest analysis” – which is, essentially, the first step in the California approach. 500 F. Supp. at 1052.
- ii. The court of appeals said *lex locus* (the law of the place of the wrong) was Michigan’s basic rule, but that it might be weakening in favor of a “most significant relationship” approach. 644 F.2d at 630.
- iii. A third reading of the cases is that Michigan has an expanding “public policy” exception to *lex locus*, which presages a modern approach, but it has not yet chosen any particular one. In any event, all the approaches would lead to a denial of punitive damages.
- iv. Similarly, for New York the trial court said interest analysis was the state’s choice-of-law approach. 500 F. Supp. at 1051. The court of appeals, relying on the same New York opinion, *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), said the focus was essentially on “most significant contacts.” 644 F.2d at 628-29. *Compare id.* at 629 n. 44 (a discussion of a post-*Babcock* case focused on interests).
- e. Although the DC-10 court ended up applying the same law to both defendants no matter what the approach, that is no guarantee that the commentators who developed the approaches or the respective state courts that apply them would. In fact, if were it not for the fact that all the trans-

feror states appear to deny punitive damages in death cases, that unanimity would be very surprising.

i. The Seventh Circuit's opinion might be seen as a conscious attempt to conform to Professor Leflar's description: "Essentially, [the various approaches] are consistent with each other. Any one of them is likely to produce about the same result on a given set of facts as will another." R. LEFLAR, *AMERICAN CONFLICTS LAW* 218 (Bobbs-Merrill, Indianapolis, 3d ed. 1977), *quoted in* 644 F.2d at 610.

D. Forum-Preference under the Modern Approaches

1. The previous comment that all the transferor states in the DC-10 case would probably reach the same result because they all deny punitive damages in death cases adverts to a common characteristic of all the modern approaches.
 - a. No matter how the approach is characterized, each requires that the court applying it consider the interests of the respective states. Whenever a state has some contact with the litigation or the parties, it is relatively easy to say that it has an interest in determining the result.
 - i. Thus, if each state can find an interest in applying its own law and if each has the same substantive law, it is likely that all will reach the same result.
2. Strictly speaking, a state has an "interest" in a conflicts case only if application of its domestic rule-of-law will promote or impair the purposes of that rule.
 - a. Thus, in the classic *Babcock* case, Ontario has no interest in the application of its guest statute to a suit between a New York passenger and her New York driver. *Babcock v. Jackson*, 12 N.Y.2d 473, 482-83, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963).
 - i. This is true because the purpose of the guest statute — to protect Ontario insurers against collusion between host

and guest — would not be advanced by applying Ontario law nor would it be impaired by applying New York law.

b. Many courts, however, use the word “interests” more loosely, to indicate some general concern of the state.

i. For example, in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), the forum was seen as having an interest in its resident plaintiff recovering, even though she could in no sense be seen as an intended beneficiary of the statute under consideration.

c. In any event, it is usually possible to make a credible argument that the forum has interests in the case — even if for no other reason than the fact that the forum must have “minimum contacts” with the defendant to have personal jurisdiction.

i. If one can frequently articulate a forum interest in the case and if the forum is then likely to apply its own law, it is easy to see why the selection of the forum can be so important.

E. Limitations on Forum-Shopping

1. *Query*: What stops this forum-shopping from getting out of control? It certainly is not the Supreme Court regulating the choice-of-law process. The decision in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), strongly suggests that the Court is unwilling to limit a state's application of its own law except in the most egregious instances.

a. *Hague* grew out of the death of a Wisconsin resident who worked in Minnesota. He was killed in a Wisconsin motorcycle accident caused by an uninsured motorist. After his death his widow moved to Minnesota. There, she brought a declaratory judgment action against Allstate, claiming that the uninsured motorist coverage in his three Wisconsin automobile insurance policies should be “stacked,” or cumulated, pursuant to Minnesota law.

- i. Under Wisconsin law, she was apparently entitled only to a single coverage, of \$15,000, instead of "stacked" coverage totalling \$45,000.
 - ii. The Minnesota courts applied Minnesota law to the case. They noted that each state had interests — Wisconsin in holding down insurance premiums and Minnesota in compensating a Minnesota resident — but resolved the conflict by applying the "better law," which was, of course, Minnesota's. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 47, 49 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981).
- b. The Supreme Court upheld the application of Minnesota law, five to three, with Justice Stevens concurring in the result. The plurality and the dissent seemed to agree on the test to be applied under the due process and full faith and credit clauses. As Justice Brennan put it for the plurality:
- [F]or a state's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair. 449 U.S. at 312-13.
- c. *See id.* at 336 (Powell, J., dissenting). The plurality identified three Minnesota contacts in the case, which, together, satisfied the test:
- i. The decedent's membership in the Minnesota workforce;
 - ii. Allstate's doing business in Minnesota; and
 - iii. The Minnesota residence of the plaintiff, who was the policy beneficiary. *Id.* at 313-19.
- d. The reason for saying that the Court has virtually abdicated direct control over the choice-of-law process was pointed out by the dissenters: except possibly for Allstate's doing business in Minnesota (and the business relevant to

this case, writing the policies, was done in Wisconsin, not Minnesota), the contacts identified by the plurality had nothing to do with Minnesota's purposes in permitting coverages to be stacked. *Id.* at 337-40 (Powell, J., dissenting).

- i. In other words, Minnesota had contacts with the case, but none of them created Minnesota interests in having its rule rather than Wisconsin's applied — none was "significant" in relation to the particular laws in conflict.
 - ii. Thus the constitutional limitation on choice of law seems to boil down to whether the application of the particular law is "fundamentally unfair," and that standard will almost never be met when a party does interstate business and has contacts that are foreseeable in the other state. *See id.* at 320.
- e. Of course, *Hague's* potential force may be underestimated. For example, the Eighth Circuit has struck down an application of Missouri law to a case on the ground that the Missouri contacts were constitutionally insignificant. In *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578 (8th Cir.), *aff'd mem.*, 454 U.S. 1071 (1981), the plaintiff had been hired in Missouri in 1956 and had accepted a transfer to the defendant's North Carolina plant in 1970.
- i. In 1975, he was again promoted and transferred to the company's Milwaukee headquarters, but a dispute arose over this transfer, and he was fired. He then returned to Missouri and there sued the company for breach of contract. In that suit he included a claim that his termination was in violation of a Missouri service-letter statute.
 - ii. In reversing a judgment for the plaintiff on the service-letter claim, the Eighth Circuit noted, first, that the post-occurrence change of residence to Missouri was, by itself, not a sufficient contact, under *Hague*, to permit the application of Missouri law. 649 F.2d at 583. Second, the court

treated each of the promotions and moves as under a new contract, so the firing in Milwaukee was not related to the 1956 Missouri contract.

iii. Thus Missouri had only the one, insignificant contact and could not apply its service-letter law to the case without infringing on Wisconsin interests and denying the defendant due process. 649 F.2d at 583-84. The decision was affirmed by the Supreme Court without opinion. 454 U.S. 1071 (1981).

2. If, however, situations like *McCluney* will be rare, choosing a forum can be particularly important in planning litigation. And the number of possible forums has been increasing over most of the past 40 years, since there has been an expansion of jurisdiction paralleling that in choice of law. *International Shoe*, with its "minimum contacts" test, spawned *McGee*, *Mullane*, and the long arm statutes. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).
 - a. Recently, however, the Supreme Court has tightened up somewhat on jurisdiction. Although the Court's opinions only hinted at it, this tightening appears to have been partly in response to choice-of-law developments. See, e.g., Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960, 960-61 (1981); Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 103 (1981).
 - i. Rather than controlling a state's application of its own law directly, the Court has protected out-of-state defendants from the imposition of the forum's law by precluding the exercise of jurisdiction.
 - b. The Court has taken two tacks in tightening up on jurisdiction. First, it has applied the minimum-contacts test to all exercises of jurisdiction, not just those traditionally described as in personam. Furthermore, the Court has said

that the relevant minimum contacts are those between the forum and the defendant; it will not suffice, as some courts had thought, simply to find contacts between the forum and the plaintiff.

- i. Thus, in *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court held that the presence of the defendant's property in the forum was not, by itself, sufficient basis to adjudicate a claim unrelated to that property. And the Court in *Rush v. Savchuk*, 444 U.S. 320 (1980), held that even the combination of the defendant's insurance policy and the plaintiff's residence in the forum were insufficient when the claim related to an out-of-state accident.
- ii. *Rush*, which struck down the *Seider* procedure used by a few states to obtain jurisdiction over nonresidents, is an example of the Court's indirect control over choice of law: Minnesota, the forum, apparently would have applied its own law regarding the statute of limitations, host-guest liability, and contributory negligence, even though, at the time of the Indiana accident, both parties were Indiana residents. See 444 U.S. at 322 & n.2, 325 n.8; *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).
- c. The second tack followed by the Court in tightening-up regarding jurisdiction has been a renewed emphasis on the question whether the party to be bound has purposefully availed himself of the benefits and protections of the forum. *Hanson v. Denkla*, 357 U.S. 235, 253 (1958).
 - i. Thus, in *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978), a New York father was held not amenable to a California custody proceeding instituted by the mother who had moved to that state. The father had no contacts of his own with California, and the Court said he had not purposefully availed himself of its benefits and protections when he sent his children out there so that they could stay with their mother.
 - ii. The "purposefully availing" test was also important in the decision in *World-Wide Volkswagen Corp. v. Wood-*

son, 444 U.S. 286 (1980). In that case, the Court struck down Oklahoma's exercise of long arm jurisdiction over New York defendants who had sold an allegedly defective car in New York. Although it was foreseeable in some sense that the car would injure people in Oklahoma, the Court held that the defendants had structured their business so as not to be relying on Oklahoma's benefits and protections. *See id.* at 297-98.

iii. Once again, it is possible that the Court was protecting the defendants from choice-of-law rules that would apply the forum's law. *Compare id.* at 292 (the minimum contacts test "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system") *with id.* at 311 n.19 (Brennan, J., dissenting) (implying that, in this case, permitting the Oklahoma forum would not also "[impose] on the defendant an unfavorable substantive law which the defendant could justly have assumed would not apply").

d. A hint that the Court might retreat from even its indirect, personal-jurisdiction approach to limiting choice of law was given in *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). Responding to Justice Powell's concurrence, the Court denied that the due process limitations on personal jurisdiction serve any federalism concerns. *Id.* at 709. Rather, they protect only an individual liberty interest. *Accord, Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174, 2182 n.13 (1985).

i. Thus the Court appears to have rejected the notion implicit in *World-Wide Volkswagen, supra*, that due process limits on personal jurisdiction can be used to keep Oklahoma from applying its law in derogation of New York's sovereignty. *But see Horne v. Adolph Coors Co.*, 684 F.2d 255, 259 n.2 (3d Cir. 1982).

ii. The retreat from personal jurisdiction limitations on choice of law was also apparent in *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473 (1984). The court of appeals,

in striking down New Hampshire's exercise of personal jurisdiction over a nationally-distributed magazine in a defamation action, emphasized the state's uniquely long statute of limitations and the unfairness, in those circumstances, of allowing recovery for alleged injuries largely suffered elsewhere. 682 F.2d 33, 35-36 (1st Cir. 1982).

iii. The Supreme Court reversed, holding that the minimum-contacts question remained whether the defendant could "reasonably anticipate being haled into court" in the forum; and there was no unfairness in calling a publisher of a nationwide publication aimed at a nationwide audience "to answer for the contents of the publication wherever a substantial number of copies are regularly sold and distributed." 104 S.Ct. at 1481-82. To introduce the first amendment concerns regarding defamation actions at the jurisdictional stage "would be a form of double counting," as they are already taken into account in the limitations on the substantive law. *See also Calder v. Jones*, 104 S.Ct. 1482, 1487-88 (1984).

iv. The Court's latest personal jurisdiction decision, *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985), makes it explicit that defendants will not be protected against unfair substantive law by limitations on jurisdiction. In holding that a Michigan franchise was subject to process from a federal court in Florida, the franchisor's home, Justice Brennan wrote that

where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another State may be accommodated through application of the forum's choice-of-law rules. 105 S. Ct. at 2185 (*citing Allstate v. Hague*).

v. Further, in discussing the consequences of a choice-of-law clause in the franchise contract, the opinion noted that

[t]he Court in *Hanson v. Denckla*, 357 U.S. 235 (1958) and subsequent cases has emphasized that choice-of-law *analysis* — which focuses on all elements of a transaction, and not simply on the defendant's conduct — is distinct from minimum-contacts jurisdictional analysis — which focuses at the threshold solely on the defendant's purposeful connection to the forum. 105 S. Ct. at 2174 (emphasis in original; footnote omitted).

3. The Supreme Court has also struck a blow against forum shopping by making forum non conveniens dismissals easier to obtain in federal court. The decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), held that litigation convenience is the principal concern in deciding a forum non conveniens motion and that the substantive law that would be applied should ordinarily not be given conclusive or even substantial weight in the inquiry.
 - a. As a limitation on forum shopping, the *Reyno* decision will be effective in relatively few cases.
 - i. In the first place, it is only an application of federal law, not constitutional doctrine, and is thus not binding upon the states.
 - ii. Second, and more significant, even within the federal court system, few conflicts cases involve non-United States contacts. Therefore, most changes of venue will be pursuant to 28 U.S.C. §1404(a) (transfer for the convenience of parties or witnesses, in the interests of justice), rather than by a forum non conveniens dismissal.
 - iii. At least when the defendant seeks the section 1404(a) transfer, it is settled law that the transferee district will apply the law of the district from which it receives the case, including the transferor's choice-of-law rules. *Piper Aircraft Co. v. Reyno*, *supra*, 454 U.S. at 243 n.8; *Van Dusen v. Barrack*, 376 U.S. 612 (1964). See generally *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1107-11 (5th Cir. 1981), for a discussion of the law applicable in other transfer situations.
 - iv. Thus, in most cases, the plaintiff will be able to retain the benefits of its choice of even an inconvenient forum.

F. Recent Developments

1. On June 26, 1985, the Supreme Court handed down an important decision dealing with both personal jurisdiction and choice-of-law issues. *Phillips Petroleum Co. v. Shutts* 105 S. Ct. 2965 (1985), was a class action brought in Kansas state court against Phillips, a natural gas producer, to recover interest on royalty payments that had been delayed by Phillips.
 - a. The class certified consisted of 33,000 royalty owners, who were residents in all 50 states, the District of Columbia, and several foreign countries; the royalties related to leases in 11 states.
 - i. Notwithstanding the fact that over 99 per cent of the leases and 97 per cent of the plaintiff class members had no apparent connection to Kansas except for the lawsuit, the Kansas courts adjudicated the claims of all the class members and applied Kansas law to every claim, finding Phillips liable to all class members for interest on the delayed royalty payments.
 - ii. Because the "burdens placed by a State upon an absent class-action plaintiff are not of the same order or [*sic?*] magnitude as those it places upon an absent defendant," however, due process does not require that class-action plaintiffs have the same "minimum contacts" with the forum. *Id.*
 - b. The Supreme Court held that the absent plaintiff class members were not denied due process by the adjudication of their claims without their participation.
 - i. Citing *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702-03 & n.10 (1982), the Court reaffirmed that the Due Process Clause limits personal jurisdiction to protect the "personal liberty interest" of those whose property rights are to be affected by the litigation. 105 S. Ct. at 2973.
 - ii. Because the "burdens placed by a State upon an absent class-action plaintiff are not of the same order or [*sic?*] magnitude as those it places upon an absent defendant," however, due process does not require that class-action plaintiffs have the same "minimum contacts" with the forum. *Id.*
 - c. The Court held that to receive due process, class action plaintiffs are entitled only to the following:

- i. The best practicable notice, “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, *supra*, 399 U.S. 306, 314-15 (1950);
 - ii. An opportunity to be heard and participate in the litigation, in person or through counsel;
 - iii. An opportunity to remove themselves from the class by executing and returning an “opt out” or “request for exclusion” from the court; and
 - iv. Adequate representation of their interest at all times by the named plaintiff. *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940); 105 S. Ct. at 2975.
- d. On the choice-of-law issue, however, the Court held that the application of Kansas law to all the claims violated the Due Process and Full Faith and Credit Clauses. *Id.* at 2981.
- i. The test of *Allstate Ins. Co. v. Hague*, 449 U.S. at 312-13 (plurality opinion), 332 (*Powell, J., dissenting*), was again held to be controlling: “[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” 105 S. Ct. at 2979.
 - ii. Unlike *Allstate*, though, the Court gave little emphasis to the defendant’s conducting substantial business in the forum; rather, the focus was apparently on the locations of the plaintiffs and the leases in question.
 - iii. Factors cited by the Kansas Supreme Court — a “common fund” in Kansas, the plaintiffs’ “consent” to the application of Kansas law by not opting out — were summarily rejected, as was the argument that a court adjudi-

cating a nationwide class action had much greater latitude in applying its own law than might otherwise be the case. *Id.* at 2979-81.

iv. The Court's repeated citations to Justice Powell's dissent in *Allstate* (he did not participate in *Phillips*) suggest that it may not again be willing to countenance a forum's applying its own law when its contacts are as tenuous as they were in that case. At the same time, the *Phillips* decision, with its remand for "further proceedings not inconsistent with this opinion," gives no clear indication what contacts or factors are to be treated as significant in determining whether a choice of law is constitutionally permissible. *Id.* at 2981.